THE 31

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 LXI.

VICTORIA, B. C.
Printed by The Colonist Printing & Publishing Company, Limited
1946.

JUDGES

OF THE

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

During the period of this Volume.

CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HON. GORDON McGREGOR SLOAN.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. GORDON McGREGOR SLOAN.

JUSTICES:

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. 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.

MEMORANDUM.

On the 2nd of October, 1945, Harry Joseph Sullivan, one of His Majesty's Counsel learned in the law, was appointed a Judge of the County Court of the County of Westminster and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour David Whiteside, resigned.

TABLE OF CASES REPORTED

IN THIS VOLUME.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

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Oct. 2, 3; *Nov.* 14.

Insurance, benefit—Mutual Benefit Association—Defendant's husband a member — Certificate of membership named member's mistress and housekeeper as beneficiary—Whether a "dependant"—Status of member's widow—Societies Act—Insurance Act—R.S.B.C. 1936, Cap. 265, Sec. 3 (2); Cap. 133, Sec. 127.

The defendant separated from her husband in September, 1935. Under the separation agreement he agreed to pay $40 a month to support her and their two children. In 1936 Hortin met the plaintiff and they lived together openly as man and wife from November, 1936, until his death in 1943. In December, 1937, Hortin made application for membership in the Canadian Mutual Benefit Association and named the plaintiff his dependant and beneficiary for $2,500 in the membership certificate issued to him. There being adverse claims, an order was made authorizing the society to pay the money into Court. The plaintiff then brought action for a declaration that she was entitled to the money in Court as the dependant named in the membership certificate and recovered judgment.

Held on appeal, affirming the decision of WILSON, J. (O'HALLORAN, J.A. dissenting), that there is no authority for giving the word "dependant" anything else than its ordinary meaning or of limiting it to cases where the deceased person was under legal or moral obligation to support the beneficiary or saying that it is unlawful for a man to support his mistress which may be morally wrong but not legally so.

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APPEAL by defendant in her personal capacity and as administratrix of the estate of William Hortin, deceased, from the decision of WILSON, J. of the 22nd of April, 1944 (reported, 60 B.C. 264). William Hortin was killed in a Vancouver shipyard on August 6th, 1943. In September, 1935, deceased and his wife, the appellant, entered into a deed of separation providing, *inter alia,* for monthly payments of $40 to the appellant for maintenance. These payments were made. For seven years prior to his death deceased lived openly with the plaintiff Elizabeth Ronan. On December 20th, 1937, William Hortin, while living with the plaintiff, had issued to him a membership certificate in the Canadian Mutual Benefit Association under which the association agreed to pay the beneficiary named in the certificate the sum of $2,500 upon his death. The beneficiary named in said certificate was the plaintiff Elizabeth Ronan and at all times the membership certificate in question remained in the possession of the beneficiary. On the death of William Hortin, both plaintiff and defendant made claim to said moneys and on the 29th of December, 1943, on the application of Canadian Mutual Benefit Association, an order was made by BIRD, J. that the $2,500, less costs, be paid into Court under section 127 of the Insurance Act. Elizabeth Ronan then brought this action for a declaration that she was entitled to be paid the moneys so paid into Court.

The appeal was argued at Victoria on the 2nd and 3rd of October, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Hamilton Read, for appellant: The sum of $2,416.55 is paid into Court. The defendant is administratrix of her husband's estate. The plaintiff was the deceased's mistress. We submit that she was not a dependant of deceased in law. The Court will not recognize the claim of a concubine. Deceased lived with her since 1936. Under the Societies Act the only class into which the plaintiff could fall is "dependant." She had not in fact abandoned her means of livelihood when she lived with deceased. It is not lawful to support a woman knowingly occupying this relationship: see *Keener* v. *Grand Lodge, A.O.U.W.,* 38 Mo.

App. 543; *Supreme Lodge A.O.U.W.* v. *Hutchinson* (1893), 33 N.E. 816, at p. 819. There is no right of action. That a concubine is not a dependant in law or fact see *Crosby* v. *Ball* (1902), 4 O.L.R. 496; *Blanchett* v. *Hansell,* [1943] 3 W.W.R. 275; 45 C.J. 185 and 980; *McCarthy* v. *New England Order of Protection* (1891), 26 N.E. 866; 153 Mass. 314; *Good* v. *Towns* (1883), 56 Vt. 410, at p. 415; 48 Am. Rep. 799; *Re Harris* (1929), 36 O.W.N. 105; *Willyams* v. *Bullmore. Bullmore* v. *Willyams* (1863), 11 W.R. 506. There is no evidence that the wife knew the plaintiff was the deceased's mistress. The moneys are payable to the administratrix of the deceased.

Marsden, for respondent: The plaintiff is described as "dependant" in the membership certificate. They lived together in Hortin's house and the wife knew of it. A concubine in this Province has a legal *status*: see *Re Joslin, Joslin* v. *Murch,* [1941] 1 All E.R. 302, at p. 304; *In re Testator's Family Maintenance Act and In re Estate of Hubert Shadforth, Deceased* (1943), 58 B.C. 317. A concubine is a secondary wife: see *Hortin* v. *Ronan* (1943), 60 B.C. 264; *In re Henderson. Henderson* v. *Bird* (1889), 5 T.L.R. 374; Bacon on Life and Accident Insurance, 4th Ed., 680, sec. 236; *Woodmen of the World* v. *Rutledge* (1901), 65 P. 1105. There are only two parties to the contract, *i.e.,* the Benefit Association and the plaintiff: see *Theobald* v. *Winnipeg Musicians' Association,* [1926] 2 W.W.R. 303, at p. 308 and on appeal, [1926] 3 W.W.R. 337. These societies cannot carry on a commercial enterprise: see *Royal Arcanum* v. *Behrend* (1918), 247 U.S. 394. She cannot get this money *qua* administratrix and she cannot get it in any other capacity. In her personal capacity she would be out of Court at once: see *Crosby* v. *Ball* (1902), 4 O.L.R. 496. There is ample evidence that the plaintiff was a dependant in fact and the trial judge so held.

Read, in reply: A mistress is not a dependant in any sense.

Cur. adv. vult.

14th November, 1944.

O'HALLORAN, J.A.: This appeal raises the question whether "other dependants" in by-law four (later quoted) of the Cana-

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dian Mutual Benefit Association includes the concubine of a member living apart from his wife and children who are not responsible for the separation.

In September, 1935, the appellant Florence Hortin separated from her husband William Hortin. The separation occurred because Hortin was named as co-respondent in divorce proceedings. Under the separation agreement he agreed to pay $40 per month to support her and their two children, a boy and a girl then aged 18 and 13 respectively. In 1936 Hortin, aged 42, met the respondent Elizabeth Ronan, a married woman also living apart from her husband. She knew he was married and had two children. They lived together openly as man and wife from 2nd November, 1936, until his death in August, 1943, when he was killed in a Vancouver shipyard where he was working as an electrician. There were no children.

About a year after commencing to live with the respondent, Hortin made application for membership in the Canadian Mutual Benefit Association and named her his dependant and beneficiary for $2,500 in the membership certificate issued to him on 20th December, 1937. Before applying for membership he had informed the manager of the society that he was living separate from his wife and enquired if he could name his concubine as his dependant and beneficiary. Upon the manager of the society assuring him he could do so, he proceeded with the application.

The Canadian Mutual Benefit Association is a society formed under the Societies Act, Cap. 265, R.S.B.C. 1936. Under section 3 (1) thereof five or more persons may form a society

> to promote objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, agricultural or sporting character.

Such a society is also empowered by section 3 (2) (later quoted) to secure its members against sickness and death, *inter alia,* if licensed (as this society is) under the Insurance Act, Cap. 133, R.S.B.C. 1936.

Upon Hortin's death in 1943, the respondent applied to the society for payment. But the appellant Florence Hortin also claimed payment in her personal capacity as lawful wife and

dependant of the deceased as well as in her representative capacity as administratrix of his estate. The society then applied to a judge of the Supreme Court under section 127 of the Insurance Act, *supra,* and obtained an order authorizing it to pay the money into Court, and that upon doing so it be discharged from all liability. Elizabeth Ronan then commenced action against Florence Hortin in the latter's personal capacity as well as administratrix, and asked for a declaration that she was entitled to the money as the dependant named in the membership certificate. The appellant wife, administratrix, claimed a declaration that Elizabeth Ronan was not a dependant in law within the meaning of section 3 (2) of the Societies Act and the society by-laws, and consequently that the money ought to be paid to her as administratrix of the estate of her deceased husband.

The learned judge of first instance held Elizabeth Ronan was a dependant within the meaning of the fourth by-law of the society, and that her designation as dependant in Hortin's membership certificate was not contrary to the policy of the law, in that the consideration therefor was not the continuance of her immoral relations with the deceased Hortin, but the service she rendered Hortin as his housekeeper and his gratitude to her for such service.

The initial point for decision is whether the respondent concubine of the deceased comes within the meaning of "other dependants" as employed in the fourth by-law of the society. Under section 3 (2) of the Societies Act, *supra,*

> A society may make provision for the benefit of its members by means of subscriptions against sickness, disability, unavoidable misfortune, or death, and for relieving their husbands, wives, children, or other dependants, but shall not otherwise carry on the business of insurance.

The fourth by-law of the society as declared in the membership certificate reads:

> 4. The object of the Association is to make provision, by means of subscriptions, against death relieving the husbands, wives, orphan children or other dependants of members, but shall not otherwise carry on the business of insurance. . . .

It is to be observed that "children" in the statute becomes "orphan children" in the by-law which we have to construe.

The immediate problem is the meaning to be given the words "other dependants" in the by-law. Words are not self-contained

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and self-sufficient things in themselves, but are vehicles of meaning reflecting the sense demanded by their context of language or circumstances, *vide Galt* v. *Frank Waterhouse & Company of Canada Ltd.* (1944), 60 B.C. 81, at p. 99. The clue to the proper interpretation of "other dependants" in the by-law is not to be found therefore by simply taking the meaning of the word "dependant" as it is popularly and often loosely and inexactly used. Nor is it to be found in decisions upon statutes or by-laws where it is embedded in language whose context imposes a meaning peculiar to that particular language and context. The meaning of "other dependants" in this case must be governed by the context of the by-law in which those words appear. In *River Weir Commissioners* v. *Adamson* (1877), 47 L.J.Q.B. 193, Lord Blackburn said at p. 202 that

> the meaning of words varies according to the circumstances with respect to which they were used.

I am prepared to assume generally that concubines are in fact supported by their paramours, and in that popular sense are dependent upon them. But whether a concubine is a "dependant" within the meaning of the by-law is quite a different thing, for that is governed by the context of the language in which it is found. It is a question of law in the circumstances of this case, and not a question of fact as I think it was mistakenly regarded in the Court below. It is in point also that what we have to construe is the expression "or other dependants" and not the word "dependant" alone.

In my judgment the clause in the by-law relieving the "husbands, wives, orphan children or other dependants" excludes the respondent concubine. Two reasons direct me to that decision. The first is, that the context limits "or other dependants" to persons who have a legal right to the support of the member. The second is, that concubines have no common-law *status* as such, and as neither the statute nor the by-law includes them expressly or by necessary implication, the policy of the law forbids their inclusion as against an innocent wife.

The first reason is dictated by the *ejusdem-generis* rule. The rule is thus stated by Lord Campbell, C.J. in *Reg.* v. *Edmundson* (1859), 28 L.J.M.C. 213, at p. 215:

> . . . , where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

In this case, "husbands," "wives" and "orphan children" are the particular and specific words, and "other dependants" are the general words. Hence "other dependants" must be confined to dependants possessing the distinguishing characteristic of husbands, wives and orphan children, that is to say, a legal right to support which the member cannot escape at pleasure. *Excelsior Lumber Co. v. Ross* (1914), 19 B.C. 289 illustrates the application of the rule. The phrase was "boards, deals, joists, laths, shingles, or other sawn lumber." This Court held the general words "sawn lumber" must be confined to the type particularized by "boards, deals, joists, laths and shingles."

Crosby v. *Ball* (1902), 4 O.L.R. 496 and *Blanchett* v. *Hansell*, [1943] 3 W.W.R. 275, affirmed by the Manitoba Court of Appeal without written reasons in [1944] 1 W.W.R. 432, related the meaning of "dependant" to its context. In *Crosby* v. *Ball* a decision of the Ontario Divisional Court, the clause read:

> No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependant, mother, father, sister, brother, aunt, uncle, nephew, niece, cousin, step-child, step-parent, half-sister or half-brother of the member. . . .

That language obviously did not require a test of legal dependency nor the application of the *ejusdem-generis* rule, such as is the case in the appeal before us.

The claim of the wife of a bigamous marriage was opposed there on the ground she was not related to the deceased as lawful wife or by blood or affinity. The argument was rejected. Falconbridge, C.J. held the quoted clause left no room for the application of the *ejusdem-generis* rule, observing that the draftsman had carefully designated the different kinds of beneficiaries, and it was manifest that it was intended a "dependant" should rank next after wife, husband and children, apart from any question of legal relationship. I may add that it is also manifest that the various kinds of beneficiaries designated necessarily excluded an overriding qualification of legal dependency. All of which clearly distinguishes *Crosby* v. *Ball* from the case at Bar.

The exact language of the by-law then under review does not

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appear in the report of *Blanchett* v. *Hansell*. In the judgment of Dysart, J. it is quoted in this fashion (p. 279):

> Death benefits shall be made payable only to the wife, husband, (excluding common law wife and husband) . . . a person dependent upon the member . . . whom the applicant shall designate in the application. . . .

It is observable that the words which would or would not relate "dependant" to the distinguishing characteristics of a wife or husband were left out of the learned judge's quotation of the by-law. This, of course, would not have happened if the missing words had confined "dependant" to the type particularized by husbands and wives and thus made the *ejusdem-generis* rule applicable. From what has been said, it follows that the language in which "dependant" is found in *Crosby* v. *Ball* and *Blanchett* v. *Hansell* is so different to the language in which it appears in the case at Bar, that those decisions cannot give much assistance in this aspect of the case.

While in my judgment the foregoing reasoning is sufficient in itself to set aside the judgment appealed from, I do not think I should neglect reference to another equally powerful ground, *viz.*, that the policy of the law forbids the interpretation of the language in this by-law to include a concubine as a dependant against an innocent wife. The common law does not assist a claim founded on conduct facilitating immorality, and *cf.* the *ratio decidendi* of *Dominion Fire Ins. Co.* v. *Nakata* (1915) 52 S.C.R. 294 and cases there cited. It is an accepted principle also that the language of a statute or by-law will be construed strictly against an interpretation which derogates from the common law. Hence, as a husband is legally bound to support his wife at common law and is not legally bound to support his concubine, any attempt to include a concubine as his "dependant" in the by-law in preference to an innocent wife, cannot be supported unless the strict and intractable language of the statute compels that interpretation. If that rule of construction is applied to the present case the judgment cannot stand.

In *West* v. *Grand Lodge A.O.U.W. of Texas* (1896), 37 S.W. 966 in the Court of Civil Appeals of Texas, the by-law limited the beneficiary of the member to (p. 967)

> one or more members of his family, or some one related to him by blood, or who shall be dependent upon him.

At p. 969 the Court said:

> . . . , the only authorities that have come to our notice hold that a mistress, even in the absence of a contract like the one alleged, [concubinage] is not a dependant, such as contemplated in the law of the order, and is not entitled to the insurance money from a mutual benefit association, at the death of her paramour. *Keener* v. *Grand Lodge*, 38 Mo. App. 543; Bacon, Ben. Soc. sec. 261. As said by Bacon in the section cited: "We must logically exclude also those whose dependence upon the member is for favor, which may or may not take a pecuniary form, and which may be cast off at pleasure."

The language of the clause in which "dependant" appears in the above decision is very much wider than in the by-law in the case at Bar, but I refer to the judgment as an exposition of the policy of the law in regard to concubines. Counsel for the respondent sought to answer it in two ways. First, he said it is lawful in this Province for a man to support his concubine and cited section 102 of the Administration Act, Cap. 5, R.S.B.C. 1936. But upon examination all that section provides is that if a man has died intestate the Court may, on application of the concubine, grant her an amount out of his estate up to $500 or not to exceed ten per cent. of his estate.

That section had its origin in the peculiar conditions prevailing in the early days of the Province. It is purely discretionary as the subsequent sections 103-105 show even more clearly. It does not give the concubine a legal right to support, but does give quite a different thing with which it is not to be confused in some of the decisions cited to us, *viz.*, a discretionary power to the judge to grant her a limited amount out of the estate of her deceased paramour. So understood, it bears a similarity to the principle applied in *Nye* v. *Moseley* (1826), 6 B. & C. 133; 108 E.R. 402 (where Moseley had two children by the concubine) that a man, after his cohabitation with her has ceased, may properly pay money to a concubine, not as a consideration for cohabitation, but as voluntary damages in compensation for the injury done her.

In the second place, counsel for the respondent submitted the policy of the law argument was inapplicable here, because the learned judge in the Court appealed from found as a fact that Hortin had named the respondent as his dependant and bene-

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ficiary, not in consideration of the continuance of their immoral relation, 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 livelihood and become his dependant.

It is to be regretted the learned judge did not refer to the evidence upon which he based this important finding of fact. Counsel for the appellant in his factum and in his argument submitted there was no evidence whatever to support it. And counsel for the respondent did not refer to any such evidence either in his factum or in his argument. I have carefully perused the appeal book and must say with respect, I cannot find any evidence which would enable me to justify that finding of fact.

In my view, the evidence points in two places to a realistic inference that Hortin named her as his dependant and beneficiary in reward for living with him as his concubine. The first is that the manager of the society testified:

> . . . he [Hortin] told me that he was separated from his wife, and that he was living with Mrs. Ronan, would it be alright to take out a policy in her favour. I said, "As a dependant, yes." So he took out the policy.

Hortin did not ask the manager if he could name his housekeeper as his dependant. He made it plain to the society he regarded her as his dependant, not because of her services as housekeeper, but as his concubine. That should suffice to explain what his intention was.

The second bit of evidence is the tacit admission of the respondent on cross-examination that Hortin would not have allowed her to remain very long in his house as housekeeper, if she had refused to live with him as his wife. If, instead of doing what he did, Hortin had rewarded the respondent by giving her a house, and later had met with financial difficulties and his creditors had attacked the transaction, the case would not be unlike *Holten* v. *Vandall* (1900), 7 B.C. 331 (WALKEM, J.). However, even if the consideration were partly good (as housekeeper solely) and partly bad (concubinage), the two are so interrelated and indivisible that the bad cannot be separated from the good, and the whole must fall, *cf. Willyams* v. *Bullmore*. *Bullmore* v. *Willyams* (1863), 11 W.R. 506, a decision of the Master of the Rolls (Sir John Romilly).

Some point was made that the wife had acquiesced in the relation of Hortin and the respondent, by occasional friendly visits to them. She could not of course acquiesce in the legal sense. Nothing she did could legalize the illicit relationship existing between Hortin and the respondent. If it were a suit for damages for enticing her husband away from her and the respondent were found liable in damages then, perhaps such conduct would affect the *quantum* of damages. But that is not this case. There is no suggestion that she connived to bring about or continue their illicit relationship, or agreed that the respondent should be the beneficiary named in the membership certificate. She kept on a friendly footing with Hortin because, as she testified, she did not wish to stop the children from seeing their father. Instead of that being an argument against the appellant, it may be more in her favour as a dependant, since it excludes any conclusion that a reconciliation with her husband was unlikely, such as would be the case if the attitude of the husband and wife toward each other had been characterized by hate, recrimination or constant clash of temperament, *cf. Fender* v. *Mildmay* (1937), 106 L.J.K.B. 641, at p. 664.

This case presents a clear-cut issue between the legal *status* of an innocent wife and a concubine. The wife separated from Hortin because of his improper relations with another married woman. He conveniently ignored his responsibility to his wife and children (except for a provision of $40 per month to support the three of them) and instead of trying to assist them or repair the damage he had done them, he linked himself with still another married woman (the respondent) who was fully aware of his marital obligations, and sought to put her financially in the place to which his wife was entitled. It is true the husband and wife were living apart under a separation agreement. But it contained a provision for its automatic termination if they resumed cohabitation. And she was of course entitled to a wife's share in his estate upon his death, if for no other reason, as a substitute for the $40 per month maintenance she would lose upon his death. There is nothing final about a separation agreement. The possibility of reconciliation may often be far from remote, particu-

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larly where, as here, the parties remained on friendly terms, *cf. Fender* v. *Mildmay, supra,* Lord Wright at p. 664.

Blanchett v. *Hansell* and *Crosby* v. *Ball, supra,* were much referred to in argument. They have been distinguished already because of the context in which "dependant" appeared therein. But they are also distinguishable on this branch of the case. In *Blanchett* v. *Hansell* the wife had deserted her home and husband years before and was living with another man. The concubine was a widow with three small children when she began to live with the husband. At common law a husband is not bound to support his wife if she is living with another man, and section 127 of the Administration Act, Cap. 5, R.S.B.C. 1936, provides that such a wife shall take no part of his estate, and see also section 110 of the Insurance Act, *supra.* In *Crosby* v. *Ball* the wife had deserted the husband and their three young children. At common law such a wife has no right to claim support from her husband and *cf. Mainwaring* v. *Mainwaring* (1942), 58 B.C. 24, at p. 32, if he has not driven her away or refused to take her back. Moreover in *Crosby* v. *Ball* when the claimant married the deceased she did not know that his wife was alive.

In neither *Blanchett* v. *Hansell* nor *Crosby* v. *Ball* does it appear that the wife had a legal right to the support of the husband as she had in this case. In both those cases the moral turpitude of the pseudo-wife was mitigated to such a degree by the nature of the circumstances which involved her after the guilt of the wife, that the Court experienced no reluctance in giving her the benefit of a generous construction of the word "dependant" which was there permitted by the governing language in which it appeared. But that is not this case. As I must regard it, not only the law but the equities shift the balance of natural justice overwhelmingly to the wife.

As the above conclusions would necessitate setting aside the judgment, the next question would be whether the wife is entitled as administratrix of the estate of the deceased. But one phase at least of that question concerns the validity of the membership certificate, and that cannot be judicially decided in the absence of the Canadian Mutual Benefit Association, which is vitally interested in that issue. However, as the majority of the Court

have upheld the claim of the respondent as a dependant, no useful purpose may be served by my pursuing the matter further or by indicating the course that the Court ought now to take if my view had prevailed.

In my opinion the judgment ought to be set aside and the appeal allowed to that extent, but, for the reasons just stated, without consequential directions.

ROBERTSON, J.A.: The appellant Florence Hortin is the widow and administratrix of the estate of her deceased husband, William Hortin. They had been living apart since September, 1935, under the terms of a deed of separation.

The respondent lived with Hortin as his mistress from the 2nd of November, 1936, until his death on the 6th of August, 1943. On the 10th of December, 1937, Hortin applied for membership in the Canadian Mutual Benefit Association, which is incorporated under the Societies Act. In that application he named the respondent as the beneficiary and stated her relationship to him as "dependant." The evidence shows that the association's manager knew all the relevant facts. Pursuant to the application a "certificate of membership" dated 20th December, 1937, was issued, whereby the association agreed "with William Hortin . . . to pay, after his death, to Elizabeth Ronan (dependant)" an amount not in excess of $2,500.

After Hortin's death the appellant and respondent applied to the association for payment of the $2,500. As the association admitted liability for the insurance money and there were adverse claimants, it obtained, *ex parte,* an order under section 127 of the Insurance Act to pay the money into Court. It did so and thereupon became discharged, as provided by the statute. Then this action was commenced by the respondent. She alleges that, in fact, she was dependent on Hortin and also that she is a dependant within the meaning of subsection (2) of section 3 of the Societies Act, which, in part, enacts: [already set out in the judgment of O'HALLORAN, J.A.].

It is first submitted that the association having admitted liability for the insurance money and having discharged its liability upon payment into Court, has no further concern in the

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matter and therefore it is no longer a question as to whether or not the policy was one which the association could not issue legally, but one as between the parties only; and, accordingly the appellant can have no right to money which Hortin had provided for the respondent. I am of the opinion that the matter must be decided as if there had been no order under section 127. See *Crosby* v. *Ball* (1902), 4 O.L.R. 496, at p. 499.

The first question is: Was the respondent a dependant in fact? I think there is sufficient evidence to support the learned judge's finding that the respondent was in fact a dependant. The evidence shows that the respondent "looked for support" to Hortin from the 2nd of November, 1936, until his death. It is true she kept boarders during that time but there is no evidence to show how much money she derived from this source of income. It is also true that at any time she could have maintained herself.

In *Simms* v. *Lilleshaw Coal Company,* [1917] 2 K.B. 368 the facts were that a daughter, who could have at all material times earned her own living, had given up her employment when her father became a widower and kept house for him for nine years; she received from him during that period her board, clothing and pocket-money. It was argued that she was not a dependant as at all material times she had been able to support herself. The Court of Appeal said it was irrelevant to consider whether the daughter could have supported herself and decided she was wholly dependent.

Turning now to the second question: Was the respondent a dependant of the deceased within the meaning of the section? A number of American cases were cited to us, in some of which it was laid down that in order that a person may be said to be a "dependant" the obligation of the deceased to furnish support or maintenance must rest upon some moral or legal or equitable grounds. See *McCarthy* v. *New England Order of Protection* (1891), 26 N.E. 866, at p. 867.

In *Keener* v. *Grand Lodge, A.O.U.W.,* 38 Mo. App. 543 it was said:

> I would not restrict dependents to those whom one may be legally bound to support, nor, yet, to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support.

The *Keener* case was followed in *Goff* v. *Supreme Lodge Royal Achates* (1912), 134 N.W. 239; see p. 242. With respect, I am unable to see any justification for limiting the meaning of the word as indicated in these decisions.

In *Atchison T. & S.F. Ry. Co.* v. *Hopkins* (1922), 207 P. 66, at p. 69, Flanigan, J., with whom the other appeal judges agreed, said:

> However varying may be the connotations of the term "dependent" in different relations of contract or *status*, we think that for the purpose of this case it is sufficient to point out that there is denoted in the legal and customary use of the term the idea of the sustaining or support of one person by another, or the reliance by one upon another either wholly or partially for support. It has been said that, generally speaking, a dependent is one who is sustained by another, or relies for support upon the aid of another.

In Vol. III., Murray's Oxford Dictionary, at p. 208, "dependant" is defined as "A person who depends on another for support, position, etc."

In *Main Colliery Company* v. *Davies,* [1900] A.C. 358 a father was held to be a dependant within the meaning of the Workmen's Compensation Act, of his 16-year-old son who had been killed. In that case the statute gave certain benefits to a person who was wholly or partially dependent upon the workman who was killed. The son lived at home with his father and mother and gave them all his wages—they finding him in food, lodging, clothes, etc., and giving him occasionally a bit of pocket-money. The son was under no legal obligation to support his parents or any of his family.

Suppose a deceased person had for years supported a friend or a distant relation and named him as a beneficiary in a policy of the kind under consideration, could it be said such a person was not a dependant, although the deceased was under no obligation whatsoever to him?

It was held in *West* v. *Grand Lodge A.O.U.W. of Texas* (1896), 37 S.W. 966 that where a woman expressly agreed to become a mistress in consideration of her paramour taking out fraternal insurance in her favour, she was not a dependant but was merely a party to a contract, which was repugnant to public policy. In the case at Bar, however, there is no evidence that the deceased took out the insurance in question as consideration for

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the plaintiff having entered into, or continuing her illicit relations with him. The insurance was taken out more than a year after they commenced to live as man and wife.

It has been held that a deed given by a man to his mistress in consideration of past cohabitation was valid; the mere contemplation of future cohabitation not being enough to invalidate it. *In re Wootton Isaacson-Sanders* v. *Smiles* (1904), 21 T.L.R. 89.

In *Hall* v. *Palmer* (1844), 3 Hare 532 the plaintiff had lived as the mistress of one Vidler, who gave her a bond in consideration of past cohabitation, at the same time stating that "he had no intention of breaking off the connexion." The Vice-Chancellor said that if the security was of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connexion the instrument would be void. Upon these facts it was held that the bond was good.

In *Blanchett* v. *Hansell,* [1943] 3 W.W.R. 275 the facts were that a by-law of the society under which the insurance contract had been issued naming the mistress of the member as a beneficiary, provided that death benefits should be "payable only to the wife, husband (excluding common-law wife and husband) [of] a person dependent upon the member." Dysart, J. held that she was a dependant.

Upon careful consideration I am of the opinion that there is no authority for giving to the word "dependant" anything else than its ordinary meaning or of limiting it to cases where the deceased person was under legal or moral obligation to support the beneficiary, or saying that it is unlawful for a man to support his mistress, which may be morally wrong but not legally so.

For all these reasons I think the appeal should be dismissed.

SIDNEY SMITH, J.A.: The action to which this appeal relates involves, in effect, a contest between a housekeeper-mistress and a wife for certain insurance moneys, payable on the death of the husband.

The deceased lived apart from his wife, the appellant Florence Hortin, under a separation agreement dated 30th September, 1935. He paid her $40 per month. They had had one son and one daughter, who were aged 26 and 21 respectively, at the death of their father.

In September, 1936, the deceased formed an association with the respondent Elizabeth Ronan and the two of them thereafter lived as man and wife. Mrs. Ronan had also been married but for 15 years had lived apart from her husband, without support from him.

In December, 1937, the deceased took out a membership policy with the Canadian Mutual Benefit Association in favour of Elizabeth Ronan, by which $2,500 became payable to her upon his death. He died on the 6th of August, 1943. Both housekeeper and wife now claim these moneys; the wife in her personal capacity and also as administratrix of her husband's estate. By an order of the Supreme Court they were paid into Court to abide the result of these proceedings.

Counsel for the appellant Florence Hortin argues that the respondent Elizabeth Ronan is not entitled to payment of these moneys, as she was not a dependant of the deceased either in fact or in law, and that it was therefore *ultra vires* of the association to issue this policy in her favour.

Such is not the view of the association. When the policy was taken out the deceased was quite frank about the matter. He told of the exact relationship that existed between Mrs. Ronan and himself. He was informed that the association could and would issue the policy in favour of Mrs. Ronan as a dependant. After the death the association acknowledged her as the beneficiary and would have paid the money to her, had not this claim been made by the wife. They then, by way of caution, paid the money into Court.

But the association's views as to this are irrelevant if in fact they acted beyond their powers in issuing this policy. But I do not think they did. No doubt there are many circumstances in which the word "dependant" may be used as meaning one who is not able-bodied and unable to earn his or her own livelihood. A case in point is *Re Harris* (1929), 36 O.W.N. 105 where dependency in that sense was made a prerequisite to payment. But in this case there was no such provision and I think the word "dependant" must here be construed in the wide sense of one who is being maintained at another's cost.

Then counsel for the appellant maintained that the law pro-

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hibited a policy in favour of a mistress. There are cases which lend support to this view, but when examined their circumstances are found to differ considerably from those now before us. They are for the most part contests between an insurance company and a claimant. Here there is no such contest. And here, it is very important to remember, the appellant wife knew of the illicit relationship between the respondent housekeeper and the deceased. Knowing this, she not only visited them, but encouraged or at least allowed her children to visit them. The learned trial judge has so found and I am bound to say, after a careful reading of all the evidence, that there is ample testimony to justify his finding.

I see no reason in law why the respondent should not take these moneys in the character of a dependant, and I think *Crosby* v. *Ball* (1902), 4 O.L.R. 496 supports this view. There, it is true, the claimant had married the deceased, not knowing that he had a wife still living. But later she knew of this and continued to live with him. Moreover, Falconbridge, C.J. points out at p. 500 that the policy might have been made payable in the first place to the claimant "as a dependant" had the facts been known.

The recent case of *Blanchett* v. *Hansell,* [1943] 3 W.W.R. 275, affirmed on appeal [1944] 1 W.W.R. 432, is most helpful to the respondent. Appellant seeks to distinguish it upon the ground that there the claimant wife was herself living in adultery while here the wife is free from taint. Even if this distinction were sound, I am not prepared to say that the wife is blameless. As I have already mentioned, she knew and acquiesced in the relationship between her husband and his housekeeper. She knew he was supporting her. By what right can she complain now of this particular method of support and seek to snatch these moneys from the hands for whom they were intended?

I would dismiss the appeal with costs.

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

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitor for respondent: *P. S. Marsden.*

CLELLAND v. CLELLAND OR McNABB.

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1944
March 1, 2, 3, 13; Aug. 5.

Trusts and trustees—Mistake of fact—Transfer of property by man to woman believing they were legally married—Presumption of advancement—Consideration—Action for declaration of trust.

The parties were married in Mexico in 1934. Both were previously married. The husband (plaintiff) had secured a decree of divorce in Mexico, his domicil at the time being in the State of California, and the wife had secured a decree of divorce in the State of Washington, the domicil of her husband at the time being in the Province of Alberta. When they were married both thought they were properly divorced. The parties lived together as man and wife until February, 1940, when the plaintiff went overseas. The defendant followed him overseas in May, 1940, but at the suggestion of the plaintiff to ensure her safety, she returned to Canada in July, 1940. During their cohabitation, the plaintiff transferred to the joint names of himself and the defendant or to the defendant practically all his property and assets. The plaintiff avers that on his return from England in February, 1942, he first learned from the defendant that she was not his lawful wife as her divorce from her husband (McNabb) was invalid and their Mexican marriage was void. She demanded a division of the property and when he declined, she advised him that she was through. In an action for a declaration that the defendant holds her interest in the property transferred to her as trustee for the plaintiff and for ancillary relief, the plaintiff averred that his intention at all times material to the execution of these transfers into the joint names of himself and the defendant, whom he thought to be his wife, was to provide for her in the event of his prior decease and were not made for the purpose of vesting in her an immediate beneficial interest.

Held, that the plaintiff's evidence be accepted that there was no intention of vesting the immediate beneficial interest in the properties in the defendant. The mistake here is a mistake of fact and is fundamental or basic. What he has to prove is that he thought they were legally man and wife. He says so and she in her discovery says so. He then has to prove that he acted on this belief. He has satisfied that requirement. Then he has to prove that she was not his lawful wife; that is admitted. There should be judgment for the plaintiff for the relief asked.

ACTION for a declaration that certain properties transferred by the plaintiff to the defendant, whom he believed at the time to be his wife, were held by her as trustee for him. The facts are set out in the reasons for judgment. Tried by MACFARLANE, J. at Victoria on the 1st, 2nd, 3rd and 13th of March, 1944.

McAlpine, K.C., and *Dawe*, for plaintiff.

W. S. Owen, and *G. B. Duncan*, for defendant.

Cur. adv. vult.

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5th August, 1944.

MACFARLANE, J.: The parties to this action were the parties to a ceremony of marriage, performed at Agua Caliente in the Republic of Mexico on July 3rd, 1934. Both had been married previously. Both had secured decrees of divorce, the plaintiff in Mexico, the defendant in the State of Washington. At the time the respective decrees were obtained, the domicil of the respective parties was as to the plaintiff in California and as to the defendant, her domicil being that of her husband, in the Province of Alberta. At the time of the marriage both thought that they were properly divorced and free to marry. The parties lived and cohabited together as man and wife until the plaintiff went overseas in the month of February, 1940. From 1937, the domicil of the plaintiff was in British Columbia. The defendant followed the plaintiff to England in May, 1940, and remained there with the plaintiff until July, 1940, when in order to ensure her safety, at the suggestion of the plaintiff, she returned to Canada. During the period of their cohabitation the plaintiff transferred to the joint names of himself and the defendant or to the defendant practically all his property and assets.

The plaintiff says that his intention at all times material to the execution of these transfers was to transfer these properties into the joint names of himself and the defendant whom he thought to be his wife, so as to provide for her in the event of his prior decease and that the transfers were not made for the purpose of vesting in her an immediate beneficial interest.

On his return from England in February, 1942, he says he first learned from the defendant that she was not his lawful wife when she informed him that her divorce from her husband McNabb was invalid and the Mexican marriage therefore void. The two met, the plaintiff desiring her to get a divorce which would be valid in British Columbia and remarry. He says that the defendant then wanted him to transfer all the property then in their joint names and he refused. She then demanded a division of the property and when he declined advised him that she was through. The plaintiff then presented a petition for divorce which upon coming on for hearing was dismissed on June 24th, 1942, on the plaintiff's own motion, the plaintiff then having

been advised that under the law of California (where the plaintiff was domiciled at the time he obtained his Mexican divorce) the Mexican divorce obtained by the plaintiff was worthless, and of no legal effect, and that there was therefore no marriage between the plaintiff and the defendant for the Supreme Court of British Columbia to dissolve.

The plaintiff now sues for a declaration that the defendant holds her interest in the property transferred to her as trustee for the plaintiff and for ancillary relief.

The evidence is entirely that put in on behalf of the plaintiff, including his *viva-voce* examination and cross-examination, the transfers, letters, and telegrams between the parties and portions of the defendant's discovery. The defendant relies on this evidence raising by her pleadings and arguing from this evidence that the transfers were gifts and not recoverable by reason of the fact that (1) the marriage between the parties was illegal, and (2) alternatively that if the defendant is also a party to the illegality then the parties are *in pari delicto* and *in pari delicto potior est conditio defendentis.*

The plaintiff's evidence is that he never intended by the transfers he made to give to the defendant any immediate beneficial interest. There is no evidence presented by her, or on her behalf, that she thought she obtained any such interest. She relies on the transfers themselves, together with certain portions of the letters to which I shall refer later. His evidence thus stands uncontradicted except as it may be shown to be modified by the documents and letters. That his intention was as he says is, in my opinion, also borne out by the course of dealing with the property transferred. After transferring shares into their joint names, he appears to have dealt with them at will, selling some and using part of the proceeds and depositing part in the Bank of Nova Scotia at Vancouver in a joint savings account. She not only was required to sign in these dealings, but did so willingly. She did not draw cheques except on a "commercial account" until sometime late in 1939, when surreptitiously she drew out nearly the whole of the balance in the joint savings account at Vancouver. When he found this out, he requested her to re-establish the account, which she promised to do. When the

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question arose as to the withdrawal of the money from the Bank of Nova Scotia account in Vancouver he swears she said and it is not denied, "You know you can trust me. When you come back as much will be here as when you left."

The first Cadillac car he had he put in her name. He later gave this to a friend of his. On the payment off of Pacific Western debentures he drew the sum of $10,000 from the joint bank account in Vancouver, and deposited it in his personal account in California. With this he purchased other shares. He says he did not consult the defendant as to what he bought, although when he bought securities or property he told her what he was doing. I think the conclusion is irresistible from the evidence that her understanding was as complete as his and was that the property was, in fact, his, but that he was making these transfers and keeping these titles in their joint names, so that in the event of anything happening to him they would pass to her by survivorship, with a minimum of trouble, and that all was done, on the underlying assumption that she was his wife. She does not deny his repeated statements and nowhere does she, in letter or other document produced, say anything contrary to this.

What she does is to put in a large number of letters written by the plaintiff to her from England after he went there on active service. These letters contain many expressions of complete confidence in and of abounding affection of the plaintiff for the defendant, arising out of the fact that he thought she was not only his legal but his loyal wife, but it is significant that, for instance, he says in a cable (Exhibit 5) dated March 10th, 1940, "Everything your control without restriction during my absence," and again (Exhibit 2) in a cable dated September 7th, 1941, "Leave everything your trust and care." These expressions and many others are entirely consistent with what he now says, that when overseas he wished to make it convenient for her to handle the property, and that, if anything happened to him, then she could have what was his without difficulty.

Under these circumstances, I do not think I need deal further with the evidence as to whether a gift or an immediate beneficial interest was intended. I find that there was no intention on the part of the plaintiff in making the transfers of any of the property

into the joint names of himself and of the defendant, or into the name of the defendant alone, to make a gift of these properties to her. By the use of the word properties I intend to include real property, shares, money in the bank, the second Cadillac car and the motor-vessel "Sinbad."

The case was very fully and ably argued before me, and I will deal briefly with the points raised. The parties agree that there is no presumption of advancement in respect of transfers made by a man to a woman who is not his wife with one qualification. Counsel for the defendant submits that the presumption of advancement rests on intention, and while it is true that no presumption of advancement arises in respect of such a transfer, yet if the transferor thought the transferee to be his wife, then his intention governs the construction of his act, and the presumption is the same as if she were his wife. I do not think this is so. I think the law is that if he is so mistaken, then the mistake excludes intention. In *Norwich Union Fire Ins. Soc. Ltd.* v. *Wm. Price, Ltd.*, 103 L.J.P.C. 115, at p. 118; [1934] A.C. 455, at p. 463; [1934] 3 W.W.R. 53, at p. 58, Lord Wright put the position clearly in the following passage:

> It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic.

The mistake here was, as I see it, fundamental or basic. I find that all the plaintiff did, he did on the underlying assumption that the defendant was his wife and she was not.

I have already dealt with the evidence in regard to these transfers being construed as a gift.

The defendant then submits that the mistake, if any, which actuated the plaintiff, was a mistake of law and not of fact and that he is therefore not entitled to be relieved. I think that the plaintiff's belief that the defendant was his wife, and he her husband was a mutual mistake of fact. Such a mistake is not less a mistake of fact because it involves a conclusion of law. As Jessel, M.R. said in *Eaglesfield* v. *Marquis of Londonderry* (1876), 4 Ch. D. 693, at p. 703; 35 L.T. 822:

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There is not a single fact connected with personal *status* that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it.

I think a consideration of this statement will eliminate the suggestion that the mistake was as to the law of the plaintiff's domicil at the time of the marriage. It is argued that he is not to be excused for not knowing the law of his domicil, and therefore he must be presumed to have known that he and the defendant could not be legally man and wife. I think he did not know that law. But I think that the mistake as to the *status* of the woman whom he thought to be his wife is a matter which is clearly separable from the reason why she did not have that *status*. As Jessel, M.R. says in the passage I have quoted:

> It is not the less a fact because that fact involves some knowledge or relation of law.

Viscount Haldane in *Salvesen* v. *Administrator of Austrian Property*, 96 L.J.P.C. 105; [1927] A.C. 641, at p. 653 explains what *status* means in this connection, when he says:

> For what does *status* mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. *Status* may result from such a contractual relationship, but only when the contract has passed into something which private international law recognizes as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. The juridical result is more than any mere outcome of the agreement *inter se* to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of.

Still it is urged that the plaintiff in order to prove this mistake must rely on the fact of the illegality of the marriage which was performed at Agua Caliente, and that, this illegality coming to the notice of the Court, the Court will not assist him.

I do not think there is any question as to the law. A good deal of confusion, however, arises from failure to distinguish cases where relief is refused by the Court when as in *Taylor* v.

Chester (1869), L.R. 4 Q.B. 309; 38 L.J.Q.B. 225, money has been paid over or property handed over "in pursuance of an illegal or immoral contract," and cases where there is no illegal or immoral purpose. I have no hesitation here in finding that there was no idea of consideration for illicit cohabitation in the mind of the plaintiff, when he made these transfers. I accept his evidence that he wished to make arrangements with regard to his property, so that the woman he thought was his wife would be able, in the event of his prior decease, to acquire the enjoyment of that property with a minimum of trouble. The situation here to my mind is purely one of a mistake of fact; of a mistake of fact which is admitted on the pleadings and not in issue. The defendant does not contend that she was his legal wife. She, on the other hand, says at the time she thought that they were properly married. In these circumstances, I do not see that the proof of the illegal marriage is necessary to establish the case of the plaintiff. What he has to prove is that he thought they were legally man and wife. He says so, and she in her discovery says so for herself. He has then to prove that he acted in this belief. In my opinion he has satisfied that requirement. Then he has to prove that she was not his lawful wife; that again is admitted. But then it is said that the plaintiff cannot recover, because the reason that she was not his lawful wife is that the marriage was illegal. I do not think that follows.

I think this case is in line with the case of *Galloway* v. *Galloway* (1914), 30 T.L.R. 531. There the plaintiff and defendant believing (as was not the fact) that they were legally married entered into a deed of separation. The defendant, the husband (*sic*) had been married in 1898. In 1903, his wife left him. In 1907, assuming his wife was dead, he married the plaintiff. In 1913, the parties separated and entered into a deed of separation. Afterwards the defendant received information that his first wife was alive. He then fell into arrears with the payments under the separation, and the plaintiff sued and the defendant counterclaimed for rescission. On appeal to the Divisional Court, consisting of Ridley and Bray, JJ., Ridley, J. held that the agreement between the parties was void (p. 532):

The law clearly was that if there was a mutual mistake of fact which was

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material to the existence of an agreement, the agreement was void. In the present case, looking at the terms of the deed of separation, there could be no doubt that its basis was the belief of both parties that they were respectively husband and wife. As that was in fact not the case, in his opinion the deed of separation was void.

In that case the question of illegality of the marriage is not mentioned as being argued, but it was apparent on the face of the proceedings.

I have considered carefully a large number of cases cited by counsel on both sides. It is impossible to discuss them in detail. Apart from those dealing with the doctrine of the presumption of advancement they dealt largely with relief in cases of mistake and the extent to which illegality in collateral matters would cause the Court to refuse relief. I have come to the conclusion that the plaintiff is not required to rely on the illegality connected with the marriage to establish his right to relief on the ground of mistake; that the mistake is one of *status* and that the *status* of the defendant is admitted and not in issue. On this basis I do not see how the plaintiff is required to rely on or prove the illegal marriage, or how that is a bar to relief being granted.

There should be judgment for the plaintiff for the relief asked for in the prayer of the amended statement of claim, with the exception of paragraph (e), which is an alternative claim. There will be judgment for costs of the action including the two motions at the trial against the defendant. With respect to the relief claimed under paragraphs (a) and (b) there will be leave to apply for such amendment as counsel for the plaintiff deems necessary.

There will be an order for any necessary accounts to be taken before the registrar.

Judgment for plaintiff.

KUZYCH v. STEWART *ET AL.*

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1944
Oct. 30, 31; *Nov.* 4.

Labour organization—Union having closed-shop agreement—Illegal expulsion from union—Consequent dismissal from employment—Damages—Whether obligation to seek employment as non-unionist to mitigate damages.

If on the trial of an action it is found that a union wrongfully and illegally suspended and expelled a member from membership, the union must be responsible for damages flowing from its wrongful and illegal act, namely, in the preventing such person from obtaining employment as a union member. A union member is not bound under such circumstances to seek employment as a non-union member in order to entitle him to damages for the wrongful act of the union.

ACTION for wrongful suspension and expulsion of the plaintiff from the defendant union and for an injunction restraining the defendant union from acting upon such expulsion and for damages. Tried by FARRIS, C.J.S.C. at Vancouver on the 30th and 31st of October, 1944.

Hodgson, for plaintiff.
Stanton, for defendants.

Cur. adv. vult.

4th November, 1944.

FARRIS, C.J.S.C.: This action came on for trial before me on October 30th and 31st. The action was in reality against the defendant the Boilermakers' & Iron Shipbuilders' Union of Canada, Local No. 1, claiming a wrongful suspension and expulsion of the plaintiff from the defendant union, and for an injunction restraining the defendant union from acting upon such expulsion and for damages.

On the first day of the hearing counsel for the defendants frankly and specifically admitted that the plaintiff had been wrongfully and illegally suspended and expelled from the defendant union, and that the plaintiff was entitled to an injunction restraining the union from acting upon such expulsion. I accordingly so found, and the case resolved itself into a question of assessment of damages only.

The plaintiff was a welder employed by the North Van Ship

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Repairs Limited, a company that was operating its business under an agreement with the defendant union, under which agreement the operation was carried on in what is known as a closed shop, that is to say, only members of the defendant union could be employed in working unless the union was unable to supply the necessary labour. No question arose as to the union being able to supply the necessary labour.

The plaintiff had been employed since the Fall of 1942 by the North Van Ship Repairs Limited. On December 9th, 1943, the North Van Ship Repairs Limited was notified by the defendant union that the plaintiff had been suspended from membership in the defendant union, this being a notice in writing dated December 8th, 1943. On the date of the receipt of the notice the plaintiff was advised by North Van Ship Repairs Limited of receiving such notice, and he was accordingly dismissed from the employment of the North Van Ship Repairs Limited.

Correspondence ensued between the solicitors for the plaintiff and defendants, but this correspondence was without prejudice and did not come before me. But on the 26th of February, 1944, the plaintiff commenced this action. In the meantime, about the 17th of December the plaintiff attended at the Selective Service Board and reported the situation in respect to his employment and difficulties. He did not, however, obtain a separation card from the North Van Ship Repairs Limited, entitling him to other employment, and did not otherwise seek employment.

On the 21st of June, 1942, while this action was still pending, he was reinstated as a member in good standing of the union.

On the trial of the action I had no difficulty in coming to the conclusion that the plaintiff had been dismissed from his employment as a result of the wrongful and illegal act of the defendant union, in suspending and expelling the plaintiff as a member of the defendant union.

In my opinion the plaintiff was a truthful and frank witness, and I accepted his evidence without question.

The sole question then left for me to determine was as to the question of damages that the plaintiff was entitled to recover as a result of the wrongful act of the defendant union.

The plaintiff was earning approximately $160 per month after

payment of income tax, and was out of employment, as I found, as a result of the wrongful act of the union, from the 9th of December, 1943, the date that the North Van Ship Repairs Limited received the notice of the plaintiff's suspension, until the 21st of June, 1944, when the North Van Ship Repairs Limited received the notice that he had been reinstated as a member in good standing. I accordingly awarded the plaintiff $1,000 as general damages.

In view of the importance of this decision to unions, I have been requested by counsel for the defence to give written reasons, to which request I gladly accede.

It was urged by counsel for the defendants that the plaintiff had not taken steps to obtain other employment, and therefore mitigate the damages, and for this reason he was only entitled to nominal damages.

The plaintiff's contention was that he was illegally expelled from the union, and that having brought an action to have this so declared, he was not to be expected to go out and seek employment as a non-union member pending the determination of his reinstatement or the termination of the action.

Neither counsel for the plaintiff nor defendant were able to cite me any cases upon this point, although counsel for the defence stated that he had made an exhaustive search of not only the British authorities but the American authorities as well. It is notorious the many union actions brought in the United States.

It was my opinion that a person wrongfully discharged is only bound to take reasonable steps to obtain similar employment in order to mitigate damages. It appeared to me to be highly unreasonable to expect a union man who had been wrongfully deprived of his membership in the union to be compelled to seek employment as a non-union man. If it is recognized that a plaintiff is only bound to take reasonable steps to seek similar employment to that from which he is dismissed, surely it cannot be said that obtaining "similar" employment is of greater importance to the union man than being required to seek employment as a non-union member.

I pointed out during the trial that unions, and particularly those unions operating under a closed-shop agreement had a great

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responsibility to their members, as the depriving of a union member of his membership in a union might be really depriving him of his means of livelihood. It was my opinion that the plaintiff, during the period in which the legality of his expulsion as a member was being determined, was not bound—in order to mitigate the damages which flowed not from his wrongful act but the wrongful act of the defendant—to seek similar employment other than as a union man; and of course during the period of his wrongful expulsion he could not obtain employment as a union member.

While evidence was tendered by the defendant to show that the plaintiff might have been employed during this period as a non-union man without prejudice, nevertheless the plaintiff felt, and I think, with good reason, that he might have been seriously prejudiced had he not stood upon his rights to be reinstated as a member of the union, and refuse during such period to seek employment as a non-union man.

I was satisfied on considering the whole evidence that the plaintiff had just reason to fear future serious repercussions if he so acted. I am impressed with the words of Younger, L.J. in the case of *Braithwaite* v. *Amalgamated Society of Carpenters, &c.* (1921), 91 L.J. Ch. 55, at p. 68:

> The preliminary contention which each of the two trade unions concerned in these actions here put forward—namely, that the union is entitled to have withdrawn altogether from the cognisance and jurisdiction of any Court of justice the determination of the question whether there is any warrant at all under its rules for the expulsion of the plaintiff members from its ranks—is one so wide reaching in its effect as to invest these proceedings with an importance to all trade unionists that can hardly be exaggerated. Expulsion from their unions of convinced trade unionists, as both these plaintiffs are said to be, is in these days of nationally organised labour no light thing. Mr. Stevenson, a representative of one of the unions concerned, described at an interview before action what such expulsion involved to a man in the position of the plaintiffs. "Naturally he would become a non-unionist, and other members of our association will not work with non-unionists. That is the position." In other words, he would be in danger of becoming what Lord Moulton in another connection once described as "an odd lot" in the labour world. It is hardly too much to say that to such men as the plaintiffs expulsion from the union is little less than a sentence of industrial death.

In my opinion a trade unionist, having been expelled from membership in the union and having brought an action for reinstatement as a member of the union, is not bound to seek during

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the pendency of such action employment as a non-union member in order to mitigate damages, and the failure to seek employment under such circumstances would not deprive the injured person from receiving damages.

If on the trial of the action it is found that the union wrongfully and illegally suspended and expelled a member from membership, the union must be responsible for damages flowing from its wrongful and illegal act, namely, in the preventing such person from obtaining employment as a union member. A union member is not bound under such circumstances to seek employment as a non-union member in order to entitle him to damages for the wrongful act of the union.

Upon this reasoning I found the plaintiff entitled to damages in the amount of $1,000 as above set out.

Judgment for plaintiff.

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Oct. 30;
Nov. 6.

Partition—Tenants in common—Sale on partition—Appointment of receiver—Boarding-house premises—Tenancy only as to real property—Sale as going concern.

Where the Court finds that a property, consisting of premises operated by one of the parties as a boarding-house, is held in common between the parties, but refuses an accounting with respect to the revenue arising therefrom on the ground that it would be impossible to say what part of the revenue was received in respect of the premises or personal labour or capital, a sale for partition purposes may be ordered and a receiver appointed to obtain a reasonable rental pending the sale and to conduct the sale.

Where the Court finds there is a tenancy in common as to the real property, but none as to the furnishings of the boarding-house, it cannot in the absence of consent of the parties, order the sale of the premises as a going concern.

MOTION to implement portion of judgment of ELLIS, J. varied on appeal (see 59 B.C. 551) with respect to sale on

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partition of property held by parties as tenants in common. Heard by WILSON, J. at Vancouver on the 30th of October, 1944.

J. A. MacInnes, for plaintiff.
McAlpine, K.C., and *D. J. McAlpine,* for defendant.

Cur. adv. vult.

6th November, 1944.

WILSON, J.: This action was tried by the late Mr. Justice ELLIS. His judgment was appealed, and certain of his rulings disallowed. His order, as modified by the Court of Appeal, now comes before me on a motion to implement the last paragraph thereof which reserved certain matters for later consideration.

The defendant counterclaimed to be the sole owner of the east ½ of lot 13, block 21, D.L. 185, group 1, New Westminster. This claim was dismissed and the judgment held that the plaintiff was the owner of an undivided one-half interest in the said lands and premises.

Both the plaintiff and the defendant had, at different times prior to the trial, control of the property, and collected the revenue therefrom. The trial judge ordered that they should each account for the revenues earned during the periods of their respective control. The Court of Appeal held that such an accounting should not have been ordered as, due to the fact that the property had been operated as a rooming-house, it would be impossible for the registrar to say how much of the revenue received was in respect of the premises, how much in respect of personal labour and how much in respect of expenditure of capital.

The last paragraph of the judgment reads as follows:

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the matter of appointment of a receiver, sale or partition of the said lands and of the costs of the action and counterclaim be reserved to be dealt with on further consideration.

Under this paragraph I am now asked to appoint a receiver, order sale of the property and award costs.

I have no doubt, after reading the judgment and reasons for judgment of the late Mr. Justice ELLIS, that a sale should be ordered. Counsel for the plaintiff asks me to conclude from the

pleadings and from the judgment of the Court of Appeal that the plaintiff is possessed of a half interest in the furnishings of the house on the property, and that these should be sold as well as the real estate, half the purchase-money going to each person. I can see no sound foundation for this argument, and only order the sale of the lands hereinbefore described.

I have been asked to add some directory provisions to this order for the guidance of the receiver or other person selling the lands. It is suggested that the property will fetch a better price if sold as a going concern, that is to say that the furniture should be sold with the house, and that I should authorize the receiver to sell on this basis, computing the value of the furnishings which will go to the defendant, and that of the house, which will be divided between the parties. I cannot make such an order. The furniture can only be sold with the consent of the defendant, and I have no assurance that he or the plaintiff will accept the valuation placed on it by a receiver. If they refused to do so the receiver would be powerless to force the valuation on them, since the furniture is not involved in this litigation. The order will be for sale of the lands. If the obstinacy of the parties prevents them getting together and agreeing to sell the house and furniture as a going concern, they will suffer whatever loss flows from that obstinacy.

Counsel for the defendant oppose the appointment of a receiver. They say, in short, that a receiver can only be appointed where there is something to receive. They say that the Court of Appeal having found that the defendant is not liable to account, there is nothing to come into the hands of a receiver. I imply from this that they admit that the defendant is still receiving the revenues from the property.

I cannot believe it right that such a state of affairs can be allowed to result from the Court of Appeal judgment. The Court of Appeal found that up to the time the writ was issued it would be impossible to get a true accounting. But a receiver is not concerned with the past dealings between the parties; he is concerned with future management. He will be receiver only of the property of which the parties are tenants in common, that is the real estate. A receiver may be appointed of property held

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jointly or in common (Halsbury's Laws of England, 2nd Ed., Vol. 28, p. 24). It will be the receiver's duty to get, until the property is sold, a proper rental from the defendant or any other person in possession. It should be easy to fix such a rental from a consideration of rentals of similar properties. The receiver, it appears to me, might well conduct the sale, but I leave this to be spoken to, as well as the name of the receiver to be appointed.

It is never very satisfactory to try to award costs in respect of an action tried by another judge. In this case I think the plaintiff should have two thirds of her costs of the action and all of her costs of the counterclaim. The defendant will have one third of his costs of the action. The costs will be taxed and set off.

Order accordingly.

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Oct. 27;
Nov. 13.

SCHOFIELD v. SCHOFIELD.

Practice — Divorce — Decree absolute — Maintenance — Petition for—Time within which petition must be filed—Divorce rules 65 and 69.

Divorce rule 65 provides that the petition for maintenance may be filed at any time not later than one calendar month after decree absolute.

The petitioner obtained a decree absolute on the 26th of March, 1943. This decree was duly entered on the 9th of April, 1943, and on the 29th of April, 1943, the petitioner filed a petition for maintenance.

Held, that for the purposes set forth in Divorce rules 65 and 69, a decree is not finally pronounced until it is entered. The petition was filed in time.

MOTION to confirm the registrar's report made on a reference of a petition for maintenance. Heard by HARPER, J. at New Westminster on the 27th of October, 1944.

Carmichael, for petitioner.
Allison, for respondent.

Cur. adv. vult.

13th November, 1944.

HARPER, J.: This is a motion by the petitioner to confirm the registrar's report made on a reference of a petition for mainten-

ance. Objection was taken before him by the respondent's solicitor that the petition had not been filed within the calendar month after decree absolute. Subject to this objection the reference proceeded, and on this motion the objection is again raised.

A decree absolute was obtained by the petitioner on the 26th of March, 1943. This decree was duly entered on the 9th of April, 1943, and on the 29th of April, 1943, the petitioner filed a petition for maintenance. Thus, this petition was filed within one calendar month after entry of the decree absolute, but not within one calendar month of the pronouncement of the decree.

Divorce rule 65 provides that the petition for maintenance may be filed at any time not later than one calendar month after decree absolute, except by leave to be applied for by summons to a judge. No such leave was obtained in this case.

Counsel for the respondent in his very comprehensive submission points out that a decree or judgment is effective from the date of pronouncement, but there is, nevertheless, power in the judge to amend or vary the decree or judgment at any time before it is entered. Jurisdiction still existing in the trial judge, it would seem to be in the interests of litigants that the decree or judgment be fully perfected by entry before subsequent substantive proceedings such as a petition for maintenance be considered. The decree having been perfected and entered, any ambiguity as to the exact order made by the trial judge would be removed. The registrars to whom such petitions for maintenance are referred, could safely proceed to hear the evidence produced. For the purpose set forth in Divorce rules 65 and 69, it would not in my opinion be any great straining of the language used to hold that for the purposes before mentioned, a decree is not finally pronounced until it is entered.

The motion confirming the registrar's report will be allowed.

Motion granted.

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WORKMEN'S COMPENSATION BOARD v. GRAHAM AND BARROW, GARNISHEE, AND DOMINION GOVERNMENT MINISTER OF REVENUE, INTERVENER.

Workmen's Compensation Board—An employee indebted to board—Action to recover—Garnishee—Money paid into Court—Department of Income War Tax intervenes—Priority—Can. Stats. 1942, Cap. 28, Sec. 92, Subsecs. 6 and 7.

The defendant Graham engaged in logging operations in the year 1943 deducted from his employees approximately $1,700, but did not keep the money so deducted separate from his other funds as required by section 92, subsection 7 of the Income War Tax Act. He was indebted to the Workmen's Compensation Board in the sum of $1,800 and in the summer of 1944 the Board sued him for this amount and garnisheed one Barrow, who paid said sum into Court. The Board notified the Dominion Government of the proceedings and in pursuance thereof the department of income tax intervened, claiming it was entitled to receive said moneys in priority to the Workmen's Compensation Board under section 92, subsection 7 of the Dominion Income War Tax Act.

Held, that the Dominion Government has not a general priority for the payment of the income tax due it, except as against the funds in the trust account or which can be followed as having come from the funds either which should have been paid into the trust account or which had been improperly paid out of the trust account. It has not been established here that the funds garnisheed by the Workmen's Compensation Board either have come out of the trust fund or were funds that should have been paid into the trust fund and therefore the Workmen's Compensation Board is entitled as against the Dominion Government to priority for the amount brought into Court as a result of the proceedings instituted by the Workmen's Compensation Board.

ACTION by the Workmen's Compensation Board against the defendant Graham who was a logging operator and in 1943 was indebted to the Board in the sum of $1,800. The Board garnisheed one Barrow who paid said sum into Court. Upon the Board notifying the Dominion Government of the proceedings, the department of income tax intervened, claiming it was entitled to receive said moneys in priority to the Board under section 92, subsection 7 of the Dominion Income War Tax Act. In his logging operations in 1943 Graham deducted from his employees about $1,700, but did not keep the money so deducted separate from his other funds, as required by section 92, subsection 7 of

the Income War Tax Act. Tried by FARRIS, C.J.S.C. at Vancouver on the 11th of December, 1944.

J. A. MacInnes, for Workmen's Compensation Board.
Donaghy, K.C., for intervener.

Cur. adv. vult.

16th December, 1944.

FARRIS, C.J.S.C.: In this matter Graham was operating a logging operation in British Columbia in the year 1943, during which time he deducted from his employees an amount of approximately $1,700, but did not keep the money so deducted separate and apart from his other funds as required by section 92, subsection 7 of the Income War Tax Act.

Graham also became indebted to the Workmen's Compensation Board of British Columbia in the sum of $1,800, and in the summer of 1944 the Workmen's Compensation Board sued for the amount and garnisheed one Barrow who paid into Court approximately the sum of $1,800 upon the garnishee summons.

The Workmen's Compensation Board notified the Dominion Government of the proceedings, and in pursuance of such notification the department of income tax has intervened, claiming that it is entitled to receive the said moneys in priority to the Workmen's Compensation Board of British Columbia under section 92, subsection 7, of the Dominion Income War Tax Act.

It is contended by the intervener in effect that the Dominion Government has a prior claim on all moneys withheld or deducted by an employer and not paid to the Dominion Government under all circumstances as against any other claim, and as against all or any of the assets of the employer in default, and relied upon the authority of *In re C.F.L. Engineering Co.* (1944), 25 C.B.R. 310.

The Workmen's Compensation Board contended that subsection 7 of section 92 simply meant this:

1. That the employer upon deducting or withholding any moneys from an employee for income-tax purposes was to place the money so held in a separate account, and that the employer should be the trustee therefor, and his failure so to do would subject him to a penalty. Secondly, that in the event of any

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liquidation or assignment in bankruptcy the moneys so set aside should not form any part of the estate of the person in liquidation, assignment or bankruptcy, and thirdly, that even in the event of there being no liquidation, assignment or bankruptcy, and any claim being made against the employer, that the funds so set apart should be paid to the Dominion Government in priority of any other claims.

It was further contended that save as aforesaid it did not extend the rights of the Dominion Government to have a general prior claim against any or all of the assets of the employer and that as in this case the moneys garnisheed by the Workmen's Compensation Board were not the moneys deducted or withheld and set apart, that the Dominion Government had no priority and that the Workmen's Compensation Board was entitled under the general rule of law, having succeeded in its garnishee, to recover the amount paid into Court as a result of its proceedings.

In my opinion the deducting or withholding the income tax by the employer is a book-keeping transaction only, and when the wage is paid to the employee showing to the employee that the wage so paid is the net amount coming to the employee after deducting or withholding the income tax, that it matters not from what source the money was obtained to pay the employee, and whether or not the employer had on hand the funds necessary to pay the amount to the Dominion Government on account of income tax. To this extent I am in agreement with the learned judge in the case of the *C.F.L. Engineering Co., supra.*

It is further my opinion that when the employee has been paid and the tax deducted or withheld as aforesaid, that the drastic provisions of subsection 6 of section 92 of the Income War Tax Act become effective and whether or not such employer has in hand the actual funds to pay such income tax, he is, nevertheless, deemed to have such funds on hand and is the trustee thereof for the Dominion Government, and is liable as is any trustee for the failure to account for trust moneys, and is also liable to a penalty for failing to keep such money separate and apart as required by subsection 7 of section 92.

It does not seem to me that the Act contemplates giving the Dominion Government any greater right than any person would

have against a trustee handling trust funds, save and except the penalty against such trustee for failing to keep such trust funds separate and apart from his other funds.

It is my opinion, therefore, that the Dominion Government has not a general priority for the payment of the income tax due it, except as against the funds in the trust account, or which can be followed as having come from the funds, either which should have been paid into the trust account or which had been improperly paid out of the trust account.

If it were otherwise it would mean an entire disruption of the credit life of the country. To illustrate: Supposing A, an executor of an estate, had loaned to Graham in 1940 the amount of $1,700 on a mortgage as authorized for the investment of trust funds, the property being at the time of the granting of the mortgage worth say $5,000, and in 1944 it had depreciated in value until it was worth only $1,700, the amount of the mortgage. A, the executor of the estate, is a secured creditor of Graham's. Yet, if subsection 7 is to be construed as sought by the Dominion Government, the Dominion Government's claim, being approximately $1,700, would be paid in priority to the secured claim of the estate represented by A, and the estate's investment would be entirely wiped out. Surely, if there was such an intention it should have been expressed in the clearest language. The language could have been simple, such as this: "In any event whether the amount so deducted or withheld shall have been paid into a separate account or not, or whether the employer is in liquidation, bankruptcy, or has made an assignment or not that the amount withheld by the employer shall rank as a claim of the Dominion Government in full priority of any secured or unsecured creditors, whether such security has been given prior to the withholding or deducting of the tax or not, and including any claims of His Majesty in right of any Province of Canada and against all or any of the assets of the estate." No such language or similar language is found in the Income War Tax Act.

It has not been established here that the funds garnisheed by the Workmen's Compensation Board either have come out of the trust fund or were funds that should have been paid into the trust fund, and therefore the Workmen's Compensation Board of

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British Columbia is entitled as against the Dominion Government to priority for the amount brought into Court as the result of the proceedings instituted by the Workmen's Compensation Board.

Judgment for plaintiff.

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Oct. 10;
Dec. 27.

EDNA ELEANOR SHAW v. WILLIAM FREDERICK SHAW.

Nullity of marriage—Impotence—Status of parties—Test of jurisdiction—Domicil—Impotence distinguished from other grounds for annulling marriage.

The petitioner and the respondent were married in the Province of Alberta on the 10th of October, 1942. They lived together as man and wife in Alberta from time to time until August, 1943. The respondent is domiciled in the Province of Alberta while the petitioner is resident in Vancouver in the Province of British Columbia. The action was brought for a nullity on the grounds of impotency of the respondent. The case was not defended, nor was any appearance entered by the respondent.

Held, that the Court has no right to entertain this action as the respondent is not domiciled within this jurisdiction.

Inverclyde v. *Inverclyde*, [1931] P. 29, followed.

White otherwise Bennett v. *White*, [1937] P. 111, not followed.

ACTION by the petitioner for a declaration that a marriage entered into on the 10th of October, 1942, in the Province of Alberta is a nullity. The facts are set out in the reasons for judgment. Tried by FARRIS, C.J.S.C. at Vancouver on the 10th of October, 1944.

Annable, for petitioner.

No one, for respondent.

Cur. adv. vult.

27th December, 1944.

FARRIS, C.J.S.C.: This was an action brought by the petitioner for a declaration that a marriage entered into on the 10th of October, 1942, in the Province of Alberta, was a nullity.

The petition disclosed that the petitioner and respondent lived together as man and wife in Alberta from time to time, from the date of the marriage until August, 1943, and that the respondent is domiciled in the Province of Alberta, while the petitioner is resident in the city of Vancouver, Province of British Columbia.

The action was brought for a nullity on the grounds of impotency of the respondent. The case was not defended, nor was any appearance entered by the respondent.

Counsel for the petitioner contended that residence of the petitioner in a nullity action where the respondent had not entered an appearance but had been duly served, was sufficient to give jurisdiction to this Court, and relied upon the authority of *White otherwise Bennett* v. *White*, [1937] P. 111.

Counsel for the petitioner further contended that for the purpose of jurisdiction no distinction should be drawn between voidable and void marriages, and relied upon the case of *Easterbrook* v. *Easterbrook*, [1944] P. 10, and the case of *Hutter* v. *Hutter*, [1944] W.N. 196. The authorities, *supra*, quoted by learned counsel for the petitioner clearly support his contentions. The decisions in these cases came to me as a distinct shock, as, if correct, they would have the effect of changing what I considered the fundamental principles, giving to a Court extraterritorial jurisdiction. It was my opinion that the law as to extraterritorial jurisdiction is as laid down by the Earl of Selborne in *Sirdar Gurdyal Singh* v. *Rajah Faridkote*, [1894] A.C. 670; 11 R. 340, where he said (pp. 683-4):

> . . the plaintiff must sue in the Court to which the defendant is subject at the time of suit (*"Actor sequitur forum rei"*); which is rightly stated by Sir Robert Phillimore (International Law, vol 4, s. 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and *"extra territorium jus dicenti, impune non paretur."* Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory.

I have carefully examined the authorities cited, and find that I

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am unable to follow them. In the case of *White otherwise Bennett* v. *White, supra,* Bucknill, J. (p. 125) says:

> He further argued that there was a general principle that this Court would not exercise jurisdiction in a case where the respondent has not subjected himself to the jurisdiction by residence or domicil or by submission to it. I appreciate the weight of these arguments, and if the respondent had entered an appearance to the petition under protest against the exercise of jurisdiction, I should have had serious doubts whether this Court had jurisdiction over the matter. But I do not think I have to decide that question in this case. In my view, the respondent, by his conduct and by his admissions, has so acted as to justify the Court in exercising jurisdiction. He has not in terms submitted to the jurisdiction, but he has, I think, made it clear that he has no objection to its exercise. In my view, under the special circumstances of this case, the Court has jurisdiction to make the decree sought by the petitioner.

The particular circumstances referred to were these (p. 121):

> I Augustine George White do hereby acknowledge that I am the person of that name mentioned in the within petition and that I have this day been served with a sealed copy of the said petition dated July 5, 1935,

and the further admission by the said White, that:

> I . . . , do hereby admit that I am the Augustine George White mentioned in the Copy of Marriage Certificate Numbered 3646 and that when I went through the form of marriage with Ghislaine Rosy Bennett I was a married man, my wife living in Malta. I also state that I am now living with my wife Dolores White at 39, Hill Street, Perth,

Perth being in Australia.

It appeared in the *White* case that the petitioner had gone to Australia to marry the respondent. The respondent at no time lived in England. At the time of the launching of the action the petitioner's residence and (if not affected by the marriage) her domicil was also in England. His Lordship further proceeded to hold that there was a difference in a nullity action brought on the grounds of impotency and one brought on the grounds of it being a bigamous marriage. With that part of His Lordship's judgment I am quite in agreement, because, to my mind the distinction between an action for nullity on the grounds of a marriage being bigamous and one on the grounds of impotency is clear. A bigamous marriage is void *ab initio.* It is quite obvious that a woman could not acquire the domicil of her husband when in law there was no husband from whom she could acquire such domicil, and it would therefore seem to me that in a bigamous marriage the petitioner could bring the action within the jurisdiction of the Court in which she was resident, provided the respondent was

also subject to such jurisdiction. The words of Bateson, J. in the case of *Inverclyde* v. *Inverclyde,* [1931] P. 29, are indeed very helpful. I quote from page 41:

> The Court of the domicil is the only competent Court to grant a decree affecting *status*. No case can be found before 1857 or since in which the Court has been held to have jurisdiction in a suit for nullity on the ground of impotence when the parties are domiciled abroad. Further it has to be remembered that impotence is not always a ground for a decree of nullity.

And again at p. 48:

> In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage, and the argument that there is no distinction or difference between the two classes of cases seems to me untenable.

As to His Lordship Mr. Justice Bucknill's finding in the *White* v. *White* case, *supra,* in which he says as previously quoted:

> In my view, the respondent, by his conduct and by his admissions, has so acted as to justify the Court in exercising jurisdiction.

His Lordship seems by inference to take the view that a respondent outside of the jurisdiction must, in order to take away the jurisdiction of the Court in which the action was instituted, enter an appearance and protest against the jurisdiction of the Court. To my mind the contrary is the case. The failure to enter an appearance and to accept the jurisdiction of the Court is simply ignoring a process of the Court which the respondent knows has no jurisdiction over him.

As to the cases of *Easterbrook* v. *Easterbrook* and *Hutter* v. *Hutter, supra,* their Lordships in both of these cases seemed to have followed the *White* v. *White* case, *supra,* in so far as where a respondent outside of the jurisdiction of the Court fails to enter an appearance, *viz.,* that he thereby confers jurisdiction upon the Court. As I have already indicated, with this view I cannot agree. Their Lordships in both cases apparently are unable to distinguish the difference between void and voidable marriages in an action for nullity. To me the distinction is clear, and I prefer to follow the reasoning of Bateson, J. quoted *supra.* The same view has apparently been taken by the Courts in Manitoba in *Diachuk* v. *Diachuk,* [1941] 2 D.L.R. 607, and in *Hutchings* v. *Hutchings,* [1930] 2 W.W.R. 565.

In this action which is brought for nullity on the ground of impotence which is a voidable and not a void marriage, I find

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this Court has no right to entertain this action, as the respondent is not domiciled within this jurisdiction.

Had the action been brought on the grounds of it being void as a result of it being a bigamous marriage I would have similarly dismissed it, as the respondent has never been resident within the Province, nor otherwise subject to the jurisdiction of this Court.

Action dismissed.

Action dismissed.

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Oct. 30;
Dec. 30.

BAKER v. VANDEPITTE.

Negligence—Hotel premises—Log in parking area several feet from sidewalk—Beaten path to hotel porch—Plaintiff falls over log at night—Licensee—Injury—Liability

The defendant was the owner of an hotel at Oliver, a small village in the Okanagan Valley. About five years previously a log had been placed in front of the hotel in the parking area for the purpose of preventing automobiles from making a U turn. It was about five feet from the sidewalk and there was a beaten path leading to the porch which was a safe approach to the verandah. On the night of the 27th of December, 1943, when it was fairly dark with two street lights on in front of the hotel, the plaintiff, who had been a friend of the defendant for some years, intended to visit the defendant and, on arriving in front of the hotel, evidently took a short cut from the street towards the porch, fell over the log and was severely injured. The premises were familiar to the plaintiff as she had visited there many times previously for some years.

Held, that the conclusion reached is based on the knowledge of the plaintiff as to these premises and the location of the log in question as well as the fact that the plaintiff was at the time merely a licensee. The log was put where it lay for a definite purpose and was known or should have been known to the plaintiff. She must have forgotten the location of the log and was taking a short cut. There was no failure of any duty owed to the plaintiff by the defendant and the action is dismissed.

ACTION for damages for injuries resulting from falling over a log on the premises of the Reopel Hotel at Oliver, B.C., the defendant being the owner of the premises. The facts are set

out in the reasons for judgment. Tried by HARPER, J. at Vernon on the 30th of October, 1944.

H. W. McInnes, for plaintiff.
McAlpine, K.C., and *F. R. Pincott,* for defendant.

Cur. adv. vult.

30th December, 1944.

HARPER, J.: On the evening of 27th December, 1943, the plaintiff was severely injured by falling over a log on the Reopel Hotel premises at Oliver, a small village in the Okanagan Valley, British Columbia. The defendant is the owner of these premises.

It is alleged that the plaintiff who was well known by the defendant, was proceeding across the premises in front of the hotel for the purpose of calling on the defendant, whose husband had been killed the day before, when the plaintiff fell over a log which had been placed in front of the hotel in the parking area for the purpose of preventing automobiles making a U turn. It is charged that this log or pole was left unguarded and that the plaintiff had no warning or notice of the presence of this log on these premises.

The defendant alleges that the plaintiff was at most a licensee and was the author of her own injury, by failing to enter the premises by the usual and proper way, and by not keeping a proper look-out. It was further alleged that the plaintiff at the time of her injury was wearing glasses which became misty and so obstructed her vision.

The exact location of this pole is shown on Exhibit 4 (an enlargement of Exhibit 3). Ollie Carlson, a witness called on behalf of the plaintiff testified that the log had been lying where it was on the night in question ever since he could remember, and that it was not overlapping the sidewalk. Another witness, Stephen Zakall, and a former employee of the defendant testified that on the night of December 27th the defendant told him the plaintiff had fallen over the log, and he was instructed to go out and move the log off the sidewalk, taking care that no one saw him. This witness had had a dispute about wages later with the defendant, and in my opinion was not a credible witness. He

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clearly bore animosity toward the defendant who testified that she was not aware of the accident until later in the week, and I think this is the fact.

On the whole evidence the conclusion I reach is that this log, which was being used as a car stop, was on the night of December 27th, 1943, in the same place where it had been for some considerable time, and could clearly be seen, at least in the daytime. It lay several feet from the sidewalk. Exhibit 3, a snap-shot, which gives a good view of these hotel premises (as enlarged in Exhibit 4) was said by the defendant to have been taken in 1938.

Due to the death of her husband under tragic circumstances, the defendant had closed the hotel for general business until after his funeral which was to be held on December 28th. The usual lights on the hotel grounds were not on. These lights consisted of the flood light at the north end of the property, and a Neon sign at the west end. There were also lights on the porch which were not on, but there was a tri-light in the lobby where the defendant and some friends were sitting. The night could be described as dark but not extremely so, and there were two street lights on, close to the hotel.

Mrs. Gladys Marteno, a witness called on behalf of the defendant, testified that on the evening of December 27th, she was walking on the street, and passed the plaintiff, who exchanged greetings with her. Shortly after, she heard a cry and saw a black object lying over the log. She went over, and some 30 paces away she recognized the plaintiff. She and a young lady (Dorothy Canniff) assisted the plaintiff to her feet. She further testified that the plaintiff stated to her that her glasses had become misty and that she did not see the log. She further testified that the log on its west end was some three or four feet from the sidewalk and had been in that position for some four or five years.

This evidence as to the glasses was contradicted by the plaintiff who swore definitely that she never made any such statement to Mrs. Marteno.

The conclusion I reach as to liability is based on the knowledge of the plaintiff as to these premises and the location of the log in question, as well as the fact that the plaintiff was at the time of her injury merely a licensee. The plaintiff and defendant are

both of Belgian descent and had known each other for some years. Having seen and heard both these ladies give their testimony in Court, I would not say that any warm personal friendship existed between them, at the time the plaintiff sustained her injury. The defendant contended that the plaintiff suffered from diabetes and had on many occasions visited the hotel to use the toilet-room. I think this is a fact, but on the night in question I am of opinion that the plaintiff intended to make a call upon the defendant in order to express to her her condolences on the tragic death of the defendant's husband.

It should be said that in all there were three logs on these hotel premises. Two of them lay against the flower beds in front of the hotel for the purpose of protection of the flowers from automobiles. These logs lay parallel to the highway, and very close to the flower beds, and had nothing whatever to do with the plaintiff's injury.

These premises were familiar to the plaintiff. The log in question had been put where it lay, for a definite purpose, and was known or should have been known to the plaintiff, as it had been there some considerable time. There was a beaten path leading to the porch, which made a safe approach to the verandah. The plaintiff must have forgotten the location of the log and was taking a short cut.

The rule laid down by Lord Sumner, then Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew, Limited,* [1913] 1 K.B. 398; at pp. 410-11, seems applicable here:

> The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee. . . . The rule as to licensees, too, [as in the case of trespassers] is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril.

It being common ground in this case that the plaintiff was a mere licensee, the duty of the defendant was expressed by Masten, J.A. in *Guindon* v. *Julien,* [1940] 3 D.L.R. 152, at p. 157, as follows:

> If I am right in the view that the respondent is a mere licensee, then the sole legal duty owed by the appellant to her is not to expose her to a con-

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cealed danger or trap. *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74, overruling *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

However the trial Judge has found that appellant did expose the respondent to a concealed danger or trap, but I find myself unable to agree that any trap existed. What are the elements necessary to create a trap in the legal sense of that term? As applied by the trial Judge it consists in a dangerous condition of the premises which is not obvious to the licensee and which is known, or ought to be known, to the licensor.

In the case at Bar, the log in question was certainly not a hidden danger. The plaintiff was not an invitee nor a licensee with an interest. The distinction between an invitee or a mere licensee coming on premises such as these here is set forth by Viscount Cave, L.C. in *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253, at p. 261, as follows:

> When a person is invited or licensed to pass by a particular way, and the landowner without warning to him does something which makes it dangerous for him to use that way, liability may no doubt be incurred. But this is because the use of the permitted way itself is subjected to an unknown and unexpected danger; and where, as here, the danger zone is far removed from the permitted way, the same considerations do not apply. To say that a landowner who permits an element of danger to exist in a place to which he neither invites nor expects a person to go thereby sets a trap for that person would appear to me to be a strange use of language. . . .

On the facts here I can find no failure of any duty owed to the plaintiff, and the action must be dismissed with costs.

Action dismissed.

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FANE v. FANE AND McLENNAN.

Divorce—Suspicions aroused of adultery—Watching wife to obtain evidence—Whether connivance—Whether such wilful neglect or misconduct of husband as to conduce to the adultery—R.S.B.C. 1936, Cap. 76, Secs. 14, 15 and 16.

Petitioner and respondent were married in 1936 and lived a normal married life until 1940 when they became estranged. The husband claimed his wife had taken to staying out late at night. He protested this conduct for two years without results and then stopped bothering. She stated her absences from home were innocent and due to her craving for companionship, her husband not allowing her to participate in his social activities and recreations. In 1942 she formed a friendship with the co-respond-

ent. Owing to the frequency of their meetings, the husband became suspicious and devoted his leisure hours in surveillance of his wife's movements. During the spying he made no protest to his wife or the co-respondent. In May, 1944, he caught her with the co-respondent *in flagrante delicto*. The husband was a street-car conductor, the wife a telephone operator, and following their marriage, the wife pursued her vocation first at intervals and later continuously. The husband was close in financial matters. They had no children. During ten years previously the husband formed an attachment for another lady who shared his taste for skiing and mountaineering of which the wife had knowledge, but the facts were not such as to justify the finding that they were guilty of adultery. In an action for dissolution of marriage:—

Held, that the respondent and co-respondent were guilty of adultery. It remained to be decided whether the petitioner connived at the adultery or was guilty of such wilful neglect or misconduct as to conduce to adultery. Connivance was based on "*volens*" and the question was whether his conduct brought him within the words "to invite, advise or enjoin the commission of a wrong act." The facts here do not show the husband to have done any of these things. An odour of inhumanity clings to his conduct, but it would be dangerous to hold that such conduct amounted to connivance.

Held, further, that wilful neglect or misconduct is a discretionary matter and involves considering the advantage to society or maintaining or dissolving the marriage and the benefits, moral and material, which would accrue to the parties by maintaining or determining their union. In view of all the circumstances nothing but hatred and unhappiness can result from an attempt to perpetuate this union and no exemplary value to the public would result, in the enforced continuance of a cohabitation odious to both parties. The decree of dissolution is granted.

PETITION for a decree of dissolution of marriage by the husband. The facts are set out in the reasons for judgment. Heard by WILSON, J. at Vancouver on the 30th of November and 1st and 4th of December, 1944.

McAlpine, K.C., and *Schultz*, for petitioner.
Crux, for respondent.
Wismer, K.C., for co-respondent.

Cur. adv. vult.

4th January, 1945.

WILSON, J.: In this matter I have found that the respondent and the co-respondent were guilty of adultery. It remains to decide whether the petitioner connived at the adultery or was guilty of such wilful neglect or misconduct as to conduce to the adultery.

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This young couple had for some years prior to the adultery, which occurred on May 25th, 1944, led an unnatural life. They were married in 1936. Until 1940 their marital relationship was normal. About the beginning of that year they became estranged. The husband claims this was because he found that his wife had taken to staying out late at nights. He says he protested this conduct over a period of two years without results, and that finally, in 1942, he "became fed up and stopped bothering." The wife says that the breach occurred because her husband had ceased to love her, and had said so. She states that her absences from home were innocent ones and were due to her craving for some sort of companionship to fill the void left by her husband's failure to allow her to participate in the leisure hours of his life, his social activities and his recreations.

From 1940 on, these people led a cat and dog life. The husband, whose hobbies were skiing and outdoor life, left his wife home while he spent week-ends and holidays on Seymour Mountain. The wife made her own friends and went about with them.

From 1942 when the husband, as he says, stopped bothering about his wife, she began to stay out, at times all night, a fact which she admits, but explains by the evidence of women friends, who testify that she stayed with them. The husband had by now decided his wife was unfaithful, and engaged a solicitor with a view to divorcing her. Thereafter he appears to have devoted his leisure hours to a prolonged and rather distasteful surveillance of his wife's movements. She had formed a friendship with the co-respondent. They met frequently in his apartment and in his automobile. It would, I think, from the nature and the frequency of their meetings be obvious to the husband that their relationship, if it had not already become adulterous, would very probably culminate in adultery. During this period of spying, the husband made no protest either to his wife or to the co-respondent. He was still living with his wife, although a stranger to her bed. He had never met the co-respondent. He maintained his vigilant and unceasing watch on his wife without arousing her suspicions. In May, 1944, he caught her with the co-respondent, *in flagrante delicto*.

It is necessary to consider the conditions under which these

people lived. They are typical products of the modern city—the husband, a street-car conductor, the wife a telephone operator. Following their marriage the wife pursued her vocation, at first intermittently, later continuously. Their financial arrangements were, I think, indicative of a degree of niggardliness on the part of the husband. They had no children. They worked at odd hours, so that frequently they would not meet at home during an entire day.

The husband had, during the past ten years, formed an attachment for another lady who shared his taste for skiing and mountaineering. I have found, with some hesitation, that the facts of this association were not such as to justify me in deciding that the husband was guilty of adultery. On the other hand they were of such a nature as, if revealed to the wife (and they were to a great extent known to her) would justify a considerable degree of resentment on her part, and excuse to a degree her own feeling that she was free to seek her own amusements.

The initiative in sexual relationships is assumed to be with the male. Marriage is a relationship which has, for society, tremendous social and economic significance, but *inter partes,* its strongest aspect is, in youth, sexual. The husband here seems to have entirely abdicated the initiative. I cannot find, either in his own evidence or that of his wife, any indication that he made a warm-hearted and manly attempt to resume normal marital relationship. The most he says is that he censured his wife for her conduct; never that he tried, by affection and understanding, to get their marriage back on an even keel.

I consider that the wife, while not guiltless, is less culpable than the husband in this regard. I do think that she made some efforts to resume a normal married life. I think that she might have done more, but I consider that there is a greater surrender of pride involved in a woman importuning an indifferent man than there is in a man wooing a wife who shows signs of straying. But there does seem to have been, in the conduct of the husband, a degree of coldbloodedness that is hard to excuse.

On these facts, very sketchily limned here, I am asked to find connivance. The definition of connivance is based on the maxim

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Volenti non fit injuria. Was the husband here *volens* to his wife's adultery?

There is a useful discussion by FISHER, J. of this subject in *W.* v. *W. and M.* (1933), 47 B.C. 468. In that case the husband had watched, for several hours, without any attempt to interfere, actions of his wife in an hotel room which culminated in adultery. FISHER, J. found there was no connivance, but it must be said that he based his finding to some extent on the fact that the husband had from the first suspected his wife and repeatedly warned her. The factor of warning is not present here. In the present case the husband had formed, not without reason, a suspicion of adultery, and had, over a period of two years made no attempt to warn the wife or to rebuke the co-respondent. I have therefore to narrow my decision to a finer point than had FISHER, J. I have to decide: Is it connivance if a husband, suspecting, with good reason, adultery, allows, without protest, his wife to continue a perilous intimacy over a period of two years, in the meantime watching for proof of adultery, while making no attempt to prevent adultery?

Volens, willingness, means more than indifference, it implies consent. FISHER, J. quotes Sanchez's work, "De Matrimonio" (p. 471):

> "It is lawful for a man who suspects his wife of adultery to watch her with proper witnesses so as to be able to convict her of adultery, first because that it not conniving at the offence but taking advantage of her wickedness . . . ; secondly, because it is one thing to invite, advise, or enjoin the commission of a wrong thing, which is never lawful, and another to allow, or abstain from removing the opportunity for wrong-doing, which is sometimes permissible for the sake of some greater good. . . . For instance, parents or masters of a household do no wrong in abstaining from removing some opportunity for theft from their children or dependants, when they know that they are addicted to it, in order that they may by such means be caught in the theft and recalled to rectitude."

The words here that seize my attention are "invite, advise, or enjoin." I cannot feel that the facts here show the husband to have done any one of these three things. I cannot admire the gentleman's conduct. An odour of inhumanity clings to it; but I think it would be dangerous to hold that such conduct amounts to connivance. My attitude in this case cannot be better expressed than in words used by Lord Stowell in *Moorsom* v.

Moorsom (1792), 3 Hagg. Ecc. 87, at p. 117; 162 E.R. 1090, at p. 1100:

> If the question were whether [the petitioner] acted as a prudent, a wise, or an attentive man, the result would be unfavourable; if it were a question whether in fact he contributed to the disgrace of his family, the answer would again be unfavourable; but the question is whether he contributed with a corrupt intention: and, on a consideration of the evidence, I do not think myself judicially warranted to pronounce that he did so.

Connivance was not pleaded in this cause, and objection was taken by counsel for the petitioner to the adduction of evidence to prove it. I allowed the evidence. I relied on *Moosbrugger* v. *Moosbrugger* (1913), 109 L.T. 192, and in my own conviction that, since sections 14, 15 and 16 of the Act cast a clear duty on the Court to determine, in all cases, whether or not there is connivance, the Court cannot reject evidence purporting to deny or to prove connivance. Having admitted this evidence I am now in the position of finding that, while it does not prove connivance, it does prove "wilful neglect or misconduct . . . [conducing] to the adultery" within the meaning of section 16 of the Act.

This finding of wilful neglect or misconduct embraces these points:

1. That the husband was deficient in the ordinary husbandly duties of regard, attention and association to a degree that left the wife with no recourse but to seek companionship elsewhere. 2. That his relations to the lady named in the cross-petition were, while not proven to be adulterous, of such a nature as to be distressing or even provocative to a young wife. 3. That during the period when the petitioner must have known his wife to be subject to temptation by the co-respondent he maintained his cold and unhusbandly attitude and made no attempt to re-engage her wandering affections. 4. That his financial contribution to their home was inadequate.

Connivance is an absolute bar to relief. Wilful neglect or misconduct is a discretionary bar.

In exercising my discretion I must consider the advantage to society of maintaining or dissolving this marriage, and the benefits, moral and material, which would accrue to the parties by continuing or determining their union. In a recent and striking

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judgment—*Blunt* v. *Blunt,* [1943] 2 All E.R. 76, the House of Lords, discussing the exercise of the discretion to order dissolution when both parties are guilty of adultery has said, *per* Viscount Simon, L.C., at p. 78:

> These four points [to be considered] are: (*a*) the position and interest of any children to 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, *viz.*, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and 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.

Applying these rules here, I find that the first, second and fourth considerations do not apply, so that I am left to consider the prospects of reconciliation and the public interest. To this, I think should be added a consideration of the prospect of the marriage of the respondent to the co-respondent. This prospect, since the co-respondent is a married man, does not exist here.

I can see no possibility of reconciliation, and I feel that the wife's defence of the action and her cross-petition are based on a desire to thwart the wishes of the husband and to establish her innocence and his guilt rather than a desire to attempt to renew her marital rights. I think any such desire has been extinguished in her during the four years of estrangement. I do not think the husband has had any *bona-fide* desire to re-establish his marriage for a very long time. I think, in view of all the circumstances, that nothing but hatred and unhappiness can result from an attempt to perpetuate this union.

This finding, to a large extent, answers the second question as to "the interest of the community at large." Where there is, to begin with, clear proof of adultery by one party to the marriage, there can be no advantage to the community at large in the indefinite maintenance of a union unblessed by issue and unhal-

lowed by love or even by respect. There can under these circumstances be no exemplary value to the public in the enforced continuance of a cohabitation odious to both parties; and a probable if not inevitable result of such an alliance under duress will be further adultery.

I therefore, in the exercise of my discretion, grant the decree of dissolution.

Costs to be spoken to.

Petition granted.

WHEATLEY v. ELLIS AND HENDRICKSON.

Injunction — Interlocutory — Maintaining status quo pending trial — Discretion—Logging contract.

A person who comes into Court for an interlocutory injunction to preserve property *in statu quo* pending the trial of an action wherein rights to it are to be decided, is not required to make out a case which will entitle him at all events to relief at the trial. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of.

The plaintiff alleges a special contract with the defendant under which he, the plaintiff, agreed to put up certain money, and to supply certain logging-machinery for the purpose of logging a definite area covered by timber licence belonging to the defendant. In return he was to receive from the defendant all the logs which were logged from that property and pay for them at market prices. He claims a special right in the logs themselves.

Held, that this is a right which will have to be determined at the trial. In the meantime the subject-matter of this litigation should be preserved and the plaintiff has made out a case for an interlocutory injunction.

APPEAL by defendant Ellis from the order of WILSON, J. of the 20th of September, 1944, continuing an injunction until the trial of the action. The plaintiff claims that in April, 1943, he entered into an agreement with the defendants whereby he agreed to give financial assistance to the defendants for carrying out logging operations on lands specified in the timber-sale contract No. X-32258 under which contract the defendant Hendrick-

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son was the licensee. He further agreed to supply the defendants with certain logging-equipment. The defendants agreed that they would continue logging operations until said area was completely logged and the logs produced would be brought to booming-grounds and delivered to the plaintiff and sold to him and that advances made by him and the price of equipment supplied by him would be applied on account of the purchase price of the logs delivered to him. In pursuance of the agreement the plaintiff in April and May, 1943, made advances to the defendants of about $900 and supplied logging-equipment to them of the value of $4,400. The defendants continued logging operations and felled and bucked practically all the merchantable timber on said lands and in September, 1943, the defendants refused to continue said logging operations and refused to deliver said logs and timber to the plaintiff. In October, 1943, Hendrickson sold his interest in the timber-sale contract to Ellis. In December, 1943, the plaintiff issued a writ claiming, *inter alia,* an injunction restraining the defendants from selling or disposing of the logs from said area. Because of the defendants' failure to carry out their agreement, certain liens and charges were made and levied by the Forestry Branch of British Columbia against the felled logs and equipment and the plaintiff paid the Forestry Branch of the Province the sum of $1,200. The delivery of these logs to the plaintiff is essential in order to enable him to fill and supply important orders for timber and lumber for which he has contracts.

The appeal was argued at Victoria on the 11th of October, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

D. A. Freeman, for appellant: The appeal is brought by the defendant Ellis only. The defendants had a licence to cut certain timber near Harrison Lake in April, 1943. Ellis carried on operations in April until the end of May, 1943, when operations stopped and were never continued. Wheatley asked Ellis to deliver the logs but he declined to do so. The action is for specific performance or in the alternative for damages for breach of contract and in the further alternative for the return of money loaned. There are no further pleadings. In August, 1944, Ellis

carried on the logging by himself and the plaintiff obtained an *ex-parte* injunction restraining the defendant from selling. On this order to continue the injunction the main ground of appeal is that no case is made out disclosing any damage and he cannot succeed in an action for specific performance. It must be shown that irreparable damage will result before an interlocutory injunction will be granted: see Halsbury's Laws of England, 2nd Ed., Vol. 18, p. 29, par. 44; *Smith* v. *City of Vancouver,* [1935] 3 W.W.R. 116. The plaintiff has suffered no injury. There are plenty of logs on the market. He had no more than some inconvenience in filling his orders: see *Vancouver Island Milk Producers' Association* v. *Alexander* (1922), 30 B.C. 524, at p. 526; *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1917), 24 B.C. 218; *Fothergill* v. *Rowland* (1873), L.R. 17 Eq. 132, at p. 139. He got the logs he required at a greater expense which does not amount to irreparable damage: see *Field* v. *C.N.R.*, [1934] 3 D.L.R. 383, at p. 384.

D. J. McAlpine, for respondent: As a rule an interlocutory injunction will be granted to keep the matter *in statu quo* until the trial: see *B.C. Poultry Ass'n* v. *Allanson,* [1922] 2 W.W.R. 831. These matters are in the discretion of the trial judge. It is just and convenient that the order should be made. He will suffer irreparable damage. There is great difficulty in getting logs and there is loss in his business.

Freeman, replied.

O'HALLORAN, J.A.: This is an appeal from an order continuing an injunction until the trial of the action. The order also directs the action be set down for trial immediately upon filing and service of the statement of claim and that in default thereof the defendants shall be at liberty to apply for an order discharging the injunction. The order was made on the 20th of September last and it was stated the statement of claim was filed immediately, but that the action was not set down for trial, because the defendant (appellant) did not file his statement of defence, but chose instead to launch this appeal. We wish to avoid delay-

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ing the trial any further than may be absolutely necessary, and therefore give our judgment now.

Speaking for myself, I would dismiss the appeal. I do so on the main grounds which I read from the Library edition of Kerr on Injunctions during the argument and which I think fall within order L. of our Supreme Court Rules. And *vide* also *Ward & Co.* v. *Clark and Henniger* (1895), 3 B.C. 356. To put it shortly, a person who comes to the Court for an interlocutory injunction of this nature is not required to make out a case which will entitle him at all events to relief at the trial. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of.

In *Great Western Railway Company* v. *The Birmingham and Oxford Junction Railway Company* (1848), 17 L.J. Ch. 243 Cottenham, L.C. said at p. 245:

> It is certain that the Court will, in many cases, interfere to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to the rights of the parties.

What constitutes irreparable damage may depend upon the circumstances. If, as the plaintiff respondent alleges here, the defendant has in fact acted in a high-handed manner, and has endeavoured to steal a march upon the plaintiff then as Lord Macnaghten said in *Colls* v. *Home and Colonial Stores, Limited,* [1904] A.C. 179, at p. 193, an injunction until the trial is necessary in order to do justice to the plaintiff, and *vide* also *James Jones & Sons, Limited* v. *Tankerville (Earl),* [1909] 2 Ch. 440, at p. 446 and *Leney & Sons, Limited* v. *Callingham and Thompson,* [1908] 1 K.B. 79 Farwell, L.J. at p. 84.

W. L. Macdonald & Co. v. Casein, Ltd. (1917), 24 B.C. 218, and *Vancouver Island Milk Producers' Association* v. *Alexander* (1922), 30 B.C. 524 were relied on, but in my view are not applicable to the conditions arising in this case. I regard the order appealed from as a discretionary act of the Court to protect the subject-matter pending the early trial which was then directed. In the recited circumstances in which the order was made, I do not think this is a proper case in which to interfere

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with the discretion exercised by the learned judge. I would dismiss the appeal.

ROBERTSON, J.A.: I agree with my brother O'HALLORAN. As pointed out, this is an interlocutory matter, and so we are not required to be satisfied that the plaintiff is bound to win.

The plaintiff alleges a special contract with the defendant under which he, the plaintiff, agreed to put up certain money, and to supply certain logging-machinery, for the purpose of logging a definite area covered by a timber licence belonging to the defendant. In return he was to receive from the defendant all the logs which were logged from that property, and pay for them at market prices. He claims a special right in the logs themselves. Now it seems to me that this is a right which will have to be determined at the trial. We are not called upon to decide it now. In the meantime the subject-matter of this litigation should be preserved. For these reasons I think the plaintiff has made out a case for an interlocutory injunction. I therefore think the appeal should be dismissed.

SIDNEY SMITH, J.A.: I agree with my brother O'HALLORAN.

Appeal dismissed.

Solicitors for appellant: *Freeman & Freeman.*
Solicitor for respondent: *D. J. McAlpine.*

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

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Sept. 26, 27;
Nov. 7.

Wills — Revocation — Whether conditional — Admissibility of evidence — Intestacy.

By will made in 1929 the testator left his whole estate to his wife and made provision in the event of her death before him. A codicil, executed in 1930, confirmed the will. In 1931 he made a further will revoking all former wills and declared "this only to be and contain my last will and testament" and then left all the estate to the wife unconditionally and appointed her executrix, no provision being made for the disposition of

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the estate in case she should predecease him. The wife died and he died nine days later without having changed his will of 1931. In an action by the executors named in the will of 1929 to have the said will and codicil thereto established it was held that the plaintiffs had 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 1929 will and codicil.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that in view of the unequivocal language of the will of 1931, it had not been shown that the revocation of the will of 1929 by the will of 1931 was conditional upon the testator's wife surviving him.

Held, further, that the testimony of two witnesses tendered to show an intention or a state of mind of the testator, not at the time of the execution of the second will, but shortly before his death is inadmissible under the circumstances herein.

APPEAL by plaintiff *Cunliffe* from the decision of FARRIS, C.J.S.C. of the 7th of January, 1944 (reported, 60 B.C. 51) whereby the learned Chief Justice dismissed the plaintiffs' action and found that the will of the deceased Percy Hutchinson Buller bearing date of the year 1931 is the last will and testament of the said deceased Percy Hutchinson Buller and whereby it was ordered and adjudged that letters of administration *cum testamento annexo* of the said estate be granted to Victor C. Fawcett, official administrator for part of the county of Nanaimo. By a will of the 5th of September, 1929, Percy Hutchinson 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. 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 the 10th of November, 1939, his wife having predeceased him on the 1st of November, 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. The executors under the will of the 5th of September, 1929, applied for probate of said will with the codicil of the 3rd of January, 1930.

The appeal was argued at Victoria on the 26th and 27th of September, 1944, before SLOAN, O'HALLORAN and ROBERTSON, JJ.A.

Cunliffe, for appellant: The facts are not in dispute. It is the duty of the Court in deciding what testamentary document to admit to probate to collect and give effect to the intention of the deceased: see *In the Goods of Hope Brown,* [1942] P. 136; *Simpson* v. *Foxon,* [1907] P. 54; *In the Goods of Irvine* (1919), 2 I.R. 485; *Lemage* v. *Goodban* (1865), L.R. 1 P. & D. 57; *Powell* v. *Powell* (1866), *ib.* 209; *In re Snow Estate,* [1932] 1 W.W.R. 473. The whole question is the intention of the testator. The Court will assume that the testator did not intend to die intestate: see *In re Harrison. Turner* v. *Hellard* (1885), 30 Ch. D. 390, at p. 393; *In re Stevenson Estate,* [1943] 3 W.W.R. 519; *Vauchamp* v. *Bell* (1822), 6 Madd. 343, at p. 348; *Gosling* v. *Gosling* (1859), Johns. 265, at p. 274; *Smith* v. *Thompson and others* (1931), 146 L.T. 14, at p. 17. The Court will examine and give heed to all the circumstances: see *In the Estate of O'Connor,* [1942] 1 All E.R. 546. The learned judge said the *onus* is on us. There is no such *onus* in face of the presumption that he did not intend to die intestate: see *Lowthorpe-Lutwidge* v. *Lowthorpe-Lutwidge,* [1935] P. 151. The Court should consider the circumstances in this case, namely, that an intestacy results, that the 1929 will provides for disposition in case his wife predeceases him; his feeling toward his wife's relatives and toward his own family: see *Marklew* v. *Turner* (1900), 17 T.L.R. 10; *In re Pemberton and Lewis* (1917), 25 B.C. 118. There is nothing in the 1931 will contrary to the provisions in the 1939 will dealing with the property in the event of Mrs. Buller predeceasing her husband: see *Doe dem. Murch* v. *Marchant* (1843), 6 Man. & G. 813; *Gladstone* v. *Tempest and Others* (1840), 2 Curt. 650; *Lemage* v. *Goodban* (1865), L.R. 1 P. & D. 57. In the case at Bar the second will is under the circumstances ineffectual to operate as a will: see *Dempsey* v. *Lawson* (1877), 2 P.D. 98; *In re Bernard's Settlement. Bernard* v. *Jones,* [1916] 1 Ch. 552; *Re Erskine Estate,* [1918] 1 W.W.R. 249; *Ward* v. *Van der Loeff. Burnyeat* v.

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Van der Loeff, [1924] A.C. 653; *In re Snow Estate,* [1932] 1 W.W.R. 473.

J. G. A. Hutcheson, on the same side: Conversations as to testator's friendship for his wife's relatives, evidence was allowed in subject to objection to allowing extrinsic evidence. There was error in holding that the conversations with Mrs. Thornett and Mr. Wellens were inadmissible. One of the circumstances to be considered was the deceased's feelings and attitude towards his relatives on the one hand and his wife's on the other: see *In the Estate of O'Connor,* [1942] 1 All E.R. 546; *In re Stevenson Estate,* [1943] 3 W.W.R. 519. Conversations of deceased show his attitude to the families: see *In re Hawksley's Settlement. Black* v. *Tidy,* [1934] Ch. 384. Finding the facts as he did find them, the learned trial judge has found that the 1931 will did not represent the testator's testamentary intentions under the circumstances that existed at his death. Having so found, he should have granted probate of the 1929 will alone or of both wills with the exception of the revocatory clause in the latter will. The Court will disregard the clauses that are in conflict with testator's obvious intention.

Arthur Leighton, for respondent: The will of 1931 is clear, unambiguous and validly executed containing a simple revocatory clause. Whether a document is testamentary or not see *Marklew* v. *Turner* (1900), 17 T.L.R. 10; Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 88. Extrinsic evidence should not be allowed in case of a will properly executed by one of sound mind: see *Newton* v. *Newton* (1861), 12 Ir. Ch. R. 118, at p. 128; *Collins and Tuffley* v. *Elstone* (1892), 9 T.L.R. 16; *In the Goods of Oswald* (1874), L.R. 3 P. & D. 162. Because there is some slight evidence as to what would probably have been done with his property does not enable the Court to make a will for him. The Court is bound by the clearly expressed intention to revoke: see *Simpson* v. *Foxon,* [1907] P. 54, at p. 57; *In re Kingdon. Wilkins* v. *Pryer* (1886), 32 Ch. D. 604; *Lowthorpe-Lutwidge* v. *Lowthorpe-Lutwidge,* [1935] P. 151; *In re Allen Estate,* [1935] 1 W.W.R. 584. There are cases that go as far as allowing evidence to explain something in a will not otherwise intelligible: see *In re Harrison. Turner* v. *Hellard* (1885), 30

Ch. D. 390; *In the Goods of Hope Brown,* [1942] P. 136; *In the Estate of O'Connor,* [1942] 1 All E.R. 546. Only in rare cases is evidence allowed in to show intention: see *In the Estate of Thomas,* [1939] 2 All E.R. 567; *Wilson* v. *Wilson* [60 B.C. 287]; [1944] 2 W.W.R. 412.

Hutcheson, replied.

Cur. adv. vult.

7th November, 1944.

SLOAN, C.J.B.C.: In my opinion the learned trial judge reached the right conclusion. I do not consider that the evidence of the two witnesses tendered to show an intention or a state of mind of the testator existing not at the time of the execution of the second will, but shortly before his death, is admissible under the circumstances herein. *In the Estate of O'Connor,* [1942] 1 All E.R. 546.

In consequence I would dismiss the appeal.

O'HALLORAN, J.A.: This appeal involves the question of conditional revocation. It arises out of what Lord Atkin, then Atkin, L.J., described in *In the Estate of J. R. Southerden. Adams* v. *Southerden,* [1925] P. 177, at p. 185 as a doctrine brought into existence in "recent years" and referred to as "dependent relative revocation."

The deceased made a will on 5th September, 1929, giving all his estate to his wife and providing that in the event of her death before him, the income therefrom was to be paid to his wife's sister Alice and after the death of the latter the whole estate was to go absolutely to the latter's daughter Elizabeth. On 3rd January, 1930, the deceased in a codicil thereto confirmed the said will. But in a later will validly executed on 16th May, 1931, he revoked all former wills and declared "this only to be and contain my last will and testament," and then gave all his estate to his wife unconditionally and appointed her executrix thereof, but did not make any provision therein for the disposition of his estate in case she should predecease him. His wife made a similar will in his favour under the same date. His wife died on 1st November, 1939, and he died nine days later without having changed his will of 16th May, 1931. The result is the

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same as if the deceased had died intestate. It is now sought to give effect to the previous will of 5th September, 1929, and the codicil thereto, by asking the Court to declare that its revocation in the later will of 16th May, 1931, was conditional upon the deceased's wife surviving him. In *In the Estate of J. R. Southerden. Adams* v. *Southerden, supra,* Atkin, L.J. said at p. 185:

> The revocation may be conditional on the existence or future existence of some fact. . . . You must prove that there was in fact a condition.

While *In the Estate of J. R. Southerden. Adams* v. *Southerden* concerned revocation by destruction of a will with special reference to the equivalent of section 18 of our Wills Act, I see no reason to question the general application of that portion of Atkin, L.J.'s remarks as quoted above. It follows that in order to succeed, the appellants must prove that when the will of May 16th, 1931, was executed the deceased intended to revoke the previous will conditionally and not absolutely.

But the language of the will of 16th May, 1931, is too precise and unequivocal an expression of intention to permit any doubt as to its finality. And it is in point to observe the deceased, a man of good education, was a notary public and a stipendiary magistrate at Qualicum Beach. Perhaps it should be said also that there is no evidence as to what prompted him to make a new will in May, 1931. And there is no evidence why he left out of that will any provision for the disposition of his estate if his wife should die before he did, such as he had inserted in the previous will. Since no such testimony exists here, it is unnecessary to consider whether it would be admissible if it did exist. In the circumstances an inference of conditional revocation is impossible in this case, and, of course, conjecture is not permissible. The distinction between inference on the one hand, and conjecture and speculation on the other, is clearly defined by Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.,* [1940] A.C. 152, at pp. 169-70.

In the Court below it was sought unsuccessfully to introduce evidence of two persons (a nurse and a Provincial constable) from which counsel for the appellants hoped to establish an intention of conditional revocation. But that testimony concerned

circumstances, not leading up to or occurring at the time of the will of 16th May, 1931, but instead related to circumstances long after, and more particularly to that which the deceased said and did during the nine days he survived his wife. In my opinion it is not relevant to the issue of conditional revocation as raised here and the learned judge properly ruled that testimony was inadmissible. Furthermore, in my judgment it does not come within the types of admissible extrinsic evidence referred to in Lord Blackburn's, then Blackburn, J., classic judgment in the Exchequer Chamber in *Allgood* v. *Blake* (1873), 42 L.J. Ex. 101, at pp. 103-4.

However, even if that testimony could be regarded as admissible, it does not support the appellants' proposition. The testimony of the Provincial constable upon cross-examination pointed rather to an intention of the deceased formed after his wife's death, to make a new will, but, that such intention was defeated in the existing circumstances by his illness and by his own death following so quickly after his wife's death. Finally, it is to be observed that section 17 of the Wills Act, Cap. 308, R.S.B.C. 1936, provides that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

In my opinion the learned judge below reached the right conclusion and this appeal must be dismissed.

ROBERTSON, J.A.: The question is: Does the doctrine of independent relative revocation apply in this case so that the Court should grant probate of Buller's original will dated 5th September, 1929, the codicil dated 3rd January, 1930, and the will made on a printed form on the 16th of May, 1931, omitting the revocation clause in the last-mentioned will?

The 1931 will contained a printed revocation clause revoking "all former wills and other testamentary dispositions heretofore made" and declaring "this only to be and contain my last will and testament." By this will the testator gave all his property to his wife. The will contained a printed residuary clause but no residuary legatee was named; the reason being, of course, that he had left everything to his wife. A subsequent testamentary paper containing a revocation clause does not necessarily revoke a former will. It is clear that

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probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit:

see *Gladstone* v. *Tempest and Others* (1840), 2 Curt. 650, at pp. 653-4. As is said in Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 88:

> Revocation by destruction, or obliteration, or by subsequent will or codicil, may be conditional, and if the condition in question is unfulfilled revocation fails and the will, as made before such revocation, remains operative.

Jarman on Wills, 7th Ed., Vol. 1, at p. 155 states:

> Questions of dependent relative revocation arise most commonly in cases where a will is destroyed or revoked by some physical act, and although the question can arise where a will purports to be revoked by a subsequent testamentary instrument, it would seem that there is greater difficulty in applying the general principle to such cases, because revocation by a written instrument is more deliberate and unambiguous than revocation by destruction.

The intention of the testator is the guide—see *Lemage* v. *Goodban* (1865), L.R. 1 P. & D. 57 and *In the Estate of Brown,* [1942] 2 All E.R. 176, at pp. 177-8. Section 18 of the Wills Act provides that no will may be revoked, *inter alia,* otherwise than by another will, or by burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same. As to the latter mode of revoking the will, as pointed out in *Freel* v. *Robinson, infra,* it is an equivocal act and parol evidence is admissible to show, amongst other things, the intention of the testator and the circumstances under which the will was destroyed.

But where a will disposes of the whole of the testator's estate and contains a clause revoking all former wills and testamentary dispositions the right to show his intention by parol evidence is limited. Riddell, J. in delivering the judgment of the Divisional Court of Ontario in *Freel* v. *Robinson* (1909), 18 O.L.R. 651, at pp. 654-5, said:

> The doctrine of dependent relative revocation, in strictness, is applicable only to a case of physical interference with a testamentary document with the intention of revoking it. Of the three methods by which a will may be revoked—(1) marriage; (2) will, codicil, or other paper; (3) burning, tearing, or otherwise destroying: . . . —the first does not depend upon intent; the second only under certain circumstances will justify parol evidence as to intent; the third depends wholly upon intent, and parol evidence may always be given of the intent. Sir J. P. Wilde, in *Powell* v. *Powell* (1866), L.R. 1 P. & D. 209, at p. 212, speaking of the doctrine of

dependent relative revocation, says: "This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done in the light of the circumstances under which it occurred and the declarations of the testator with which it may have been accompanied. For, unless it be done *animo revocandi*, it is no revocation."

At p. 655 he said:

In cases, however, in which the revocation is by a subsequent document and not some physical act, the rule is different. If there be by a subsequent document an express unambiguous revocation, the intent of such revocation can be found only by an examination of the words of the subsequent document itself.

See also the judgment of the Lord Chancellor to the same effect in *Newton* v. *Newton* (1861), 12 Ir. Ch. R. 118, at p. 129; Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 88 and *In the Goods of Palmer* (1889), 58 L.J.P. 44.

In *Smith* v. *Thompson and others* (1931), 146 L.T. 14 the question before the Court was whether a general revocatory clause in a duly-executed will operated to revoke a power of appointment exercised in an earlier will, also duly executed. The first will exercised a special power of appointment under an *ante*-nuptial settlement. The second will revoked all former wills without expressly dealing with the power of appointment at all. The two testamentary documents were admitted to probate with a declaration that the revocatory clause did not in fact revoke the appointment. In this case the first will was drawn by a solicitor. The second will was drawn by a layman. It did not purport to deal at all with the power of appointment which disposed of by far the larger part of the property. Langton, J. said at p. 17:

For the defendants it was submitted that the court could not look outside the terms of the document and must not speculate on what was in the mind of the testatrix. I think in the main that principle is a safe guide, and the court should be very slow to endeavour to interpret words of an instrument which are not ambiguous in a sense contrary to natural sense. As was said in one case, that process comes very near to making a new will. But here the instrument omits to deal with what is practically the bulk of the testatrix's property. On the authority of the cases cited, it is possible to look at the surrounding circumstances and consider whether or not the general revocatory clause is intended to revoke the earlier exercise of the power of appointment.

In *Marklew* v. *Turner* (1900), 17 T.L.R. 10, the head-note is as follows:

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A testator executed a will, drawn by a lawyer, disposing of his real estate, but leaving some personal property undisposed of. He expressed an intention of disposing of the latter by a future instrument. Subsequently he bought a printed form, and, without legal advice, disposed of his personal property, inserting a clause revoking all former dispositions. *Held*, that the second document was intended to be supplemental to the prior one, that the revocatory clause did not represent the testator's wishes, and that both documents would be admitted to probate, the revocatory clause in the second being omitted. *"In the Goods of Oswald"* (L.R., 3 P. & D., 162) followed.

In *In the Estate of Brown,* [1942] 2 All E.R. 176 the facts were that the testator, with legal assistance, had made a will in 1934. In 1939 with some legal aid, by letter, he prepared and executed a will which contained a clear revocation clause. In the principal clause in the later will the testator failed to fill in the names of the beneficiaries and the interests they were to take. The Court ordered both wills to be admitted to probate, excluding the revocatory clause.

The three last-mentioned decisions were cases where the will containing the revocatory clause did not dispose of the bulk of the testator's estate and, as I understand them, it was for this reason that parol evidence as to the testator's intention was admitted. In the case at Bar the whole of the estate is dealt with.

The facts in *In the Estate of O'Connor,* [1942] 1 All E.R. 546 were that two spinster sisters who lived together and had no surviving relatives, executed in 1933 a joint will which in part read as follows:

> We, . . . , who intend at a later date making each our separate will in favour of the other, are now leaving this document, . . . In the event of our death together, by accident, or other cause, or, if one of us should survive the other and be incapable by illness, or should die, without making any later will, we . . . , wish . . . that this will should stand.

Later both made wills each in favour of the other, using a printed form, containing at the beginning a revocation clause. One sister predeceased the other. After the death of the second sister the residuary legatees of the joint will applied for grant of administration with the will annexed, which was granted. Hodson, J. said at p. 547:

> In order to ascertain the intention of the deceased as to what shall operate and compose his or her will, it is permissible to examine all the circumstances of the case. They must, however, be circumstances existing at the time when the will was made. . . . There remain, therefore, the documents themselves, the terms upon which the two sisters lived, the fact that they

had no relations, their pious and charitable interests and the fact that the only operative effect of admitting the last will of Margaret would be, on the face of it, to produce an intestacy.

In this case the Court considered the written documents and because of the intention of the sisters, expressed in their joint will, let in parol evidence as to the terms upon which the two sisters lived and other matters referred to *supra*.

Again, evidence is admissible to show the testator did not know there was a revocatory clause in the later will—see *In the Goods of Oswald* (1874), L.R. 3 P. & D. 162. There is nothing in the 1931 will to show that the intention of the testator was not as indicated in the document which disposed of the whole of the estate. In my opinion parol evidence bearing on the question of intention was inadmissible in this case; and even if admissible, falls far short of establishing any clear intention of the testator that the revocatory clause should not have its full effect. As was said in *O'Connor's* case, *supra*, if the circumstances of the case are to be considered they must be circumstances existing at the time when the will was made. On this principle the evidence of two of the witnesses as to what took place shortly before the death of the testator would not be admissible. The remaining evidence is of too vague a description in any event to found any conclusion as to the testator's intention. Cogent evidence is necessary. See *Lowthorpe-Lutwidge* v. *Lowthorpe-Lutwidge*, [1935] P. 151.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *R. F. Bainbridge.*

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ROSS v. GILL.

Negligence—Damages — Collision between motor-cars — Question of fact— Power of Court of Appeal to overrule judge of first instance.

Shortly after 9 o'clock on the morning of December 4th, 1944, the plaintiff was driving his Whippet car north on Lulu Island bridge at New Westminster. On reaching a point a short distance north of the middle of the bridge, he collided with the defendant's Oldsmobile car driving south. The driveway of the bridge is about 15 feet wide, but on its west side and level with it is a railway with planking on each side, in all about eight feet wide. It was foggy and the surface was wet. The plaintiff states he was driving close to the kerb on the east side when he was struck by the defendant's car, and in this he is corroborated by a passenger in his car. The defendant states he was driving well to the west side with his right wheels over the east track of the railway and that when he saw the plaintiff's car coming he stopped. Then the plaintiff side-swiped his car and glanced off north-easterly going across the driveway, his right front wheel jumping the kerb and landing on the sidewalk on the east side. The bridge tender, an independent witness arriving five minutes after the accident, found the plaintiff's car partly on the sidewalk on the east side and the defendant's car was on the west side over the railway tracks. It was held by the trial judge that he accepted the plaintiff's evidence, which was corroborated by one of his passengers, but he could not accept the defendant's evidence as correct when he claimed that the plaintiff's car drove against his car and though its left front wheel was smashed, it dragged the defendant's car in a north-easterly direction some 10 or 15 feet across to the other side of the bridge, the plaintiff's car being much lighter than the defendant's. Judgment was given for the plaintiff.

Held, on appeal, reversing the decision of WHITESIDE, Co. J., that the learned judge misdirected himself as there is no evidence whatever of the plaintiff's car dragging the defendant's car in a north-easterly direction, or in any direction, across to the other side of the bridge. On the contrary, the only independent witness, the bridge tender, testified that when he arrived five minutes after the accident he found the defendant's car on the west side of the bridge and helped the defendant to push it across the bridge to the east side and park it behind the plaintiff's car. It was due to this misconception on the part of the learned judge that he accepted the plaintiff's evidence and his misconception in this regard was of "'a governing fact, which in relation to others has created a wrong impression.'" The bridge tender's evidence was accepted by the trial judge and he agrees with the defendant who testified that the plaintiff's car glanced off the defendant's car in a north-easterly direction across the bridge to the east side, leaving the defendant's car on the west side. The plaintiff's claim is dismissed and the defendant's counterclaim allowed.

Powell and Wife v. *Streatham Manor Nursing Home*, [1935] A.C. 243, at p. 266, applied.

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APPEAL by defendant from the decision of WHITESIDE, Co. J. of the 16th of June, 1944, in an action for damages resulting from a collision between the plaintiff's Whippet motor-car and the defendant's Oldsmobile car. At about 9.15 on the morning of the 4th of December, 1943, the plaintiff was driving his car north on the Lulu Island bridge at New Westminster, a Mrs. Thompson being in the front seat with him and one Miller in the back seat. On reaching a short distance beyond the middle of the bridge he came into collision with the defendant, who was driving his car south on the bridge. It was foggy and the surface was wet. The road proper is about 15 feet wide and on the west side of the road are railway tracks, the width between the tracks with the planking on each side being about eight feet and level with the road. The plaintiff swore he was on his proper side of the road when the defendant ran into him and took off his left front wheel. In this he was corroborated by his passenger, Mrs. Thompson. The defendant swears he was driving on his proper side with the right wheels of his car over the east track of the railway and on seeing the plaintiff coming sounded his horn and stopped. The plaintiff then hit the left side of his car, proceeded across the road to the east kerb with his right front wheel going over the kerb on to the sidewalk eight inches above the road, and leaving the defendant's car on the railway tracks. Five minutes after the accident, one Rennie, the bridge tender, found the defendant's car straddling the tracks on the west side and the plaintiff's car on the east side with the right front wheel on the sidewalk. To get the defendant's car off the tracks and clear the road for traffic, he helped the defendant to shove his car across the road leaving it close to the east kerb behind the plaintiff's car. It was held by the learned trial judge that he accepted the evidence of the plaintiff which was corroborated by Mrs. Thompson who was in the front seat with him, but he could not accept the defendant's evidence that the plaintiff's car drove against his car and though his left front wheel was smashed, it dragged the defendant's car in a north-easterly direction for a distance of 10 to 15 feet across to the other side of the street and judgment was given for the plaintiff for the amount claimed and the defendant's counterclaim was dismissed.

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The appeal was argued at Vancouver on the 11th and 13th of December, 1944, before SLOAN, C.J.B.C., ROBERTSON and SIDNEY SMITH, JJ.A.

Hamilton Read, for appellant: The plaintiff Ross with his witness Miller was arrested at 2 o'clock on the morning of the accident charged with causing an affray. They were both intoxicated and taken to the police station at 2 o'clock in the morning and at 8 a.m. the plaintiff was let out on bail and went to Lulu Island in his car and on the way back, shortly after 9 a.m., the accident happened on the bridge. He had a black eye which was swollen, impeding his vision. There was no evidence supporting the learned judge's statement that the defendant said the plaintiff's car dragged his car from the west side of the bridge to the east side. The bridge tender Rennie was an independent witness whose evidence was accepted and he swore that he helped the defendant five minutes after the accident to move his car from the railway tracks to the kerb on the east side of the bridge: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at p. 266. His evidence should be accepted showing the collision was on the west side of the bridge where he found the defendant's car.

McGivern, for respondent: The learned trial judge found in favour of the plaintiff whose evidence was corroborated by Mrs. Thompson and Miller. His finding should not be disturbed unless clearly wrong. The plaintiff and his witness Miller were sober at the time of the accident and their evidence was supported by Mrs. Thompson.

Read, replied.

Cur. adv. vult.

20th December, 1944.

SLOAN, C.J.B.C.: I am in agreement with the judgment of my brother SIDNEY SMITH.

ROBERTSON, J.A. agreed with SIDNEY SMITH, J.A.

SIDNEY SMITH, J.A.: This appeal is concerned with an automobile collision on the Lulu Island bridge at New Westminster, shortly after 9 a.m., on the 4th of December, 1943. At the trial

judgment was given by WHITESIDE, Co. J. in favour of the plaintiff for $291.93 and the defendant's counterclaim for $331.48 was dismissed. The defendant now appeals.

The plaintiff was driving his 1929 Whippet motor-car north across the bridge, and the defendant was proceeding in the opposite direction in his 1936 Oldsmobile car. It was foggy. The cars collided slightly to the north of the middle of the bridge. The learned judge makes no express finding of excessive speed on the part of either driver. So far there is substantial agreement between the parties, but here the agreement ends.

The plaintiff states that he was driving on his proper side of the bridge (*i.e.*, the east side) but that the defendant was on the wrong side. The defendant says the exact opposite, namely, that he was on his proper side (*i.e.*, the west side) while the plaintiff was on the wrong side.

In accepting the evidence of the plaintiff the learned trial judge deals with the matter thus:

> The defendant claims that the plaintiff's car drove against his car and though its left front wheel was smashed, it dragged the defendant's car in a north-easterly direction for a distance of 10 or 15 feet across to the other side of the street. If one adds up the list of items supplied as shown in the quantity column of Exhibit 5 it will appear that it required 63 new parts to complete the repair of the defendant's. If I were to accept the defendant's explanation of what occurred when these two cars came together I would have to believe that the plaintiff's car a small Whippet about 16 years old crashed headlong into the heavy Oldsmobile 1936 car and with its left front wheel broken in pieces dragged the latter car in a north-easterly direction across a distance of 10 or 15 feet without leaving any debris in the shape of broken parts along its pathway from one side of the street to the other. There were no skid marks showing when Mr. Rennie, five minutes from the time the crash occurred, went from his bridge house to where the cars were standing after the accident.
>
> The plaintiff's evidence is corroborated by that of Mrs. Thompson who was in the front seat of the plaintiff's car when the collision occurred. I cannot accept the defendant's evidence as correct and I do accept the evidence of the plaintiff, corroborated as it is by the witness Mrs. Thompson.

But with great respect the learned judge appears to have misdirected himself. There is no evidence whatever of the plaintiff's car dragging the defendant's car in a north-easterly direction, or in any direction, across to the other side of the bridge. On the contrary, the only independent witness, George Rennie, the bridge tender, whose evidence was also accepted by the learned trial judge, testified that when he arrived on the scene, about five

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minutes after the collision, he found the defendant's car on the west side of the bridge and helped the defendant to push it across the bridge to the east side and there park it behind the plaintiff's car. It was due, I think, to this misconception on the part of the learned judge that he accepted the plaintiff's evidence. It seems to me that his misconception in this regard was of "a governing fact, which in relation to others has created a wrong impression":

Powell and Wife v. *Streatham Manor Nursing Home,* [1935] A.C. 243, at p. 266.

The Court is therefore free to consider the facts afresh. I have done so with anxious care because of the reluctance of a Court of Appeal to disagree with the factual findings of an able and experienced trial judge. As stated, the learned judge accepted the evidence of the bridge tender, George Rennie. His evidence agrees with that of the defendant, who testified that at the point of collision the plaintiff's car glanced off the defendant's car in a north-easterly direction across the bridge to the east side leaving the defendant's car on the west side. They were in this position when found by the bridge tender, as has just been stated.

In these circumstances I see no alternative but to allow the appeal, dismiss the plaintiff's claim and allow the defendant's counterclaim.

Appeal allowed.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitor for respondent: *H. J. McGivern.*

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Criminal law—Forgery—Charge — Description of offence — Insufficiency—Essential averment omitted—Matter of substance—Criminal Code, Secs. 467, 468 and 852.

The accused was tried and convicted under section 467 of the Criminal Code on a charge that he "did unlawfully and knowingly . . . , utter a forged document, to wit, a cheque dated March 20th, 1944, payable to O. Nash for $75.00 drawn on the Canadian Bank of Commerce, by using the same as if it was genuine." The cheque itself was not forged, but the endorsement of the payee Nash was forged thereon and by reason of evidence of such forged endorsement the accused was convicted.

Held, on appeal, reversing the decision of COLGAN, Co. J., that the count upon which the appellant was convicted lacked a necessary ingredient to sustain the conviction. He was tried and convicted on a count which was not preferred against him. It was not a "defect apparent on the face" of the count requiring objection before plea within the meaning of section 898 of the Code, nor was it something curable by verdict under section 1010, subsection 2. What occurred was a violation of an essential of justice amounting to an abuse of jurisdiction, since no Court has jurisdiction to convict a person upon a count with which he has not been charged. The appeal is allowed and the conviction quashed.
Brodie v. *Regem*, [1936] S.C.R. 188, applied.

APPEAL by accused from his conviction by COLGAN, Co. J. of the 29th of November, 1944, on a charge under section 467 of the Criminal Code that he

"did unlawfully and knowingly between the 19th and 24th days of March, A.D. 1944, utter a forged document, to wit, a cheque dated March 20th, 1944, payable to O. Nash for $75.00 drawn on the Canadian Bank of Commerce, by using the same as if it was genuine."

The appeal was argued at Victoria on the 15th of January, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

A. W. Fisher, for appellant: The accused was charged with uttering a forged cheque. There was no forgery with relation to the cheque. There is no charge as to the endorsement: see *Queen* v. *Cunningham* (1893), Cassels' Dig. 195; *Brodie* v. *Regem*, [1936] S.C.R. 188. There was no proof of the handwriting: see Roscoe's Criminal Evidence, 15th Ed., 6-7. The learned judge misled the accused into making a statement. If an accused makes a statement, it has no evidentiary value and this should have been told to the accused. The right to make an unsworn statement is taken away by section 4 of the Canada Evidence Act: see *Rex* v. *Krafchenko* (1914), 22 Can. C.C. 277; *Rex* v. *Marcovich* (1923), 40 Can. C.C. 1, at p. 45; *Rex* v. *Aho* (1904), 11 B.C. 114, at p. 115; *Rex* v. *Frederick* (1931), 44 B.C. 547; *Rex* v. *Kelly* (1916), 27 Can. C.C. 140; *Reg.* v. *Rogers* (1888), 1 B.C. (Pt. 2) 119; *Rex* v. *Wong Gai* (1936), 50 B.C. 475.

H. W. R. Moore, for the Crown: The forgery was with relation to the endorsement, but under the section the whole document comes before the Court: see *Reg.* v. *Cunningham* (1885), 18 N.S.R. 31. It does away with the form of the indictment and in any case objection should be taken to it before pleading.

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The letter of September 27th, 1944, by the accused to Dumont is fatal. His failure to cross-examine as to the letter is an admission by him of guilt: see *Rex* v. *Krafchenko* (1914), 22 Can. C.C. 277.

Fisher, replied. *Cur. adv. vult.*

25th January, 1945.

O'HALLORAN, J.A.: The appellant was charged and convicted under Code section 467 that he did unlawfully and knowingly

> . . . , utter a forged document, to wit, a cheque dated March 20th, 1944, payable to O. Nash for $75.00 drawn on the Canadian Bank of Commerce, by using the same as if it was genuine, . . .

The cheque itself was not forged. It was a good and genuine cheque. But the endorsement of the payee, Nash, was forged thereon, and it was by reason of evidence of such forged endorsement that the appellant was convicted. Counsel for the appellant submitted the conviction ought to be quashed, because the count did not contain an averment of a circumstance essential to support the conviction, *viz.,* that the cheque was unlawfully endorsed with the name of the payee.

What is an essential circumstance omitted from a count, and what is insufficient particularity of an essential circumstance admittedly contained in a count, may easily vary with the facts of each case. The omission of the essential circumstance itself cannot be cured by attempting to furnish particulars of it, *cf. Rex* v. *Buck,* [1932] 3 D.L.R. 97. What I said in that respect at p. 458 in *Rex* v. *McLeod* (1940), 55 B.C. 439 seems to have been misinterpreted in the 1944 edition of Tremeear. If the passage quoted at p. 1075 of Tremeear is read with my unquoted observations made earlier on p. 458 of 55 B.C., as it must be, it will be seen that I did not depart from what was accepted by the Ontario Court of Appeal in *Rex* v. *Buck, supra.*

Brodie v. *Regem,* [1936] S.C.R. 188 contains a considered examination of the meaning and legal effect of the relevant Code section 852 *et seq.* It was remarked in *Rex* v. *Wyatt* (1944), 60 B.C. 255, at p. 258, that the *Brodie* case acknowledges a rational distinction between a count 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 on the other hand a count, which is merely defective (*e.g.*, which does charge a crime but with insufficient particularity of an essential circumstance). It is the distinction (p. 198) between a charge which is imperfectly stated, and a charge wherein an averment of an essential circumstance is wholly omitted.

What constitutes an essential circumstance? In my view, Chief Justice Rinfret, then Rinfret, J., furnished the answer at p. 194 of the *Brodie* case when he described its two requisites as (a) an essential to be proved, and (b) of a nature to identify the particular act which is charged. The learned Chief Justice concluded at p. 194, that averment of an essential circumstance so described, is a necessary ingredient of the count, so that the accused may have notice of it and be advised of the particular nature of the offence alleged against him and thus be enabled to prepare his defence accordingly. This recognizes that the first general rule respecting counts is that they should be framed with reasonable certainty. That certainty consists of two parts, the matter to be charged and the manner of charging it, *cf.* the decision of the Ontario Court of Appeal in *Rex* v. *Bainbridge* (1918), 42 D.L.R. 493, at p. 499.

Applying the foregoing reasoning to the facts of this case, it is at once apparent, that the failure to aver the forged endorsement is an omission to aver matter, without proof of which, it could not be shown that the document was forged. It is equally apparent that without such averment the act which is charged cannot be identified. It is further apparent that the omission of that averment prejudiced the accused by leaving him in ignorance of the act which formed the basis of the offence upon which he was being tried and convicted. For the circumstances of the offence disclosed in the charge, did not disclose to him the substantial circumstance, proof of which was essential to support the conviction.

The reasoning and authority of the *Brodie* case lead me to the conclusion that the omission to aver the forged endorsement in the count upon which the appellant was convicted, was the omission of what is described at p. 194 of the *Brodie* case as "a necessary ingredient" of any count which could justify the con-

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viction now under review. I do not think anything decided in *Rex* v. *Adduono* (1940), 73 Can. C.C. 152 minimizes the necessity in a case of this nature that the count shall in itself reasonably identify not only the nature of the crime charged, but the act or transaction forming the basis of the crime named. This is not a technical rule, for it reflects a principle which goes to the very root of the safeguards surrounding a fair trial under our system of law, and *cf. Clute,* J. in *Rex* v. *Bainbridge, supra,* at p. 506.

I find other convincing support for that view in this case. The severity of the penalty, and the number and variety of documents to which the term "forged documents" may apply emphasize the necessity for certainty and precision in prosecutions under section 467, the more so in such a case as this, where the accused was not represented by counsel at his trial. Section 468 enumerates in (*a*) to (*y*) the many kinds of "forged documents" for which the penalty may be imprisonment for life. One cannot overlook the fact that section 468 (*r*) draws a distinction between a forged cheque and a forged endorsement thereof. That points to a substantial distinction between the matter essential to be proved in the case of a forged cheque and a forged endorsement respectively. It also points to the lack of identity between the particular substantial matter essential to be charged in the case of a forged cheque and a forged endorsement respectively.

I must conclude therefore that the count upon which the appellant was convicted lacked a necessary ingredient to sustain the conviction. He was tried and convicted upon a count which was not preferred against him. That was not a "defect apparent on the face" of the count requiring objection before plea within the meaning of section 898. It was not apparent on the face of the count. Nor was it something curable by verdict under section 1010, subsection 2. What occurred was a violation of an essential of justice amounting to an abuse of jurisdiction (*cf., inter alia, In re Low Hong Hing* (1926), 37 B.C. 295, at p. 302 and *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at p. 555), since no Court has jurisdiction to convict a person upon a count with which he has not been charged. It has been already observed the appellant was not represented by

counsel at the trial and *cf. Rex* v. *Wilmot* (1933), 24 Cr. App. R. 63, at p. 68. The appeal will therefore be allowed. The conviction must be quashed.

Counsel for the appellant brought to our notice another aspect of the trial to which reference must be made, although for the reasons already given the disposition of the appeal is no longer affected by it. At the conclusion of the case for the prosecution, in the course of informing the accused-appellant (who was not represented by counsel) of his rights, the learned judge said:

> If you make a statement under oath the Crown will have the right to cross-examine. If you make a statement without being under oath the Crown cannot cross-examine.

This was repeated to the accused-appellant, who then elected to make a statement not under oath, and did so with the learned judge's concurrence. It ought to be made clear that the passing of the Canada Evidence Act in 1893 brought to an end the right of an adult accused to make a statement not under oath. *Reg.* v. *Rogers* (1888), 1 B.C. (Pt. 2) 119 was decided prior to the passing of the Canada Evidence Act. The right was not preserved by statute in Canada, as it appears to have been in England by section 1 (*h*) of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36) Archbold, 31st Ed., 178.

There was perhaps room for another view in this Province, until the decision of this Court in *Rex* v. *Frederick* (1931), 44 B.C. 547, which must be taken to prevail over opinions expressed during argument by members of the old Full Court in *Rex* v. *Aho* (1904), 11 B.C. 114. The judgment of MARTIN, J.A., later C.J.B.C., in the *Frederick* case concurred in by MCPHILLIPS, J.A. and MACDONALD, J.A., later C.J.B.C., reviewed the matter comprehensively. It accepted the view adopted by the Manitoba Court of Appeal in *Rex* v. *Kelly*, [1917] 1 W.W.R. 46. The latter decision was affirmed in the Supreme Court of Canada (1916), 54 S.C.R. 220 but this point does not seem to have required express consideration by the majority of the Court. It is noted also that the Appellate Division of Alberta expressed the same view in *Rex* v. *Campbell*, [1919] 1 W.W.R. 1076. It may be advisable to add that the point now discussed has no relation to an unsworn statement of an accused at a preliminary hear-

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ing (*cf.* Code section 1001) which this Court considered in *Rex* v. *Wright* (1939), 54 B.C. 421.

The appeal is allowed and the conviction quashed.

SIDNEY SMITH, J.A.: The appellant was tried and convicted by COLGAN, Co. J. at Fernie, B.C., on 29th November, 1944. He was sentenced to two years in the penitentiary and to pay a fine of $1,000 and in lieu of payment thereof to an additional one year in the penitentiary. The charge against the accused was that, he did unlawfully and knowingly between the 19th and 24th days of March, A.D. 1944, utter a forged document, to wit, a cheque dated March 20th, 1944, payable to O. Nash for $75.00 drawn on The Canadian Bank of Commerce, by using the same as if it was genuine.

This document, so described, was not false. The falsity was added later and consisted of a forged endorsement. The crime consisted of the uttering of the cheque with the forged endorsement, not the uttering of the cheque as above described. The count therefore failed to set out an essential averment within the principles discussed in *Brodie* v. *Regem,* [1936] S.C.R. 188, and the conviction must therefore be quashed.

There is, however, another matter to which reference should be made. Upon the trial the accused was not represented by counsel. At the end of the Crown's case he was informed by the learned trial judge that he could make an unsworn statement or go into the box and give evidence under oath. He elected to make a statement. But I think the judge misdirected himself in this regard. The Canada Evidence Act permits an accused person to give evidence on his own behalf but he no longer has the right to make an unsworn statement. This was settled in this Court in *Rex* v. *Frederick,* 44 B.C. 547; [1931] 3 W.W.R. 747. This misdirection would involve a new trial, as we cannot speculate on what the accused would have done if properly instructed. But, as I have stated, the conviction must be quashed on the first point.

The appeal is therefore allowed.

BIRD, J.A.: I would allow the appeal and quash the conviction for the reasons given by my brother O'HALLORAN.

Appeal allowed and conviction quashed.

MOORE v. DEWOLF.

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Lease—Premises as rooming-house—Improvements by landlord—Rent payable on completion—Occupancy by lessee at rental pending—Delay in making improvements—Action by lessee for damages recovered—Action by landlord for use and occupation—Counterclaim for continuing damages—R.S.B.C. 1936, Cap. 143, Sec. 10.

On the 16th of August, 1943, the parties entered into an agreement whereby Moore as landlord agreed to rent certain premises to DeWolf as tenant for three years at $80 per month. The tenancy was to commence on the completion of work upon the premises to be undertaken by Moore, as required by the city of Vancouver. DeWolf contemplated operating the premises as a rooming-house. On the 26th of September, 1943, the agreement was varied whereby DeWolf would be allowed to go into possession on October 1st, 1943, at $20 per month until the completion of said work and the lease began to run. On February 15th, 1944, DeWolf brought action for specific performance of the agreement or alternatively damages alleging Moore failed to carry out his bargain as to repairs. It was held by WILSON, J. that three months was a reasonable time for the landlord to complete the work, that the tenant lost revenue to be expected from a rooming-house for two months and assessed his damages at $100. Specific performance was refused. In May, 1944, Moore brought this action for $160 for use and occupation of one room occupied by DeWolf who pleaded *"res judicata"* and counterclaimed for continuing damages at $50 per month in accordance with said judgment of WILSON, J. On an application in Chambers by DeWolf to strike out the plaint as *res judicata* and a similar application by Moore to strike out the counterclaim, it was held that the plaintiff's claim was not *res judicata*, but the defendant's counterclaim was *res judicata*.

Held, on appeal, reversing in part the order of LENNOX, Co. J., that he was right in refusing to strike out the plaint as it involves the determination of issues not in dispute in the former proceedings. The plaintiff could have raised the question by way of counterclaim, but was not obliged to do so. The present claim is not based on the agreement but arises under the provisions of the Landlord and Tenant Act. As to the defendant's counterclaim for continuing damages, the claim was not finally determined in the first action in which damages suffered by the defendant were assessed down to the time of the assessment. The contract still subsists and any continuing breach during its life or until recession gives rise to a claim for continuing damages.

APPEAL by defendant from the order of LENNOX, Co. J. of the 2nd of October, 1944, on an application of the defendant of the 13th of September, 1944, that the plaintiff's plaint and summons herein be struck out as the subject-matter became and is *res*

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judicata by reason of a judgment given by WILSON, J. of the 19th of April, 1944, wherein the learned judge had adjudicated upon the whole of the subject-matter in the action in the Supreme Court. It was held that the facts and allegations contained in the plaint and summons were not *res judicata* and the application was dismissed. On appeal by defendant from the order of LENNOX, Co. J. of the 2nd of October, 1944, on the application of the plaintiff of the 8th of September, 1944, that the defendant's counterclaim be deemed as *res judicata* by reason of said judgment of WILSON, J. wherein he held that the plaintiff was entitled to $50 per month by way of damages for two months, it was held that the said $50 per month for two months were all the damages to which the said defendant in this action was entitled and no more.

The appeal was argued at Vancouver on the 15th of December, 1944, before SLOAN, C.J.B.C., O'HALLORAN and BIRD, JJ.A.

Fleishman, for appellant: Matters in dispute between the parties came up before WILSON, J. in April, 1944. The question now raised by the plaintiff in this action should have been brought before the Court in that case. The plea of *res judicata* applies: see *Henderson* v. *Henderson* (1843), 3 Hare 100, at pp. 114-5; *Workington Dock Board* v. *Trade Indemnity Co.*, [1937] 3 All E.R. 139; [1938] 2 All E.R. 101; *Krause* v. *York*, [1932] S.C.R. 548; *Winter* v. *J. A. Dewar Co.* (1929), 41 B.C. 336, at p. 341; *Johanesson* v. *C.P.R.*, [1922] 2 W.W.R. 761, at p. 772; *Gardiner* v. *Ware* (1913), 13 D.L.R. 151; *In re Westlake. Deceased. Public Trustee* v. *Westlake*, [1940] N.Z.L.R. 887, at p. 892. On the above-mentioned case before WILSON, J. we recovered damages at $50 a month for two months. The work to be done by Moore on the premises under the agreement between the parties has not been done and we are entitled to continuing damages at $50 per month. There was error in holding that the judgment of WILSON, J. became and is *res judicata*: see *Aikman* v. *George Mills & Co. Ltd. et al.*, [1943] O.R. 597; *Bower* v. *Richardson Construction Co.*, [1938] 2 D.L.R. 309; *De Soysa (Lady)* v. *Stanislaus de Pless Pol* (1911), 81 L.J.P.C. 126; *Delbridge* v. *Township of Brantford* (1917), 40 O.L.R. 443;

Gage v. Barnes (1914), 26 O.W.R. 225; *Strang* v. *Township of Arran* (1913), 28 O.L.R. 106; *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Lim.* (1907), 77 L.J. Ch. 102; *McLean* v. *Canadian Pacific Railway Co.* (1923), 53 O.L.R. 533.

Schultz, for respondent: This is an action for use and occupation. We are not required to include this claim in the former action before WILSON, J. It was never before the Court in that action and is a distinct right: see *Ross* v. *Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308, at p. 313; *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141; *Thompson & Taylor* v. *Ross,* [1943] N.Z.L.R. 712. The case of *Macdougall* v. *Knight* (1890), 25 Q.B.D. 1 is distinguishable. The claim arises out of section 10 of the Landlord and Tenant Act. *Res judicata* must be expressly raised: see *Johanesson* v. *C.P.R.,* [1922] 2 W.W.R. 761; *Cameron* v. *Rounsefell* (1933), 47 B.C. 401, at p. 404. The learned judge has properly found that the counterclaim was *res judicata.* He cannot bring a second action, having recovered judgment in the first action for damages in the sum of $100. That the counterclaim should be dismissed see *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, at p. 132; Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 19.

Fleishman, replied.

Cur. adv. vult.

9th January, 1945.

SLOAN, C.J.B.C.: On the 16th of August, 1943, Moore and DeWolf entered into an agreement the purport of which was that Moore as landlord agreed to rent certain premises to DeWolf as tenant for a period of three years. The tenancy was to commence on the date of the completion of work upon the premises to be undertaken and carried out by Moore "as required by the city of Vancouver."

DeWolf had in contemplation operating the premises as a rooming-house.

On the 15th of February, 1944, DeWolf commenced an action against Moore *et al.* for specific performance of the agreement or alternatively damages for non-performance thereof alleging that Moore had failed to carry out his bargain to put the premises in a fit state of repair.

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Moore in that action set up among other defences a variation of the agreement and pleaded in paragraph 6 of his statement of defence as follows:

6. The defendant, F. Moore, will contend at the trial of this action, that the agreement mentioned in paragraph three of the statement of claim herein, was on or about the twenty-sixth day of September, 1943, and at the request of the plaintiff, varied so that the plaintiff would be allowed to go into possession on or about October first, 1943, and that the plaintiff would pay the sum of Twenty Dollars ($20.00) per month rent until the plumbing and electric work mentioned in said agreement was completed, when the rent of Eighty Dollars ($80.00) per month would commence, and the lease begin, and that the said plaintiff did go into possession on or about October first, 1943.

The action came on for trial before WILSON, J., on the 21st of April, 1944, wherein judgment was given for DeWolf. In his reasons for judgment the learned trial judge said in relation to the pleading of variation set out above:

I do not think his [DeWolf's] occupancy of this one room, to the knowledge of the defendant, [Moore] and under the circumstances is a waiver of his right to insist that the work be done by the defendant [Moore].

Then he continues:

I think that the defendant must, by the contract, have been expected to do the work within a reasonable time. I think he has not done the work within a reasonable time to the satisfaction of the authorities of the city of Vancouver, as he agreed to do. I therefore think the plaintiff must succeed.

A reasonable time for the defendant to perform the work would have been three months. However, after he had done it, there would still be work to be done by the plaintiff before the premises could come into use as a rooming-house. I think that the plaintiff has lost revenue to be expected from the premises as a rooming-house for a period of not more than two months and would assess his damages at $100. I refuse the claim for a decree for specific performance on the ground that the plaintiff can be adequately compensated in damages and that performance of the contract to make alterations would require supervision by the Court.

On the 15th of May, 1944, Moore commenced the present action in the county court against DeWolf claiming $160 as "the fair use and occupational value" of the one room occupied by DeWolf in the premises the subject-matter of the first action. DeWolf after alleging in his dispute note that the claim set up in the plaint was *res judicata* counterclaimed against Moore

continuing damages at the rate of $50 per month in accordance with the findings of the Honourable Mr. Justice WILSON . . . up to and including the 15th day of May, A.D. 1944.

An application was then made to LENNOX, Co. J., in Chambers on the part of DeWolf to strike out the plaint on the ground that

the claim therein was *res judicata* and a similar application was made by Moore to strike out the counterclaim.

LENNOX, Co. J. held that the plaintiff's claim was not *res judicata* but "on the other hand the defendant's counterclaim is *res judicata.*"

From that finding DeWolf now appeals to us seeking to have his counterclaim restored and to have Moore's plaint struck out.

In my view of the matter the learned judge below was right in refusing to strike out the plaint but with deference erred in finding that the claim for continuing damages in the counterclaim was *res judicata.*

With respect to the plaint it is apparent that in the first action the question of the occupation by DeWolf of one room in Moore's building was directed to one issue, *i.e.,* variation or waiver of the terms of the agreement and was dealt with in that aspect by the trial judge. What, if any, use and occupation rental DeWolf should be chargeable with for his use and occupation of that room was not in dispute in the orignal action nor was it part of Moore's defence. True he might have raised that question by way of counterclaim but I do not think under the circumstances herein he was obliged to do so. The present claim is not based on the agreement but arises under the relevant provisions of the Landlord and Tenant Act (R.S.B.C. 1936, Cap. 143, Sec. 10). It involves the determination of issues not actually and directly in dispute in the former proceedings. See *Johanesson* v. *C.P.R.,* [1922] 2 W.W.R. 341, and on appeal at p. 761; *Cameron* v. *Rounsefell* (1933), 47 B.C. 401. That brings me to the consideration of the claim for continuing damages in DeWolf's counterclaim. In my opinion this claim was not finally determined in the first action. While the matter is not as clear as it might be from the reasons of the learned trial judge it seems to me that he was assessing the damages that had been suffered by DeWolf down to the time of the assessment. See Order XXXVI., r. 58. The contract still subsists and any continuing breach during its life or until recession gives rise to a claim for continuing damages. If DeWolf is still unable to take possession and is suffering a continuing loss of profit from not being able to carry on his contemplated rooming-house ven-

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ture in my opinion he should, subject to whatever defence on the merits that may be open, be permitted to claim such damage as may be proved in the present action.

In the result I would allow the appeal to the extent indicated. Success being divided I would allow DeWolf one half of his taxed costs of the appeal.

O'HALLORAN, J.A.: I agree with the Chief Justice.

BIRD, J.A.: I agree with the disposition made of this appeal by the Chief Justice, for the reasons given by him.

Appeal allowed in part.

Solicitors for appellant: *Fleishman & Hansford.*
Solicitor for respondent: *William A. Schultz.*

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Nov. 30; *Dec.* 1, 4, 7, 8. 1945

Jan. 22;

Company—Directors—Resolution delegating authority to manager—Contract—Financing and trusteeship—Finance fee—Subsequently increased—Authority—Verdict against evidence—Appeal.

The defendant association was incorporated for logging operations on July 22nd, 1939, and was organized by one Willis who was general manager from its inception until December, 1942. On the day of its incorporation the directors passed a resolution "that Frank Willis be authorized to conduct and consummate any arrangements with certain firms and any others necessary for the furtherance of the Northern Co-operative Timber and Mill Association and to sign all necessary papers for the said association in the transaction of said business." On May 8th, 1941, Willis, on behalf of the association, entered into a written agreement with the plaintiff whereby the plaintiff agreed to collect moneys that became due to the association as booms of logs were sold and apply these from time to time in payment of liabilities and payment of operating expenses and the plaintiff would be paid a trustee fee of $75 a month and 50 cents per thousand feet for financing the association. The plaintiff and his associate, one King, were to guarantee the account of the association with The Royal Bank of Canada up to $5,000 and this was done. The plaintiff also performed other services for the association in Vancouver. It was a term of the agreement that the association

should cut not less than eight million feet of logs per year. By August, 1941, it became apparent that the association could not live up to this undertaking and the plaintiff informed Willis that, owing to the small production of logs, the fee must be increased to 75 cents per thousand or otherwise he would be unable to continue with the agreement. Willis on behalf of the association agreed to this increase. The business of the association continued on this basis until December, 1942, when the directors passed a resolution abolishing the office of managership and Willis resigned as manager. The plaintiff continued to act as trustee with the same financing arrangement until February 25th, 1943, when the agreement with the plaintiff was terminated. In an action by the plaintiff for $1,909.06 as the balance due by the defendant to the plaintiff under the contract of May 9th, 1941, the defendant denied that the financing fee to the plaintiff was increased to 75 cents per thousand feet by oral agreement and that 381,970 feet of logs on which the plaintiff claimed a financing fee were not sold until after the plaintiff's services terminated. On the verdict of the jury judgment was entered for the defendant for $333.75.

Held, on appeal, reversing the decision of COADY, J., that the verdict can stand only as far as it concerns the claim for financing the 381,970 feet, amounting to $286.48, and not otherwise. The evidence preponderates against the verdict so as to show that it was unreasonable and unjust and such as to show that the jury have failed to perform their duty. The evidence is conclusive that Jardine was justified in dealing with Willis upon the footing that he had full authority from the association to make the 50 cents arrangement and later the 75 cents arrangement. The appellant will have judgment for the amount of his claim less $286.48 and the counterclaim is dismissed.

APPEAL by plaintiff from the decision of COADY, J. of the 1st of May, 1944, dismissing the plaintiff's action and allowing the defendant's counterclaim on the verdict of a jury in the sum of $333.75. The defendant association was incorporated on July 22nd, 1939, with registered office at Bella Coola, B.C. It was organized by one Frank Willis who was general manager and the largest shareholder. The directors and many members were employed in it on the production side of the business. On July 22nd, 1939, the directors passed a resolution authorizing Frank Willis to conduct and consummate any arrangement with Mr. Fraser of Foster, Barrett-Lennard, of Vancouver, the Bella Coola Timber Company Limited, the Warehouse Security Finance Company Limited and any others necessary for the furtherance of the Northern Co-operative Timber and Mill Association and to sign all necessary papers for the said association in the transaction of said business. That authority was not there-

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after cancelled and it was the only resolution ever passed by the directors dealing with finances, except banking resolutions. Willis came to Vancouver and after making certain financial arrangements with others he finally in May, 1941, arranged financing and trusteeship with the plaintiff and his banker. In August, 1941, he verbally arranged a new financing fee of 75 cents in place of 50 cents per thousand feet with the plaintiff. The account for finance fee and trustee fee was rendered throughout in the name of Frank King, who was associated with the plaintiff in the financing and so understood by the association. One Rouillard, secretary and former book-keeper of the association pencilled the 75 cents on the various letters when received in the course of verification of the items. In actual practice established by Willis and Jardine in May, 1941, the financing was carried out by the plaintiff procuring The Royal Bank of Canada to advance to the association up to $5,000 against the guarantee to the bank of the plaintiff and his associate Frank King. The plaintiff performed other services for the association, namely, keeping creditors satisfied, making purchases of groceries and repairs for the association, shipping material and attending the National Selective Service office with a view to retaining employees of the association. All arrangements made by Willis in the way of financing the association were reported to the association on his return to Bella Coola. In December, 1942, a resolution was passed at the annual meeting abolishing the office of managership and Willis resigned as manager, but the plaintiff continued to act as trustee and continued the same financing arrangement. His and Mr. King's guarantee remained with the bank and their liability continued on the guarantee until February 25th, 1943, when the association, having made other arrangements for the handling of their logs, paid off the bank. On the 9th of August, 1943, the plaintiff brought this action for $1,909.06 under contract in writing of the 9th of May, 1941, whereby the defendant agreed to pay the plaintiff a finance fee of 50 cents per thousand feet board measure on logs produced and sold by the defendant in consideration of certain financial advances to be made by the plaintiff for the defendant, which sum was subsequently by oral agreement increased to 75 cents

per thousand feet board measure, and the further sum of $75 per month as remuneration for acting as trustee in respect of an arrangement made by the defendant with certain of the creditors on the 8th of May, 1941. The defendant denied that said agreement was varied by oral agreement, increasing the remuneration to 75 cents per thousand feet board measure and denied that the plaintiff was acting as trustee in respect to the sale of 381,970 feet board measure referred to in the statement of claim, and counterclaimed for $333.75 moneys retained by the plaintiff out of moneys received as trustee for the defendant in addition to the remuneration to which the plaintiff was entitled.

The appeal was argued at Vancouver on the 30th of November and 1st, 4th, 7th and 8th of December, 1944, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Guild, for appellant: The verdict of the jury was perverse in the sense set forth in these cases: *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Phillips* v. *Martin* (1890), 15 App. Cas. 193; *Brown* v. *Commissioner for Railways* (1890), *ib.* 240, at p. 250. The defendant's manager was duly authorized in writing to make and did make the contract sued on. This was done by resolution of the directors when the association was incorporated. Willis was authorized to conduct and consummate any arrangements necessary for the furtherance of the association and sign all necessary papers. The directors never questioned Willis' authority up to December, 1942, and continued the arrangements previously made with the plaintiff with full knowledge of them: see *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374; *National Pole & Treating Co.* v. *Blue River Pole & Tie Co.* (1930), 43 B.C. 98; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; *Kreditbank Cassel G.M.B.H.* v. *Schenkers,* [1927] 1 K.B. 826; *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills,* [1928] A.C. 1, at p. 16; *The Trent Valley Woollen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682; *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327. Alternatively the defendant association ratified the contract made by its manager. They became aware of the raise of the finance fee to 75 cents on or

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about the 1st of December, 1942, and continued the same arrangement until February 24th, 1943: see *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *In re David Payne & Co., Limited. Young* v. *David Payne & Co., Limited,* [1904] 2 Ch. 608; *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *McCannell* v. *McLean,* [1937] S.C.R. 341; *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, at p. 53. There was no issue between the parties, assuming the defendant liable as to the amount claimed save the sum of $286.48 for logs shipped in February and May, 1943. On the evidence the plaintiff as trustee is entitled to his fees for this.

Castillou, K.C., for respondent: The jury believed the evidence of the defendant that the manager of the defendant had no authority to make the verbal agreement alleged and that the agreement was not ratified, nor did the agreement come to the knowledge of the defendant until a short time before repudiation. The plaintiff was trustee for the defendant and not entitled to change his remuneration and if the agreement was made, the plaintiff forced the defendant to make the agreement by duress owing to the defendant's financial condition. The facts in dispute are two only: (a) Did the plaintiff and defendant make a verbal agreement changing the plaintiff's remuneration or finance fee from 50 cents to 75 cents per thousand feet for arranging advances for the defendant's logging operations? (b) Does the agreement for financial backing apply to the last shipment of 381,970 feet of timber? The second question is one of fact and the jury found the plaintiff's services ended before the last shipment and he was not entitled to remuneration on that shipment. He did not arrange for advances to the defendant for any logging operations in 1943. The first claim depends entirely on proof of the verbal agreement giving the plaintiff 75 cents per thousand feet instead of 50 cents per thousand feet in the written agreement. The plaintiff was trustee for the defendant and certain creditors and though entitled to remuneration, he could not increase his remuneration through pressure: see Lewin on Trusts, 13th Ed., 452; Godefroi on Trusts, 5th Ed., 227. The defendant was entirely dependent on advances arranged by the plaintiff and he refused to continue unless the rate was raised. Willis had

authority as to the 50 cents per thousand but he had no authority to raise this to 75 cents and Jardine knew this: see *Foley* v. *Commercial Cars Ltd.*, [1923] 3 D.L.R. 453, at p. 457; *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *In re Hampshire Land Company,* [1896] 2 Ch. 743, at p. 749; *Fred T. Brooks Ltd.* v. *Claude Neon General Advertising Ltd.*, [1931] O.R. 92 and on appeal, [1932] O.R. 205. It was Jardine's duty to enquire from the directors as to the authority of Willis. Under their laws they must delegate one of their own body: see Armour on Titles, 4th Ed., 56; *Tillmanns & Co.* v. *S.S. Knutsford, Limited,* [1908] 2 K.B. 385, at p. 400; 9 Can. Abr., p. 128 *et seq.*; *Re Coasters Limited* (1910), 103 L.T. 632; *Calloway* v. *Stobart Sons and Co.* (1904), 35 S.C.R. 301; *Jones* v. *Henderson* (1885), 3 Man. L.R. 433, at p. 436; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869, at p. 893; *Bird* v. *Hussey Ferrier Meat Co., Etc.* (1913), 25 O.W.R. 13, at p. 15; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 564, par. 637; *National Pole & Treating Co.* v. *Blue River Pole & Tie Co.* (1930), 43 B.C. 98, at p. 106; *Vancouver Breweries Ltd.* v. *Vancouver Malt & Sake Brewing Co. Ltd.* (1933), 47 B.C. 89, at pp. 104-5; *Granda Hermanos Y Ca* v. *American Electrical & Novelty Mfg. Co.* (1906), 29 Que. S.C. 444; *Winnipeg Electric Co.* v. *Jacob Geel* (1932), 101 L.J.P.C. 187, at p. 192. The jury's findings are in accordance with the evidence.

Guild, replied.

Cur. adv. vult.

22nd January, 1945.

O'HALLORAN, J.A.: Counsel for the appellant confined himself to an attack upon the jury's verdict on the ground it could not reasonably be supported by the evidence within the meaning of *Metropolitan Railway Co.* v. *Wright* (1886), 55 L.J.Q.B. 401 (H.L.), and other leading cases of that nature. The learned judge's summing-up to the jury was not questioned in any particular, nor was it contended there was not "some evidence" to go to the jury.

The authority that Willis (the manager of the respondent incorporated association) possessed and so held out to the appellant Jardine, was founded upon the resolution of the respondent

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association (Exhibit 16) dated 22nd July, 1939, which is set out verbatim with the relevant facts and circumstances in the judgment of my brother SIDNEY SMITH, with whose analysis of the evidence and conclusions I agree.

The construction of that resolution was a matter of law for the judge alone. Its authority is of the most embracing character, but within the statutory power of the association to confer. Its legal effect is more readily appreciated in the light of such decisions as *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374, at pp. 386-7, and *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382. In my opinion the questions of fact upon which the reasonableness or unreasonableness of the jury's verdict must be tested, generally stated are, first whether or not that resolution was qualified or cancelled in the circumstances we have to consider, and secondly, if so, was that effectively brought to Jardine's attention?

After studying the evidence, and assuming that the jury believed all the relevant evidence in favour of the respondent properly before them, and also that the jury drew all legitimate inferences permitted by the objective facts, I must find, as the factual analysis of the evidence by my brother SIDNEY SMITH so conclusively demonstrates, that an affirmative answer to the foregoing questions is utterly irreconcilable with the evidence. That means, the jury could not properly have reached the conclusion that Jardine had reason to believe Willis had not authority to do what the association now complains of, *viz.*, to increase Jardine's finance fee (which included remuneration for sale of logs) from 50 cents to 75 cents per thousand feet when the association failed to log at the rate of eight million feet per year as it had contracted. In my judgment, the jury's verdict dismissing Jardine's claim against the association can find no support in the evidence, except as to $286.48 later mentioned, when that evidence is reasonably interpreted in accordance with correct legal principles.

Where as here the evidence is of such a character that only one view can reasonably be taken of its effect, it is not a case for a new trial, *cf. McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, Duff, J. at p. 55 (with whom Sir Charles

Fitzpatrick, C.J. and Brodeur, J. concurred) and also the decision of the old Full Court (HUNTER, C.J., IRVING and MARTIN, JJ.) in *Yorkshire Guarantee Corporation* v. *Fulbrook & Innes* (1902), 9 B.C. 270, but we ought now give the judgment which the plain facts proven conclusively at the trial demanded, and that is, judgment for the plaintiff-appellant as asked for in the statement of claim, less the sum of $286.48, mentioned shortly, *cf.* also *Paquin, Lim.* v. *Beauclerk* (1906), 75 L.J.K.B. 395 (H.L.), and also *Canada Rice Mills Ld.* v. *Union Marine and General Assurance Co.*, [1941] A.C. 55, Lord Wright at p. 65.

The $286.48 item covers finance fees Jardine claimed in respect to logs alleged to have been produced and sold during the period February-May, 1943. Jardine's relationship was terminated by the association in February, 1943. There is evidence which the jury were entitled to believe, that no services were rendered by Jardine in respect to those logs. Accordingly it cannot be said the jury acted unreasonably in refusing to give him judgment for this amount.

I would direct that judgment be entered accordingly for $1,622.58, and the counterclaim dismissed. The appeal is therefore allowed. The appellant will have his costs in the Court below, but in this Court costs will be proportioned according to respective success of the parties. Each party will tax his costs as if successful and the appellant is entitled to 80 per cent. and the respondent to 20 per cent. the respective amounts each shall so tax, with appropriate set off.

ROBERTSON, J.A.: I agree that the appeal should be allowed to the extent mentioned in the reasons for judgment of my brother SIDNEY SMITH. In my opinion the jury, having been properly directed (no objection being taken to the charge by either party), could not reasonably have found the verdict it did.

The defendant admitted the agreement made by Willis on its behalf with the plaintiff in May, 1941, to pay 50 cents per thousand feet. The plaintiff sues upon an agreement made in August, 1941, with Willis, under which the payment was raised from 50 cents per thousand feet to 75 cents per thousand feet. The secretary of the company knew of this at the time and, as the

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accounts were received showing the charge was 75 cents per thousand feet, made entries accordingly in the defendant's books of account. He says he did not tell the directors about this new agreement until the middle of November, 1942. The directors admit this is so.

The directors dismissed Willis at their annual meeting held early in December, 1942. They took no steps whatever to advise the plaintiff that Willis was not authorized to make the new agreement and that they objected to the 25 cents increase. On the contrary, under their instructions, the letter of the 16th of December, 1942, referred to in the judgment of my brother SIDNEY SMITH, was sent to the plaintiff.

Rouillard's letter of the 21st of December, 1942, and Saugstad's letter of the 28th of January, 1943, would indicate to anyone that the defendant desired to continue the financial arrangements made by Willis with the plaintiff, under which the defendant had been paying the plaintiff at the rate of 75 cents per thousand feet for a year and a half.

Further than this, the directors sent their secretary Rouillard to Vancouver early in January, 1943, to see Jardine and he was "not instructed by the directors to quarrel with the 75 cents." The plaintiff then told him that he could keep on for a month or more with the financial arrangements. The agreement with the plaintiff was terminated on the 25th of February, 1943.

It is therefore clear upon the defendant's own evidence that from the middle of November, 1942, when it had full knowledge of the August contract which Willis had made with the plaintiff until the 25th of February, 1943, it continued to deal with the plaintiff knowing that he thought he was dealing with it on the basis of the contract Willis had made and it did not at any time intimate to him Willis had no power to make any such agreement. In fact, the first intimation to the plaintiff of any objection on the part of the defendant company was the defendant's solicitor's letter of May, 1943, which was written shortly after Rouillard had come to Vancouver to see the company's solicitor.

In my opinion it was a clear case of ratification of the contract made by Willis in August, 1941.

SIDNEY SMITH, J.A.: The respondent association was incorporated on 22nd July, 1939, under the provisions of the Co-operative Associations Act, R.S.B.C. 1936, Cap. 53, with its head office at Bella Coola, British Columbia, for the purpose of carrying on the business of logging. Upon incorporation the members of the association contributed in all some $500 or $600 and acquired the operations, and assumed the obligations, of two companies; with the result that the association started its own career with physical assets and liabilities but with very little ready money. The moving spirit in its organization was the witness Frank Willis, who was at all times the largest shareholder. He was appointed manager, and could only be dismissed at a general meeting of the shareholders. He was in complete charge of the financial affairs of the association from its inception until December, 1942, under the authority of a resolution presently to be mentioned. He was not a director. The members of the association, so far as appears, were all working loggers and all actively engaged in the logging operations.

Upon incorporation the directors passed a resolution in the following language:

> On motion of Mr. Edwin Mattson seconded by Hawkins Brekke it was moved that Frank Willis be authorized to conduct and consummate any arrangements with Mr. Foster of Foster Barrett & Lennard of Vancouver, The Bella Coola Timber Co. Ltd. Warehouse Securities Ltd. and any others necessary for the furtherance of the Northern Co-operative Timber & Mill Association and to sign all necessary papers for the said association in the transaction of said business.

The scope and intention of this resolution seem clear enough. The last two words "said business" must refer to the business of the association and therefore I think the words "the business of" should be implied after the words "for the furtherance of." The resolution is unlimited both as to persons to be dealt with and as to the time of dealing. There is no evidence that the authority conferred by it upon Frank Willis was ever cancelled.

In April, 1941, it became urgently necessary to arrange new financing for the association and Mr. Willis approached the plaintiff for that purpose and gave him a certified copy of the above resolution as his authority. The plaintiff had associated with him a Mr. King. A written agreement under the seal of the association was entered into on the 8th of May, 1941, in

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which the plaintiff is referred to as "the trustee" and under the terms of which he agreed to collect moneys that became due to the association, as booms came down and were sold, apply these from time to time in payment of certain existing liabilities and in payment of the operating expenses of the association. The following day Mr. Willis, on behalf of the association, wrote a letter to the plaintiff which admittedly must be read as part of the agreement. This stated that the plaintiff would be paid a trustee fee of $75 per month and an additional fee of 50 cents per thousand feet for financing the association. There is no dispute about the trustee fee. The arrangement as to the financing was that the plaintiff and his associate should guarantee the account of the association with The Royal Bank of Canada up to $5,000 and this was done. The agreement could be terminated by one month's notice on either side. A copy of the agreement and of the letter were kept on file in the association's office at Bella Coola and the directors were fully aware of the contents of both. In addition to the matters mentioned Mr. Jardine performed various other services and in general acted as the association's representative at Vancouver.

It was a term of the agreement that the association should cut not less than eight million feet of logs per year. By August, 1941, it became apparent that the association could not live up to this undertaking, and the plaintiff therefore informed Willis that the finance fee must be increased to 75 cents per thousand feet or otherwise he would be unable to continue with the agreement. Willis, on behalf of the association, agreed to this increase.

Counsel for the association says first that this resolution was *ultra vires* the powers of the association. This would appear to be a question of law. It was not put to the jury. But in any event it does not seem to me to be one of substance. The association adopted the rules in Schedule B of the Act, with certain alterations which are not material to this point. These are the pertinent rules:

43. The business of the association shall be managed by the directors, who may pay from its funds the expenses of its incorporation and may exercise all its powers, subject to the Act and these rules.

44. The directors shall elect a president and vice-president from their number, and may appoint a manager, secretary, and treasurer, whether from

their own body or otherwise, as they think fit, and may prescribe their duties and fix their remuneration and from time to time dismiss them. The vice-president shall exercise the powers of the president in his absence.

45. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

Rule 45 is additional to rule 44. It does not derogate from it. The directors may prescribe the duties of the manager, and there is nothing in the rules which imposes a limitation upon his duties. In particular there is nothing in the rules which prohibits the authority given to Willis by the resolution in question.

Counsel for the association then says that if the resolution was *intra vires* it applied to financial arrangements contemplated at its date and not to future arrangements, and in particular that it applied neither to the arrangement with the plaintiff made in May, 1941, for a financing fee of 50 cents per thousand feet nor to the increase to 75 cents per thousand feet in August, 1941. He argued that Willis obtained his authority for the May, 1941, agreement from the directors by telephone or otherwise, during the pendency of the negotiations. The only evidence on the point is from Willis who merely says that during the May negotiations he kept the directors advised; and from Gurr, a director, who says Willis at that time wrote one letter which was not produced. He also submitted that Willis had no ostensible authority. But it seems to me that anyone dealing with Willis, reading the resolution, going into the background of the association, be it ever so thoroughly, learning thus of Willis' dominating hand in the organization, of his financial interest, of his having arranged its financial affairs during its whole corporate existence; all that would, I think, lead irresistibly to the conclusion that he had unquestioned and unquestionable authority to act for the association in financial matters to the fullest extent. If it were not so the aforesaid resolution is nothing more than a trap for anyone doing business with Willis. I cannot see how a jury acting judicially could come to any other conclusion.

Much was made of the fact that the plaintiff in rendering his accounts to the association did not in so many words state that the finance fee was 75 cents per thousand feet. But the association's book-keeper, Phillip R. Rouillard, in every case broke down

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the figures and showed in a pencilled margin that a finance fee of 75 cents was in fact being charged. He said he did not bring this to the attention of the directors because Willis had told him not to do so. Willis denies this. In any event, the books were there in the office, open for inspection at any time.

And so matters continued during the rest of 1941 and 1942. The bank was uneasy about the association's affairs. The manager complained frequently about not getting the information he wanted. He regarded the financial position of the association as generally unsatisfactory.

The book-keeper testified that about the end of November or early in December, 1942, he told the members that they were being charged a finance fee of 75 cents. Shortly thereafter, in December, they did away with the office of manager, which meant, in effect, the dismissal of Willis. It seems that the book-keeper, thereupon, as secretary-treasurer, carried on the management of the association's affairs. However that may be, no fault was found with the plaintiff, for a letter dated 16th December, 1942, was sent to him advising him as follows:

> . . . . Mr. Willis has severed his connections with this association and consequently is discharged from his duties as manager, the board of directors remain the same with two other directors added and with the writer as secretary-treasurer.
>
> We feel that there would be no reason why this change would affect in any way our financial status as we intend to keep things going the same as before with some improvement if possible and hope that you will extend to us your same co-operation as in the past. The writer will be down to see you after the first of the year and complete any further arrangements which you may deem necessary and in the meantime, you may be assured of our fullest co-operation and will be pleased to receive your suggestions.

In January Rouillard was in Vancouver upon association business and there was still no complaint of any kind. Nor was there in any of the correspondence that followed, until a letter was received by the plaintiff from the solicitor of the association dated 26th May, 1943, to which reference will later be made.

Meanwhile the bank had refused to honour the association's cheques, notwithstanding the guarantee of the plaintiff and his associate which was still lodged with the bank. The manager had been assured by Rouillard that certain moneys would be forthcoming, but only a small part of these became available, and

only at a considerably later date. He therefore, early in February, 1943, refused to make further advances.

By letter of 24th February, 1943, the association notified the plaintiff that he would not be required further to finance the association's affairs but their relationship continued till early in March, 1943, when the association paid off its indebtedness to the bank and the guarantee thereby came to an end. At that date 381,970 feet of logs were cut and probably in the water but had not been sold.

The letter from the association's solicitor of 26th May, 1943, was the first intimation to the plaintiff that his account, or any part of it, was being disputed. The letter complained of an "overpayment which they (the association) claim you, as trustee, took from their funds amounting to $333.75." This amount was arrived at by allowing a finance fee of 50 cents only, except as to the said 381,970 feet, for which no fee at all was allowed. On the other hand, the plaintiff claimed $1,909.06. This was on a basis of 75 cents per thousand feet from August, 1941, including the aforesaid 381,970 feet.

These issues came to trial before COADY, J. and a jury in April, 1944. After three hours' deliberation the jury brought in a verdict of six to two in favour of the defendant. This was a verdict at large, and was not based upon the answers to specific questions submitted to them. Judgment was entered accordingly. From this judgment the plaintiff now appeals upon the ground that the verdict of the jury was perverse. Neither side attacks the charge of the learned trial judge.

In *Powell and Wife* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, at p. 250 Viscount Sankey, L.C., in considering the manner in which a Court of Appeal should deal with a judgment after a trial before a judge and jury, says this:

> On an appeal against a verdict, if the evidence was such that no jury properly directed could reasonably have found the verdict in question, the verdict so found will be set aside. A verdict, however, will not necessarily be set aside merely because it is, in the opinion of the Court of Appeal, against the weight of evidence, . . .

And this view he repeated in substantially the same words in *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.*, [1935] A.C. 346; and see to the same

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JARDINE v. NORTHERN CO-OPERATIVE TIMBER AND MILL ASSOCIATION

Sidney Smith, J.A.

effect the illuminating judgment of Duff, C.J. in *McCannell* v. *McLean,* [1937] S.C.R. 341.

Applying this test, I am satisfied, in the circumstances related, that this verdict can stand only so far as it concerns the claim for financing the 381,970 feet and not otherwise. This amounts to $286.48. As to so much of the plaintiff's claim, the evidence, while far from clear, might perhaps justify a jury in so finding. But in my opinion the rest of the verdict cannot be supported.

> I do not so decide simply because I myself should have come to a different conclusion, or on the ground that the verdict of the jury is one which, on a mere balance of evidence, does not appear to me to be reasonable,

but because I think

> "the evidence so preponderates against the verdict as to show that it was unreasonable and unjust": . . .

and

> such as to show that the jury have failed to perform their duty.

This is the language of Lord Wright in the *Austin* case, *supra,* at pp. 373, 374 and 375. It seems particularly appropriate to the circumstances of the case at Bar. The evidence is conclusive that Jardine was justified in dealing with Willis upon the footing that he had full authority from the association to make the 50-cent arrangement and later the 75-cent arrangement. Any evidence to the contrary is too fragmentary and speculative to be seriously considered. And, such as it is, it cannot be reconciled with the contemporary documents. I think this is fatal to its surival.

In his argument before us counsel for the association pointed to various matters which he admitted were only matters of suspicion taken separately, but that collectively might indicate underhand dealings between Willis and Jardine. There is no ground for any such conclusion. Suspicion, if suspicion there be, is not evidence, and only from evidence may a jury draw inference. And in such a case as this, over such a time, it would be curious if there were not something at which a suspicious mind could point an accusatory finger. But that is beside the point and should have no weight with a jury of reasonable men, acting judicially.

I think the appeal should be allowed to the extent that I have stated, that is to say, the appellant (plaintiff) will have judg-

ment for the amount of his claim less $286.48 and the counter-claim will be dismissed. The appellant will have his costs of the trial and 80 per cent. of his costs of appeal. The respondent will have 20 per cent. of his costs of appeal. There will be a set off as to costs.

Appeal allowed in part.

Solicitors for appellant: *Lawson, Clark & Lundell.*
Solicitor for respondent: *H. Castillou.*

REX v. MANDZUK.

Criminal law—Charge of vagrancy—Wandering abroad—Construction—Criminal Code, Sec. 238 (a).

The accused was found at 2 o'clock in the morning, walking in the corridor of the second or third story of a Chinese rooming-house on Pender Street in Vancouver. The rooming-house operates under a city licence and there is a sign at its entrance that no one is allowed in after 11 o'clock at night without the consent of the proprietor. On the evidence the proprietor gave no such consent. Accused was found guilty by deputy police magistrate Matheson on a charge that she at the city of Vancouver on the 10th of November, 1944, was a loose, idle, disorderly person or vagrant who, not having any visible means of subsistence, was found wandering abroad and not giving a good account of herself.

Held, on appeal, by way of trial *de novo* that one is not "walking abroad" when someone else is in a position to control his or her movements. As this rooming-house is a private place and she is under the control of the proprietor, the accused cannot be convicted.

APPEAL by way of trial *de novo* from the decision of deputy police magistrate Matheson on a charge under section 238 (*a*) of the Criminal Code. The facts are set out in the reasons for judgment. Argued before BOYD, Co. J. at Vancouver on the 15th of December, 1944.

Crux, for appellant.
A. W. Fisher, for the Crown.

Cur. adv. vult.

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MANDZUK

4th January, 1945.

BOYD, Co. J.: The accused was found guilty on a charge that she

> Betty Mandzuk at the said city of Vancouver, on the 10th day of November, 1944, was a loose, idle, disorderly person or vagrant, who, not having any visible means of subsistence, was found wandering abroad, and not giving a good account of herself.

The facts are that she was found at 2 o'clock in the morning on the 10th of November, 1944, walking in the corridor of the second or third story of a Chinese rooming-house on Pender Street, city of Vancouver. The rooming-house operates under a city licence, and there is a sign at its entrance that no one is allowed in after the hour of 11 o'clock at night without the consent of the proprietor. The evidence showed that the proprietor gave the accused no such consent and that she was a trespasser on his property.

The charge was one under section 238 (*a*) of the Criminal Code, and this section is as follows:

> 238. Everyone is a loose, idle or disorderly person or vagrant who,
> (*a*) not having any visible means of subsistence, is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment.

Counsel for the accused has argued that circumstances do not warrant a conviction, as she was not "wandering abroad." Neither counsel for the Crown nor counsel for the accused nor myself can find any direct authorities as to what is the exact meaning of the words "wandering abroad." This may be due to the fact that this is one of the first cases where an arrest was made under such circumstances and a charge as above laid.

On looking at the various dictionaries we find definitions as follows:

Abroad. Imperial Dictionary (Ogilvie & Annandale). "Abroad specifically means; beyond or out of the walls of a house, camp or other enclosure." Funk & Wagnall's. "Beyond the bounds of one's home grounds or usual haunts; out of doors; away." Shorter Oxford. "Outside a certain confine; outside the house; away from one's abode; to walk abroad." Chambers. "On the broad or open places; out of doors." Murray. "At large; freely moving about; . . ."

Generally speaking, we think of the word "abroad" as being in another country or out of doors.

It seems to me that the word means anywhere that a person may go at will. The Criminal Code itself bears this out when it goes on as follows after "wandering abroad":

"or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building."

With these exceptions it would appear that a person is not abroad if he or she is found in a private place, and one from which he or she might be ejected. In other words, can anyone be said to be wandering abroad when someone else is in a position to control his or her movements?

As this rooming-house is a private place, and she was under the control of the proprietor I do not think the accused can be convicted.

It is with some reluctance that I have come to this decision, and I wish that in the next similar case the police magistrate might state a case for the Court of Appeal.

Conviction quashed.

REX v. PORTA.

Criminal law — Common betting-house — Search warrant — Racing-sheets found on premises—Notation of bets on racing-sheets—Private telephone—People on premises reading racing-sheets—Criminal Code, Sec. 227 (c).

The defendant was in charge of a small tobacco store (12 x 12 feet in front of a counter) known as the Nelson Smoke Shop at 721 Nelson Street, Vancouver. From the 1st to the 27th of October, 1944, the police had the premises under daily observation. Near the counter were two telephones, one with a dial and the other a private telephone to one place only in the city. There was a look-out to give warning. During the racing period from 12 to 35 persons were in the place reading racing-sheets. When the racing was over they dispersed. On the 27th of October, 1944, the police entered the premises with a search warrant and the 15 persons present dropped their racing-sheets on the floor. The police picked four of them up and found what appeared to be notations of bets

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on them and behind the counter they found 25 similar racing-sheets. The accused behind the counter put a racing-sheet, dated October 27th, to one side. It contained a list of names of horses purporting to be running in various races giving the first three horses in each race and the prices paid in respect of them for win, place, and show. The accused immediately telephoned someone saying "Get up here right away." Shortly after, the licensed holder of the place appeared, handed the accused several one-hundred dollar bills and then said to the police: "These racing things don't mean anything. You didn't find a bet, did you?" In the till was found $2.10; in a drawer behind the counter was found $463 and on the accused $85. The total value of the cigarettes and tobacco on the premises was $18.54. On a charge of "keeping a disorderly house, to wit, a common betting-house" accused was found guilty and sentenced to six months' imprisonment.

Held, on appeal, affirming the decision of police magistrate Wood, that it is obvious upon these facts that the magistrate was clearly entitled to find the accused guilty of the offence with which he was charged, and there is no ground for interfering with the sentence imposed.

APPEAL by defendant from his conviction by police magistrate Wood, Vancouver, on the 13th of November, 1944, on a charge that

at the city of Vancouver, between the 1st and 28th days of October, A.D. 1944 [he] unlawfully did keep a disorderly house, to wit, a common betting-house situate and being at 721 Nelson Street.

The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Victoria on the 30th of January, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Wismer, K.C., and *Murdock*, for appellant: The charge is under Code section 227 (*c*). The evidence is not sufficient to bring the accused within that section. The police had a search warrant. This is a small tobacco store. They found what are called racing-sheets, but there was no evidence of what the sheets were for. There were two telephones, one with a dial, the other had no dial and was connected with another place in the city only —a private telephone. Prior to arrest of accused the small store was fairly crowded at times, but there was no evidence of what they were doing. They found one of these sheets with pencil markings on it in front of the accused: see *Rex* v. *McCann* (1936), 67 Can. C.C. 121. The police officer gave evidence of what the pencil markings meant. There was no foundation

showing his knowledge of racing. He is not qualified to give this evidence and it is of no value. What is seen in a newspaper is not evidence: see *Rex* v. *Jorgenson* (1940), 73 Can. C.C. 252. People in the place dropped sheets on the floor, but there is no evidence where they got them or that any paraphernalia belonged to the accused. They found $463 in a drawer and $85 on the accused. There was no betting paraphernalia here and the evidence does not disclose that a crime was committed: see *Rex* v. *Miller* (1931), 55 Can. C.C. 232. There must be definite proof of the crime itself. On the question of sentence, the accused was merely an employee and not the proprietor. The sentence of six months is severe in comparison with other cases even where they were proprietors.

Scott, for the Crown: Two telephones are material as bets may be sent to another place for completion. The markings on the sheets show that bets were recorded. The people leave the premises immediately after the racing is finished for the day. Some of the sheets found on the floor showed betting entries. Calling the place a tobacco shop is a sham, the tobacco found there was of the value of $18.54 and no cigarettes were found on the frequenters.

Wismer, replied.

Cur. adv. vult.

On the 9th of February, 1945, the judgment of the Court was delivered by

ROBERTSON, J.A.: The charge against the appellant was "keeping a disorderly house, to wit, a common betting-house."

The appellant urged two grounds: (1) That there was no case made out under section 227; and (2) that there was no evidence to support a *prima-facie* case under section 986, subsection 2 of the Code. The appellant relied upon *Rex* v. *Miller* (1931), 55 Can. C.C. 232 and *Rex* v. *Jorgenson* (1940), 73 Can. C.C. 252. In the first of these cases evidence as to certain betting slips was held to bring the case within section 986, subsection 2 of the Code; while in the second case it was held the facts were not so sufficient. The learned magistrate did not proceed under section 986. Apart altogether from this section, he found the Crown had made out a case under section 227 and I agree that there was ample evidence to support this view.

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Shortly the circumstances are these: During the greater part of the month of October, 1944, the police had under almost daily observation the premises known as the Nelson Smoke Shop. The premises were very small. There was a counter and in front of this a space 12 feet square. There were two telephones "right" at the accused's left hand; one a dial telephone connected with Central and the other a private telephone to some other place in the city, which could only be used to telephone to that place, and was connected by the mere lifting of the receiver. There was a look-out to give warning of the approach of the police.

During the time of the racing, as indicated on the racing-sheets, to be mentioned later, from 15 to 35 persons would be in this small place reading racing-sheets. The accused was always there behind the counter with one of these racing-sheets in front of him. About 3 o'clock in the afternoon by which time the racing would be over, all the people would have left; the accused would also have left, leaving someone to take charge of the premises. When the police entered the premises, as they did from time to time, prior to the 27th of October, the accused who was always there would quickly put his racing-sheet out of sight and lift the telephone receiver so that no calls could come in and the people would start to go out.

When the police entered on the 27th of October to execute a search warrant, they saw the accused put to one side Exhibit 4, dated 27th October, 1944, which is a racing-sheet containing the list of names of horses purporting to be running in various races at Empire City, N.Y., and Rockingham Park, N.H., and giving the first three horses in each race and the prices paid in respect of them for win, place or show, respectively.

On this occasion 15 persons were there. When the police told them that they had a search warrant and they were going to be arrested, they dropped the racing-sheets they were reading, on the floor. The police picked up four of these sheets and found what appeared to be notations of bets on them. Behind the counter were found 25 racing-sheets similar to Exhibit 4. One of the 15 persons present was a woman who stood two feet from the counter and held in her hand a slip containing the notation of a horse whose name appeared in the racing-sheet for that day.

When the police came in the accused telephoned to someone saying "Get up here right away." Shortly afterwards a man appeared who was the licensed holder of the place. He handed several one hundred-dollar bills to the accused and then said to the police in the presence of the accused "These racing things don't mean anything. You didn't find a bet did you?"

In the till was found $2.10. In a drawer behind the counter was found $463 and on the accused $85. The stock consisted of 46 packages of cigarettes, 14 packages of tobacco and eight bottles of pop. Total retail value $18.54. The accused did not give evidence.

To my mind it is perfectly obvious upon these facts that the magistrate was clearly entitled to find he was guilty of the offence with which he was charged.

The appeal should be dismissed.

The accused also appealed as to sentence. The magistrate imposed the maximum sentence of six months. His counsel submitted, and counsel for the prosecution agreed, that during 1944 there were some 26 convictions for the same offence in Vancouver in which fines only, running from $25 to $100, were imposed, and since this case was tried there have been four convictions in which fines only have been imposed.

It is submitted that the accused was an employee only and that the police came to the premises nearly every day, and must have suspected what was going on, yet gave him no warning. On the other hand I have no doubt the accused knew he was breaking the law. He also submitted that this was a test case. Counsel for the Crown said he had not seen a case where there had not been a recorded bet. He agreed it was a test case.

We have no information as to the accused's record. I can see no ground for interfering with the sentence imposed by the learned magistrate. The convictions, *supra*, show the prevalence of this crime and light punishments seem to have no effect on stopping it.

Appeal dismissed.

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WEST AND WEST v. BARR.

Landlord and tenant—Lease for one year—Date of expiry—Notice to quit—Wartime rental regulations—Order 358 of Wartime Prices and Trade Board.

The appellant is the lessee under a lease executed on the 25th of August, 1943, whereby the respondents let to the appellant certain housing accommodation "for the term of one year, to be computed from the First day of September . . . 1943," at an annual rental of $900 payable "$75 on the 1st day of September, A.D. 1943, and the sum of $75 on the first day of each and every month thereafter . . . ; the first of such payments to become due and to be made on the First day of September, 1943." By order 358 of the Wartime Prices and Trade Board, if the landlord desires to recover possession of leased premises, he is required to give six months' notice to the tenant to vacate at the end of the term. On February 7th, 1944, the respondents gave a written notice to quit whereby the appellant was required to vacate the premises "on the 31st day of August, 1944." The appellant refused to vacate, contending that the notice to quit was bad as she was thereby required to vacate the premises one day prior to the end of the term,

Held, on appeal, affirming the decision of BOYD, Co. J., that it may be taken as settled that where a term is expressed to commence from a given date without the addition of other words which make it clear that the word "from" is to be inclusive or exclusive of the date, then the context or subject-matter must be looked at to determine in which sense the words are used since "from" may in the vulgar use, and even in strict propriety of language, mean either inclusive or exclusive. Here the lease provides for an annual tenancy with rent payable in equal monthly instalments commencing 1st September, 1943, and the 1st of each month thereafter. The tenant has the right to possession for the entire month of September, 1943, commencing on the first day of that month and the word "from" in that context must be read as inclusive of September 1st, 1943. The term, having begun on the 1st of September, 1943, must be held to have expired on the 31st of August, 1944. As order 358 of the Wartime Prices and Trade Board requires that notice to quit be given for the end of the term, the notice was so given and is a good notice.

APPEAL by defendant from the decision of BOYD, Co. J. of the 18th of December, 1944, upon the application of the landlords under notice of appointment by SARGENT, Co. J. appointing the 2nd of November, 1944, before the presiding judge of the Court in Chambers at the Court House at Vancouver as the time and place for inquiry and determination as to whether the above-named tenant May Catherine Barr has been tenant of the landlords Charles F. West and Sadie West of the housing accommoda-

tion 1893 Pendrell Street, in the city of Vancouver, B.C., under a tenancy which has been determined by notice to vacate and whether the said tenant does wrongfully refuse to go out of possession having no right to remain in possession.

The appeal was argued at Victoria on the 1st of February, 1945, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

R. L. McLennan, for apppellant: The lease in question is for the term of one year to be computed from the 1st of September, 1943. The word "from" must be given its ordinary meaning whereby the time commences to run when the first day of the month expires and the second day of the month commences; the lease then includes the first of the month of the following year. At least six months' notice to vacate must be given. But the notice demands that the tenant vacate on the 31st of August, 1944, when under the lease she is entitled to hold the premises one day longer, namely, the 1st of September, 1944. The cases referred to in the judgment below do not apply. On the commencement of term see *Wesley* v. *Walker* (1878), 38 L.T. 284; *Ackland* v. *Lutley* (1839), 9 A. & E. 879. The last day is the anniversary of the day from which it runs: see *Gray* v. *Shields* (1894), 26 N.S.R. 363; *Nicholson* v. *Nicholson* (1916), 115 L.T. 791; *Savory* v. *Bayley and another* (1922), 38 T.L.R. 619; *Sidebotham* v. *Holland,* [1895] 1 Q.B. 378, at p. 382; Foa on Landlord and Tenant, 6th Ed., 114; Smith on Landlord and Tenant, 3rd Ed., 122-3; Woodfall on Landlord and Tenant, 24th Ed., 953; 2 Sm. L.C., 13th Ed., 124; *Taylor* v. *Blair,* [1943] 1 W.W.R. 170; *Doe* v. *Spence* (1805), 6 East 120; *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association,* [1891] 1 Q.B. 402; *Dempsey* v. *Tracy,* [1924] 2 I.R. 171; *Pugh* v. *Duke of Leeds* (1777), 2 Cowp. 714.

Maguire, for respondent: The word "from" should be interpreted as the beginning of a period: see *English* v. *Cliff,* [1914] 2 Ch. 376. The word "from" means exclusive or inclusive according to the context and subject-matter: see *Re Lander and Bagley's Contract* (1892), 67 L.T. 521; Woodfall's Landlord and Tenant, 24th Ed., 153 and 215; *Sidebotham* v. *Holland* (1894), 64 L.J.Q.B. 200, at p. 204; *In re Lancashire and York-*

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shire Bank's Lease. W. Davis & Son v. *Lancashire and Yorkshire Bank,* [1914] 1 Ch. 522; *Wilkins* v. *M'Ginity,* [1907] 2 I.R. 660, at p. 671; *Wilkinson* v. *Gaston* (1846), 9 Q.B. 137, at p. 145; *Ackland* v. *Lutley* (1839), 8 L.J.Q.B. 164.

McLennan, replied.

Cur. adv. vult.

9th February, 1945.

ROBERTSON, J.A.: By a lease made "the day of 1943," in pursuance of the Short Form of Leases Act the respondents demised to the appellant certain premises

to have and to hold the same unto the lessee for the term of One (1) year, to be computed from the First day of September in the year of Our Lord 1943, yielding and paying therefor . . . during the said term unto the lessor the clear yearly rental or sum of Nine hundred ($900.00) dollars . . . payable as follows: $75.00 on the 1st day of September, A.D. 1943, and the sum of $75.00 on the first day of each and every month thereafter during the said term, . . . ; the first of such payments to become due and to be made on the First day of September, 1943.

The *habendum* clause in the form of lease in the First Schedule to the Act reads,

from the day of , for the term of thence ensuing, . . .

The respondents, pursuant to section 15B of order 294 of the Wartime Prices and Trade Board, as amended by order 358, served a notice to quit (given in time) on the appellant to vacate the premises on the 31st of August, 1944. The question to be decided is: Did the lease commence on the 1st or 2nd of September, 1943? If it commenced on the 1st of September the notice to quit was valid. If it commenced on the 2nd of September it was invalid, as under order 358 the notice to quit must require the tenant to vacate at the end of the term. The appellant submits that the effect of the use of the word "from" is to exclude the 1st of September while respondents argue the word is equivocal, and its meaning, in this lease, is to be ascertained by the intention of the parties as they appear in the lease as a whole.

In *Pugh* v. *Duke of Leeds* (1777), 2 Cowp. 714, the Court had to consider the words in a lease "from the day of the date of the lease." Lord Mansfield said at p. 717:

In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word "from" must always depend upon the context and subject matter, whether it shall be construed

inclusive, or exclusive of the *terminus a quo*: and whilst the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively.

And at p. 725:

To conclude: The ground of the opinion and judgment which I now deliver is, that "from" may in the vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive: That the parties necessarily understood and used it in that sense which made their deed effectual: That courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning.

In *Ackland* v. *Lutley* (1839), 9 A. & E. 879, the language in the *habendum* of the lease under consideration read "for twenty-one years from March 25th, 1809." Lord Denman, C.J., delivering the judgment of the Court said they fully adhered to the principle of Lord Mansfield's admirable judgment.

The Court of Exchequer sitting *in banc* in *Russell* v. *Ledsam* (1845), 14 M. & W. 574, decided that letters patent dated the 26th of February, 1825, for the term of 14 years from the date thereof, took effect from and inclusive of the 26th day of February. Parke, B., who delivered the judgment of the Court, said at p. 582:

The usual course in recent times has been to construe the day exclusively, whenever any thing was to be done in a certain time after a given event or date; and consequently the time for enrolling a specification within the six months given by the proviso is reckoned exclusively of the day of the date: and many other instances are collected in the cases of *Webb* v. *Fairmaner*, [(1838)] 3 M. & W. 473, and *Young* v. *Higgon*, [(1840)] 6 M. & W. 49. But in this case the question is when the term given by the patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date.

Warrington, J., in *English* v. *Cliff*, [1914] 2 Ch. 376 decided that on the true construction of a settlement made May 13th, 1892, which provided that certain trustees should stand possessed of premises "during the term of twenty-one years from the date [thereof]," the term commenced from midnight on May 12th.

Wilkinson v. *Gaston* (1846), 9 Q.B. 137 is an authority for the proposition that the word "from" is not always exclusive. Lord Denman, C.J., said at pp. 144-5:

The mode of calculating the time must depend on the circumstances of the . . . contract.

In *Wilkins* v. *M'Ginity*, [1907] 2 I.R. 660, it was held by the

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majority of the Court of Appeal that "In the case of lettings, . . . 'from' is inclusive."

Dempsey v. *Tracy,* [1924] 2 I.R. 171 was among the cases relied upon by appellant. It is a decision of the Supreme Court of the Irish Free State. The lease under consideration was " 'from the 1st day of September, 1920,' " at a rental "payable by quarterly payments, the first to be made on the 1st day of December, 1920." The majority of the Court held "from" was exclusive. This decision is directly contrary to that in *Wilkins* v. *M'Ginity, supra,* which case as pointed out at p. 81 of the report of the *Dempsey* case was not cited to the Court.

The appellant relies upon several cases in which the term in the leases under consideration, being from a certain date, such date was excluded and was held not to be the first day of the term. These cases are, *Gray* v. *Shields* (1894), 26 N.S.R. 363; *Meggeson* v. *Groves,* [1917] 1 Ch. 158 and *Savory* v. *Bayley and another* (1922), 38 T.L.R. 619. In these cases, however, the rents were not payable on the date from which the lease was to run, a fact which was considered important by the Lord Chancellor in *Wilkins* v. *M'Ginity, supra,* for he said at p. 671:

> Another point made was, that the term did not begin until the 2nd of November. In my opinion the term began on the 1st November, although the word "from" is used. The rent is payable on the 1st day of May and 1st day of November. In the case of lettings, I think "from" is inclusive.

Another case relied on by the appellant was *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association,* [1891] 1 Q.B. 402, a decision of the Queen's Bench Division in which it was held that an insurance policy against accident "from November 24, 1887," included accidents happening on 24th November, 1888, thus excluding November 24th, 1887. There was nothing in the insurance policy to indicate a contrary intention.

O'Connor, J. said in *Dempsey* v. *Tracy, supra,* at p. 178:

> I think nine people out of ten who would take a house for one year from the 1st May would think they were entitled to get possession on the 1st May, . . .

For the reasons above mentioned I am of opinion that the lease commenced on the 1st of September. Accordingly the appeal is dismissed.

SIDNEY SMITH, J.A. agreed in dismissing the appeal.

BIRD, J.A.: This appeal raises a question as to the validity, under order No. 294, section 15C of the Wartime Prices and Trade Board, as amended by order No. 358, of a notice to quit certain housing accommodation, held under a lease for a term certain.

Section 15C as amended reads in part as follows:

15C. Unless the lease provides for a longer notice, and except as provided in subsection (3) of Section 15A, at least six months' notice to vacate shall be given directing the tenant to vacate.

. . . . .

(*c*) in the case of a lease for a term certain, at the end of the term; but, if the unexpired portion of the term is less than six months at the date on which the notice is given, the notice shall be null and void and the provisions of Section 20 shall apply.

Neither subsection (3) of section 15A nor section 20 have application here.

The appellant is the lessee of the respondents under a lease undated, whereby the respondents let to the appellant certain housing accommodation

"for the term of one year, to be computed from the First day of September, 1943," at an annual rental of $900 payable "$75.00 on the 1st day of September, 1943, and . . . $75.00 on the first day of each and every month thereafter . . . ; the first of such payments to become due and to be made on the First day of September, 1943."

By the terms of the order if the landlord desires to recover possession of leased premises he is required to give six months' notice to the tenant to vacate "at the end of the term."

On February 7th, 1944, the respondents gave a written notice to quit whereby the appellant was required to vacate the premises "on the 31st day of August, 1944."

The appellant refused to vacate the premises as required by the notice. She contends that the notice to quit is bad since she is thereby required to vacate the premises one day prior to the end of the term.

The question for determination therefore is whether the word "from" in the *habendum* clause of the lease is to be read as inclusive or exclusive of September 1st, 1943. If read as inclusive the term will begin on September 1st, 1943, and expire on August 31st, 1944, in which event the notice is good, but if read exclusive of that date the notice must be held to be defective since the order

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provides that the notice shall require the tenant to vacate at the end of the term.

Apart from authority I would have said that the meaning of the word "from" cannot finally be determined without reference to the context of the document in which it is used, the word in common parlance being equivocal and commonly used both as inclusive as well as exclusive of the specific day or date—*cf.* Murray's New English Dictionary, Vol. IV., at p. 160.

But counsel for the appellant urges that the word "from" used in the *habendum* clause of a lease must be construed as exclusive of the day named. He relies upon the statement found in Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 147, par. 159:

> Where the term is expressed to commence "from" a specified day, this day is in strictness not included in the term,

a proposition for the support of which is cited *Ackland* v. *Lutley* (1839), 9 A. & E. 879, and certain subsequent decisions founded thereon, and *Sidebotham* v. *Holland,* [1895] 1 Q.B. 378.

In my opinion support cannot be found for counsel's submission in either the judgment of Lord Denman, C.J., in the *Ackland* case, or in that of Lindley, L.J. in the *Sidebotham* case.

In his judgment in the former case Denman, C.J. said that the Court fully adhered to the principle laid down by Lord Mansfield in *Pugh v. Duke of Leeds* (1777), 2 Cowp. 714, yet the Court held that leases for terms of years extend during the whole of the anniversary of the day from which they are granted.

In the *Pugh* case the Court had under consideration a lease made October 10th, 1765 "for twenty-one years from the day of the date." The question there turned on whether "from" was to be construed inclusive or exclusive of the date.

Lord Mansfield there laid down at p. 717 in these words the principle referred to by Lord Denman, C.J. in his judgment in the *Ackland* case:

> In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word "from" must always depend upon the context and subject matter, whether it shall be construed inclusive or exclusive of the *terminus a quo.*

The *Ackland* case depended upon the date of expiration of a lease for 21 years from March 25th, 1809, and the Court held that the term ended at midnight on the anniversary, *i.e.,* March 25th, 1830.

Since it was said that the Court adhered to the principle laid down by Lord Mansfield one must conclude that Lord Denman, C.J. found in the context or subject-matter of the Ackland lease some *indicia* that the word "from" was there to be read exclusive of March 25th, 1809, although what the *indicia* there was is not apparent in the judgment.

I understand Lindley, L.J.'s judgment in the *Sidebotham* case to hold that a notice to quit given either for the day of expiration of a term or for the day following, *i.e.*, the anniversary of the commencement of a term, are equally good. No question there arose as to the date of commencement or of expiration of the term. The judgment does not appear to me to be helpful to the determination of the question here under consideration.

Nor have I been able to find any authoritative decision in which the principle laid down by Lord Mansfield in the *Pugh* case is questioned. Baron Parke does say in *Russell* v. *Ledsam* (1845), 14 M. & W. 574, at p. 582:

> The usual course in recent times has been to construe the day exclusively, whenever any thing was to be done in a certain time after a given . . . date.

But he continues with these words:

> But in this case the question is when the term given by the patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date.

The principle as laid down by Lord Mansfield in the *Pugh* case there appears to have been extended by Baron Parke.

I think it may therefore be taken as settled that where a term is expressed to commence from a given date without the addition of other words which make it clear that the word "from" is to be inclusive or exclusive of the date then the context or subject-matter must be looked at to determine in which sense the words are used, since as Lord Mansfield said in the *Pugh* case at p. 725,

> "from" may in the vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive.

Here the lease provides for an annual tenancy with rent payable in equal monthly instalments commencing 1st September, 1943, and on the 1st day of each month thereafter during the said term.

I am of opinion that the word "from" in that context must be read as inclusive of September 1st, 1943. The fact that the rent is made payable monthly and on the first day of each month

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commencing September 1st, I think imports that the tenant has the right to possession for the entire month of September, 1943, commencing with the first day of that month for which she is required to pay rental calculated in respect to the entire month. Consequently the term having begun on September 1st, 1943, must be held to have expired August 31st, 1944.

Since the Wartime Prices and Trade Board order No. 358 requires that notice to quit be given for the end of the term, the notice here was so given and was a good notice.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitor for appellant: *Reid L. McLennan.*
Solicitor for respondent: *J. S. Maguire.*

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Trespass—Negligence—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 upper. 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 was 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 tooth. In an action for damages for trespass arising from the unauthorized extraction of said teeth, it was held on the trial that both defendants were liable in damages and on third-party proceedings taken by the dentist, that the doctor was liable to indemnify the dentist.

Held, on appeal, affirming the decision of COADY, J. (O'HALLORAN and SIDNEY SMITH, JJ.A. dissenting), that as there were no instructions from the plaintiff to anyone to take out all her upper teeth, both defendants were liable to the plaintiff. As to the third-party proceedings, the evidence disclosed that it lay within the doctor's province to know the plaintiff's wishes as to what teeth were to be extracted, the dentist was desirous of ascertaining this fact for the purpose of determining his course, and the doctor gave an erroneous answer to his enquiry. The dentist is therefore entitled to be indemnified by the doctor.

APPEAL by defendant J. R. Parmley from the decision of COADY, J. of the 21st of June, 1944 (reported, 60 B.C. 395), wherein the defendants were adjudged to pay $5,200 damages for trespass to the plaintiff's person and wherein in third-party proceedings, the defendant J. R. Parmley was adjudged to pay to the defendant T. F. Parmley by way of indemnity $5,000 of the damages awarded in the main action. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 17th, 20th to the 24th and the 27th of November, 1944, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Guild, for appellant: There was error in not holding that the plaintiff was negligent in not consulting the dentist before the teeth were extracted and in fact, the doctor never instructed the dentist. The doctor was not in a position of authority and what was done does not constitute an assault. We deny that there was any trespass or any assault. It is not actionable if not intentional or the result of negligence: see Pollock on Torts, 14th Ed., 5-6 and 43-4; *Stanley* v. *Powell*, [1891] 1 Q.B. 86. As to not consulting the patient before she was under the anæsthetic see Pol-

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lock on Torts, 14th Ed., 140. As to liability in trespass see Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 4, par. 3; *Hill* v. *Walker* (1806), Peake, Add. C. 234; 170 E.R. 256; *Peddell* v. *Rutter* (1837), 8 Car. & P. 337; *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; Salmond on Torts, 9th Ed., 78-9; *McFadyen* v. *Harvie,* [1941] 2 D.L.R. 663. As to the doctor saying "you had better proceed," our position is he never made the statement in the operating-room. He is not liable unless wilful or negligent: see *Brooke* v. *Bool* (1928), 97 L.J.K.B. 511; Pollock on Torts, 13th Ed., 77; *Barker* v. *Braham and Norwood* (1773), 2 W. Bl. 866, at p. 867; *Petrie* v. *Lamont* (1841), Car. & M. 93; 174 E.R. 424; *The Koursk* (1924), 93 L.J.P. 72, at p. 77.

McAlpine, K.C., for respondent: This is not a negligence action. The doctor instructed the dentist to extract all the upper teeth. He had no authority to do so, but he gave the instructions and it is an assault: see Bullen & Leake's Precedents of Pleadings, 9th Ed., pp. 517 and 969. As to what constitutes an assault see *Boase* v. *Paul,* [1931] 1 D.L.R. 562; *Winn et al.* v. *Alexander et al.,* [1940] 3 D.L.R. 778; *McNamara* v. *Smith,* [1934] 2 D.L.R. 417; *Perionowski* v. *Freeman and Another* (1866), 4 F. & F. 977, at p. 982; Underhill's Law of Torts, 13th Ed., 58. Assault is always a trespass: see Salmond on Torts, 9th Ed., 6; *Scott* v. *Shepherd* (1773), 2 W. Bl. 892.

Guild, on third-party proceedings: The dentist did not extract any teeth as a result of the doctor advising such for health reasons. There is no suggestion by the dentist of a warranty of authority from the doctor. He understood the doctor to be a mere messenger from the plaintiff. The dentist admits the original message from the doctor was "some teeth" and the dentist was to see the plaintiff at the hospital, but did not do so as the plaintiff was under an anæsthetic when he arrived. The dentist proceeded not on the basis of instructions but on his own diagnosis of the diseased condition of the teeth. The dentist reported to the doctor in the operating-room the condition of the teeth and the doctor then said "then you had better proceed." He proceeded on the basis of his own diagnosis of the condition

of the teeth. He is not entitled to be indemnified by the doctor: see *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; *Sutton* v. *Town of Dundas* (1908), 17 O.L.R. 556, at p. 564; *Adamson* v. *Jarvis* (1827), 4 Bing. 66; *Betts* v. *Gibbins* (1834), 2 A. & E. 57; *Dugdale* v. *Lovering* (1875), 44 L.J.C.P. 197. This being an action of trespass, it is not a case for contribution between the parties either at common law or under the Contributory Negligence Act: see *Price* v. *Fraser Valley Milk Producers Association* (1932), 45 B.C. 285, at p. 290; Marsden's Collisions at Sea, 9th Ed., 27. The learned trial judge erred in several findings, certain of them being contrary to and certain of them inconsistent with the evidence.

Tysoe, for respondent T. F. Parmley: The dentist extracted the upper teeth at the request and by the authority and directions of the doctor, and relied upon the representations of the doctor that the plaintiff desired the dentist to extract all her upper teeth: see Underhill's Law of Torts, 13th Ed., 43-4. The findings of fact are in favour of the dentist. The evidence shows the doctor was vested by the plaintiff with authority to authorize the dentist to extract two particular teeth. That he is entitled to be indemnified by the doctor see *Adamson* v. *Jarvis* (1827), 4 Bing. 66, at pp. 71-2; *Betts* v. *Gibbins* (1834), 2 A. & E. 57, at p. 74; *Toplis* v. *Grane* (1839), 5 Bing. (N.C.) 636; *Collen* v. *Wright* (1857), 7 El. & Bl. 301, at p. 311 and on appeal (1857), 8 El. & Bl. 647, at p. 656; *Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196, at pp. 198-9 and 201; *Firbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54, at pp. 60 and 62; *Birmingham and District Land Company* v. *London and North Western Railway Company* (1886), 34 Ch. D. 261, at pp. 271-2, 274 and 276; *Burrows* v. *Rhodes,* [1899] 1 Q.B.D. 816, at p. 827; *Oliver* v. *Bank of England,* [1901] 1 Ch. 652 and on appeal, [1902] 1 Ch. 610; [1903] A.C. 114; *Halbot* v. *Lens,* [1901] 1 Ch. 344, at p. 352; *Sheffield Corporation* v. *Barclay,* [1903] 1 K.B. 1 and on appeal, [1905] A.C. 392, at pp. 397 and 404; *Bank of England* v. *Cutler,* [1908] 2 K.B. 208 at p. 221; *Groves and Sons* v. *Webb and Kenward* (1916), 114 L.T. 1082, at pp. 1084 and 1087; *W. Cory & Son* v. *Lambton and Hetton Collieries* (1916), 86 L.J.K.B. 401, at pp. 404-5; *Eastern*

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Shipping Co. v. *Quah Beng Kee,* [1924] A.C. 177, at pp. 182-4; *McFee* v. *Joss* (1925), 56 O.L.R. 578, at p. 584. The dentist has the right to recover the costs of defending the action: see *Eastern Shipping Co.* v. *Quah Beng Kee,* [1924] A.C. 177, at p. 184; *Williams* v. *Lister & Co.; Llewellyn Bros., Third Parties* (1913), 109 L.T. 699; *Hartas* v. *Scarborough* (1889), 33 Sol. Jo. 661; *Simpson and Miller* v. *British Industries Trust Limited—Polikoff, Third Party* (1923), 39 T.L.R. 286; *Re Wells and Croft; Ex parte The Official Receiver* (1895), 72 L.T. 359. If the dentist is not entitled to be indemnified, this is a case for application of the Contributory Negligence Act and the dentist is entitled to indemnity and contribution from the doctor to the extent of the degree in which the doctor is at fault. The statute is not confined to cases of pure negligence. The word or term "negligence" is used only in the title. Throughout the statute itself the word or term is "fault": see Maxwell on the Interpretation of Statutes, 8th Ed., 38 to 42; *Wilmot* v. *Rose* (1854), 3 El. & Bl. 563, at p. 569; *In the Estate of Groos,* [1904] P. 269; Halsbury's Laws of England, 2nd Ed., Vol. 30, p. 837, note (*l*). The statute applies to joint tortfeasors: see *The Koursk,* [1924] P. 140, at p. 158; *The Cairnbahn,* [1914] P. 25, at pp. 27 to 29. The doctor owed a duty to the plaintiff, his patient, to take care and in this he failed: see *Donoghue* v. *Stevenson,* [1932] A.C. 562, at pp. 580-1 and 618; Charlesworth on Negligence, pp. 11, 12 and 13. The doctor was guilty of negligence to a far greater degree than the dentist.

Guild, replied.

Cur. adv. vult.

9th January, 1945.

SLOAN, C.J.B.C.: In my opinion both the appeal in the main action and in the cross action should be dismissed.

I am in agreement with the reasons for judgment of the trial judge and do not think I can add anything of value thereto.

O'HALLORAN, J.A.: I agree with my brother SIDNEY SMITH.

ROBERTSON, J.A.: The plaintiff sued J. R. Parmley, a doctor of medicine, and his brother T. F. Parmley, a dentist, for damages for assault, in that the doctor, while she was uncon-

scious under an anæsthetic in the hospital, unlawfully and without her knowledge, consent or authority, instructed the dentist to extract her upper teeth and one lower tooth and thereupon the dentist, likewise, unlawfully, without the knowledge, authority or consent of the plaintiff, extracted all her upper teeth and one lower tooth.

The dentist proceeded by way of third-party proceedings for indemnity or contribution against the doctor. Judgment was given against both defendants for $5,200, "the sum of $4,800 for the unauthorized extraction of the 12 upper teeth, $200 for the lower tooth, and special damages $200."

In the third-party proceedings the dentist obtained a declaration that he was entitled to be indemnified by the doctor to the extent of $5,000, the learned judge holding that the lower tooth had been extracted without instructions from the doctor.

The doctor appeals both from the judgment in the main action and in the third-party proceedings. The dentist did not appeal from the judgment in the main action.

I am of opinion there was ample evidence to support the judgment against the two defendants in the main action. The learned judge while stating that the doctor was, in his opinion, an honest witness, said his memory as to details was not good; that he was uncertain in his evidence; that the plaintiff gave her evidence in a very frank and honest manner and where it was in conflict with the doctor's evidence he felt he must accept hers. Shortly, the plaintiff's evidence is that she had said to the doctor on three occasions that she wished two of her upper teeth taken out. The last time was about the 6th of October, 1943, when she consulted the doctor about having her tonsils removed; she pointed out to him the two teeth she wished removed; and at that time he told her "you can have those two teeth out if you want while you are under the anæsthetic." Her dentist was away. The doctor suggested she see his brother. She explained why it was not convenient then to go to see the dentist and asked him if she could see him, *i.e.*, the dentist, at the hospital Monday morning, the time first arranged for the tonsil operation, and the doctor replied "I guess that will be all right."

She asked the doctor if the dentist would come to the hospital

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just to pull two teeth. He said it did not matter because it took two to give the anæsthetic. He said "you had better go and see Fred anyhow." It was then arranged she should go to the hospital. She went in on Monday night October 11th and the next morning her teeth were taken out. While the plaintiff was being anæsthetized in the operating-room by the doctor the dentist came in and from an exclamation which he then made the doctor knew the dentist had not, prior to entering the operating-room, seen the patient. He therefore knew that the dentist did not know which teeth were to be taken out except from what he, the doctor, had told him. The dentist then examined her mouth. On the morning of the 13th of October she had a conversation with the doctor, in which she asked him why all her upper teeth had been taken out and the doctor replied "I thought you wanted them all out" and she replied that "she didn't and he knew she didn't" and reminded him that a few days before in his office she had said she only wanted two teeth out. The doctor then said "I remember now, but I was not worrying about the teeth. The tonsils are my job, not the teeth." Then he said the dentist had said that the teeth were badly infected with pyorrhœa; that they would have to come out; that they were harming her health; and so the doctor said he told the dentist "to go ahead and pull them out"; and he did, the doctor assisting.

According to the doctor's evidence, when the dentist commenced to operate he knew the dentist intended to take out all the upper teeth and he could then have stopped him. As between the plaintiff and the dentist, the latter knew that he had no direct instructions from the plaintiff. He knew the plaintiff was expecting to see him at the hospital, obviously, so that her teeth might be examined, and yet he says he believes the doctor had instructions from the plaintiff that her upper teeth should come out and he proceeded to take them out. It was submitted that the plaintiff was negligent in not having seen the dentist and given him instructions as to what teeth she wished out. I think she was entitled to conclude that as she had given no instructions to either defendant and had not even seen the dentist, that nothing would be done to her teeth. As there were no instruc-

tions from the plaintiff to anyone to take out all her upper teeth, it seems to me clear that both defendants were liable to the plaintiff.

I think then that the appeal against the decision in the main action should be dismissed.

I now turn to the appeal against the judgment in the third-party proceedings. The doctor denying that he authorized the dentist to extract the upper teeth, said that as far as he knew the teeth were extracted "with her knowledge, with her authority and with her consent." The facts are as follows: As the result of a conversation between the plaintiff and the doctor about the 6th of October, 1943, it was decided the plaintiff should have some teeth taken out on the following Monday while undergoing an operation for tonsillectomy and that the doctor should see his brother the dentist to arrange a time at the hospital when it would be convenient for both to do their respective operations. The doctor says the next day he saw the dentist and asked "Has Mrs. Yule been in to see you yet?" The dentist said "No." The doctor then said "She wants you to take some teeth out. Will Monday be alright?" The dentist replied it would have to be Tuesday as Monday was a holiday. The doctor told him he thought that would be alright with Mrs. Yule and he would get in touch with her. The dentist's account of this interview is that the doctor said to him "Fred, has Mrs. Yule been in to see you yet?" and he said "No." Then the doctor said "Well, she wants you to take some teeth out at the hospital on Monday." So he looked at his appointment book and noting Monday was a holiday, asked if Tuesday morning would do as well, and the doctor said he would get in touch with Mrs. Yule to see if that was agreeable to her. On the Saturday afternoon the doctor advised Mrs. Yule that the operation would take place on Tuesday. On Sunday afternoon the brothers met at tea. The dentist said "I asked my brother if he knew what teeth Mrs. Yule wanted extracted and he replied 'they are the uppers,'" whereupon he said that he would take his full kit of instruments in any case. The doctor's account of the interview is as follows: The dentist asked him "Is this extraction a complete extraction, or just uppers?" and the doctor replied "I thought it was just

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uppers." The dentist then said "Oh, well, he would take up all his instruments anyway." The doctor admits that he inferred that up to that time the dentist had not seen the plaintiff.

The morning of the operation the dentist arrived at the hospital in plenty of time to see the plaintiff before she went into the operating-room, but did not do so. When he went into the operating-room the plaintiff was already being anæsthetized. The dentist then said "Oh, so you have started already." The doctor admits that he knew by then that the dentist had not seen the plaintiff before coming into the operating-room.

After the plaintiff was sufficiently anæsthetized the dentist says he made an examination and found three badly decayed teeth in the upper jaw that would have to come out; and the remaining upper teeth so badly decayed and the gums in such a neglected and deplorable condition through pyorrhœa that it was necessary that they should come out in the interests of the health of the patient. He then said to the doctor "Well, Bob, I think the upper teeth should come out alright and also this lower left third molar which is so badly decayed." The doctor replied "Then you had better go ahead." He says he extracted the upper teeth on the basis of the instructions he thought he had received from the doctor before the day of the operation and the conversation with the doctor in the operating-room.

The doctor's account of what took place is that he does not recall any conversation between himself and his brother after the dentist had made the examination of the plaintiff's teeth in the operating-room. Although he says that might have been said, he denies that he said to his brother "Then you had better go ahead." The plaintiff says the doctor admitted to her the day after the operation he had told the dentist to go ahead and take them out after the dentist had examined her teeth in the operating-room. About the 12th of November the doctor signed a statement in which he said he authorized the extraction of the upper teeth.

Counsel for the doctor submitted that the doctor and the dentist were joint tortfeasors and there could be no indemnity or contribution between them. He relied upon *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186. It is first to be observed

Lord Kenyon said that the decision in that case would not affect cases of indemnity. Further the principle of the *Merryweather* case only applies when the person seeking redress must be presumed to know he was doing an unlawful act. *Betts* v. *Gibbins* (1834), 2 A. & E. 57, at p. 74 and *Groves & Sons* v. *Webb & Kenward* (1916), 85 L.J.K.B. 1533. There is nothing to suggest that the dentist thought he was doing anything wrong. Counsel for the dentist relies upon the statement of the law in *Sheffield Corporation* v. *Barclay,* [1905] A.C. 392, at p. 397 where the Earl of Halsbury, L.C. said that it accurately expressed the law upon the subject, namely:

"It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

But it is clear from the dentist's cross-examination *infra* that he did not act on the "request" of the doctor. The dentist's evidence in part is as follows:

In other words, you took the position to be this: When Dr. J. R. Parmley came to you he merely conveyed to you the wishes of Mrs. Yule? That is right, sir.

And that is all he was endeavouring to do? That is right.

To convey her wishes to you? That is right.

. . . . .

And as far as Dr. Parmley was concerned he was not acting as physician but rather as a messenger when he came to you and imparted to you what Mrs. Yule wanted done? Yes.

But there is another principle upon which I am of opinion the dentist is entitled to indemnity. Lord Justice Bowen pointed out in *Birmingham and District Land Company* v. *London and North Western Railway Company* (1886), 34 Ch. D. 261, at p. 274 that a right of indemnity

must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do.

Again, Lord Wrenbury, who delivered the judgment of the Judicial Committee in *Eastern Shipping Co.* v. *Quah Beng Kee,* [1924] A.C. 177, said at p. 182:

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A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do.

A state of circumstances to which the law attaches a duty to indemnify is pointed out by Lord Herschell in *Derry* v. *Peek* (1889), 14 App. Cas. 337, at p. 360, where he said:

> There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given.

Viscount Haldane, L.C. in his speech in *Nocton* v. *Ashburton (Lord)*, [1914] A.C. 932, at p. 950 refers to the statement from Lord Herschell's judgment, *supra*.

The doctor's answers to questions on discovery and cross-examination are in part as follows:

> . . . . .
>
> Do you say the teeth were extracted with her knowledge, with her authority, and with her consent? As far as I know, they were.
>
> And what do you base that answer on? What do you base your knowledge, that they were done with her knowledge, with her authority, and with her consent? From her conversation with me on the 6th of October.
>
> . . . . .
>
> *Tysoe*: My question was this doctor. You must have thought that what she said to you on the 6th October was sufficient authority to extract all her upper teeth? Yes, from that, I must have.
>
> . . . . .
>
> Now doctor, that being so, you knew, didn't you, that the dentist was proceeding on the strength of what you had told him? Yes, I think so.
>
> And you knew, of course, as you have said, that the only instructions he had received were from you? Yes.

In view of the evidence I am of the opinion that under the circumstances of this case it lay within the doctor's province to know the plaintiff's wishes; that he gave an erroneous answer to the dentist's enquiry, who was desirous of ascertaining the fact for the purpose of determining his course. Consequently I think the appeal from the judgment in the third-party proceedings must be dismissed.

SIDNEY SMITH, J.A.: This case illustrates the deplorable

consequences that may follow from lack of precision in language and thought among professional men in professional matters. The hearing before us occupied six days and there was much argument to and fro; but it seems to me that in the end the issue may be reduced to the meaning to be attributed to a dozen or so of our simplest words.

The circumstances leading to the subject-matter of the dispute are amongst those of everyday occurrence. The plaintiff, Mrs. Yule, 22 years of age, with a husband in service overseas, had given birth to a child in January, 1943, at Penticton, where she herself had been born. Following the birth she was not in very good health and continued consulting the defendant J. R. Parmley (herein called the doctor) who had been her family doctor for about 10 years. At one or more of these consultations the doctor advised having her tonsils out and Mrs. Yule had spoken of her desire to have two of her upper teeth extracted. The decisive consultations took place in the doctor's office on Wednesday, the 6th of October, 1943. It was then settled that the plaintiff should have her tonsils removed on the following Monday and that she would take the opportunity thus afforded to have her two teeth extracted at the same time while under the influence of the anæsthetic.

The plaintiff's regular dentist was serving in the forces and there was some talk as to whom to get in his stead. She finally decided on the defendant T. F. Parmley (herein called the dentist) who was a brother of the doctor. He was in the same building and the doctor suggested she should see him at once. But she demurred at this, as she had left her baby waiting outside. She said she could see the dentist at the hospital on the Monday morning. The doctor agreed that this was so. It was arranged that the doctor would notify the dentist of the time of the operation.

It will be necessary to refer later, with some particularity, to the communications that ensued between the doctor and the dentist. For the moment it will suffice to say that when the doctor spoke to the dentist the latter pointed out that Monday was a holiday and suggested Tuesday the 12th of October at 8.30 a.m. as the time for the operation. Mrs. Yule agreed to

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this and in due course, on Monday evening, entered the hospital to prepare for the morrow's operation. She lay in her bed next morning waiting, in vain, for a call from the dentist. Then a hypodermic was administered to her and while gradually succumbing to its influence she was taken to the operating-room. She did not see the dentist till some days after the operation.

The dentist had arrived at the hospital about 8.15 a.m. and had made enquiries for the plaintiff from a nurse who did not know her room number. He then sat waiting in the chart-room expecting to see his patient in the operating-room before she was anæsthetized. But when he arrived there she was already unconscious, and he exclaimed "Oh, so you have started." This exclamation was in some way sufficient to apprise the doctor that he, the dentist, had not seen the patient beforehand.

The dentist examined her mouth and this is his account of what was then said:

> I then spoke to my bother. "Well Bob I think the upper teeth should come out, all right, and also this lower left third molar, which is so badly decayed." He replied "Then you had better go ahead." So I extracted the teeth.

The doctor does not remember anything of this conversation and denies that he gave any instructions to "go ahead."

All uppers were extracted and also the one decayed lower tooth. During the extraction the doctor administered the anæsthetic and operated a small pump for keeping the blood and mucous out of the throat. At the conclusion of the extraction the dentist left and the doctor then proceeded with the tonsillectomy. A nurse took over the administration of the anæsthetic.

Next morning when the doctor called upon the patient she reminded him that she had only wanted two teeth extracted and blamed the dentist for removing all the uppers and the one lower. There followed other interviews between the plaintiff and the dentist and between the doctor and dentist and solicitors; but there is so much conflict of evidence as to what transpired at all of them that they are not very helpful in arriving at any definite conclusion. There was also filed a written statement signed by the doctor. But it refers to another written statement made by the dentist which was not produced. It was therefore incomplete and may be misleading. The trial judge made no mention of it. Nor need I.

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On 24th November, 1943, the plaintiff commenced action against both doctor and dentist, claiming damages for assault in that the doctor instructed his brother to extract her teeth, and his brother did so without her knowledge, authority or consent while she was unconscious under an anæsthetic. Third-party proceedings were taken by the dentist against the doctor, wherein the dentist claimed indemnity for any liability he might incur in the action, upon the ground that he extracted the plaintiff's teeth at the request and by the authority and upon the instructions of the doctor. It was agreed that the main action should be tried first and that the third-party proceedings should be heard immediately afterwards, upon such relevant evidence as may have been given in the main action, with such further evidence as the parties might wish to adduce. This course was adopted.

The learned judge found both defendants liable in damages to the plaintiff. He assessed the damages at $5,200 as follows:

> . . . 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.

I respectfully agree with this conclusion. It seems to me that the dentist was in fault for extracting the plaintiff's teeth without instructions. I think too that, in the special circumsances of this case, the doctor owed a duty to the plaintiff to prevent the dentist from doing so when he became aware, in the operating-room, that the dentist had received no such instructions. In the third-party proceedings he held the doctor liable to indemnify the dentist to the extent of the damages awarded against the dentist for the unauthorized extraction of the 12 upper teeth, *viz.*, $5,000. He found that the dentist was not entitled to any indemnity with respect to the removal of the one lower tooth. With respect, I am unable to agree with this finding. I do not think the dentist is entitled to any indemnity at all.

The dentist does not appeal from the decision against him in the main action. He opposes the doctor's appeal in the third-party proceedings. The doctor appeals from the decision against him in the main action and alternatively appeals from the decision against him in the third-party proceedings.

The learned judge thought the doctor was an honest witness

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but that his memory as to details was not good, and that he was uncertain in his evidence. He found that the plaintiff gave her evidence in a very frank and honest manner and where it conflicted with that of the doctor, he accepted hers. He made no finding on credibility with respect to the dentist except on this important point. On the question of damages he was not satisfied that the condition of the plaintiff's teeth was such as the dentist had stated, and accepted the evidence of the plaintiff. In view of these findings I shall consider in what follows the evidence of the dentist with only a passing reference to that of the doctor.

Counsel for the dentist said very frankly in argument that he was not relying upon the conversation in the operating-room. He was content with the view of the dentist that such conversation "only confirmed" the previous conversations. These were two in number and the first took place in the following circumstances, as related by the dentist:

> On Friday afternoon, October 8th, of 1943, my brother knocked at the private door entering my office and entered and I left the work I was doing to come to speak to him and he said "Fred, has Mrs. Yule been in to see you yet?" And I said, "No." "Well, she wants you to take some teeth out at the hospital on Monday." So I looked at my appointment book, and noting it was a holiday I asked him if Tuesday morning would do as well, and he said he would get in touch with Mrs. Yule and see if that was agreeable to her, and that was the end of the conversation.

The second conversation was on the following Sunday afternoon at a social gathering in the house of their mother. The dentist speaks of it in these words:

> I asked my brother if he knew what teeth Mrs. Yule wanted extracted and he replied, "They are the uppers." I replied that I would take my full kit of instruments in any case. I think that was all at that conversation.

On discovery the dentist had said that he could not honestly deny that the doctor might have said "I am not sure but I think it is just uppers." The doctor's evidence was that he (the doctor) replied "I thought it was just uppers."

It seems to me impossible to draw out of these two meagre conversations any evidence that the doctor instructed the dentist to extract any of the plaintiff's teeth, or that he warranted to the dentist that he was the agent of the plaintiff with authority from the plaintiff to instruct the dentist to extract the plaintiff's teeth or any of them. On the contrary, I think it is abundantly clear

that all the doctor did was to pass on to the dentist the information that Mrs. Yule wished to have some teeth extracted, leaving the dentist himself to get whatever particulars and instructions were necessary; and that later, in response to the dentist's enquiry, he merely, quite casually, over a cup of tea, gave him what other information he had or thought he had on the matter. I think the dentist's question was prompted by his desire to know what instruments to take, as different instruments are required for different teeth. I think, too, that the explanation of what happened in the operating-room is that both men thought the dentist was justified in extracting whatever teeth he found decayed. Certainly this is the only explanation for extracting the one lower tooth about which admittedly there were no instructions whatever. But such is not the law. Good or bad, for better or for worse, neither of them had the legal right to meddle with the plaintiff's teeth without her consent.

Mention was made of the doctor's conduct. But it must be remembered that the main operation was the tonsillectomy and that the teeth extraction was incidental thereto. The former would have gone on, whether teeth were extracted or not; and the doctor's conduct, in my view, is referable, and referable only, to his preparation for such operation.

The circumstances in which a right to indemnity will be applied are stated by Bowen, L.J. in *Birmingham &c. Land Co.* v. *London and North Western Rail. Co.* (1886), 56 L.J. Ch. 956, at p. 960 as follows:

> In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity even if they did not express themselves to that effect; or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what under the circumstances he ought to do. I say in nine cases out of ten, for there may possibly be a tenth. Thus, there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied.

They are stated by Lord Wrenbury in *Eastern Shipping Co.*

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v. *Quah Beng Kee,* [1924] A.C. 177, at pp. 182-3 in these words:

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring* v. *Ward,* [(1802)] 7 Ves. 332, 337; a case of vendor and purchaser) in cases in which the Court will "independent of contract, raise upon his [the purchaser's] conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* 34 Ch. D. 261.

It seems to me that the particular circumstances before us do not come within any of the principles mentioned in these cases. Indeed it seems to me to be all the other way. To my mind the words and conduct of the two doctors indicated that nothing was further from their contemplation than that either should indemnify the other for any eventuality whatsoever.

There remains the question of whether the dentist is entitled to contribution under the provisions of the Contributory Negligence Act, R.S.B.C. 1936, Cap. 52. Counsel for the doctor submits that he is not so entitled upon the ground that "fault" as used in that Act means negligence, and negligence only, and that this is not an action of negligence but of trespass to the person. I do not think that this view is sound. The Contributory Negligence Act is copied, *mutatis mutandis,* from the English Maritime Conventions Act, 1911, which was enacted in Canada in 1914, and has now been incorporated into the provisions of the Canada Shipping Act, 1934, Can. Stats. 1934, Cap. 44. The relevant section is 640 which is as follows:

> 640. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:
>
> Provided that
>
> (*a*) if, having regard to all the circumstances of the case, it is not possible

to establish different degrees of fault, the liability shall be apportioned equally;

(*b*) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

(*c*) nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

Dealing with the word "fault" as used in the original Act, Halsbury's Laws of England, 1st Ed., Vol. 26, p. 517, note (*t*), says as follows:

"Fault" appears to be used rather than "negligence," because it denotes wrong-doing of any kind both in its popular and legal sense, and is therefore the suitable equivalent of a similar word in other languages, this being desirable, since the Act was passed to carry out an international Convention. "Negligence" is a negative word, and is sometimes used in popular language of omissions alone, though in law it includes commissions as well.

The same language is to be found in the 2nd edition, Vol. 30, p. 837, note (*l*). We may take it therefore that the learned authors of the 2nd edition found no reason to change the view expressed in the 1st edition, although almost 30 years had intervened.

Counsel for the doctor referred to the following paragraphs, amongst others, in Marsden's Collisions at Sea, 9th Ed., namely, at p. 29, as follows:

But it is clear that there is no difference between the rules of law and of Admiralty as to what amounts to negligence causing collision; and that, before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved.

And at p. 37 as follows:

Where, as has sometimes happened, one ship is wilfully and maliciously driven against another, the wrongdoer would probably be held liable for the entire loss, notwithstanding negligence in the other ship in not avoiding the collision.

But these two paragraphs are inconsistent. If the word "negligence" in the first paragraph means negligence and nothing but negligence, then the vessel referred to in the second paragraph would not be held liable at all. For her "fault" was not one of negligence but of wrongful intent, the very opposite of negligence. I think, with respect, that the statement in the second paragraph is correct. But, carrying it a little further, if ship A wilfully and maliciously attempts to run down another vessel and thereby collides with ship B, and the negligence of ship B

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has contributed to the collision, then I think that ships A and B would both be held in fault, and that their liability would be determined under the provisions of the Maritime Conventions Act. This would be so notwithstanding that the action of ship A was wilful and not negligent.

The same view is thus expressed in Salmond on Torts, 9th Ed., 472-3 with respect to the rule of contributory negligence at common law, as follows:

> The rule of contributory negligence determines not merely the liability of the defendant for a negligent wrong, but also his liability for the unintended consequences of an intentional wrong. It must not be supposed that in all cases in which a defendant is entitled to plead the contributory negligence of the plaintiff he is himself guilty merely of negligence. He may be guilty of wilful wrongdoing, provided only that the consequence for which the plaintiff seeks to hold him liable was an unintended one. Thus, in the case already cited of *Butterfield* v. *Forrester* (1809), 11 East 60, the defendant who successfully pleaded contributory negligence was sued for wilfully obstructing the public highway. Every man should use due care for his own preservation, not merely against the negligence of other persons, but also against the unintended results of other persons' wilful wrongdoing. But as to intended consequences the defence of contributory negligence is irrelevant.

I am of opinion therefore that trespass to the person, like trespass to a ship, must be deemed to be "fault" within the provisions of the Contributory Negligence Act and whether such trespass was the result of negligence or wilfulness.

For these reasons I think the parties herein come within the provisions of the Contributory Negligence Act and as I am unable to distinguish between their degrees of liability, I would hold them equally to blame.

It follows that I think the dentist is entitled to contribution from the doctor upon the basis of equal liability, and to this extent I would allow the appeal in the third-party proceedings.

BIRD, J.A.: This appeal is taken from the judgment of COADY, J. in an action of trespass brought by a young married woman against J. R. Parmley, physician, and his brother T. F. Parmley, a dentist, who will be referred to hereafter as the doctor and the dentist respectively.

The plaintiff alleged that the defendants committed an assault upon her, by extracting without her knowledge or consent 12 upper and one lower teeth while she was anæsthetized for the

purpose of the performance by the doctor of an operation for tonsillectomy.

The dentist took third-party proceedings against the doctor, claiming indemnity or contribution in respect of any liability found against him in favour of the plaintiff.

Judgment was given against both defendants in the sum of $5,200, of which $4,800 being for the unauthorized extraction of 12 upper teeth, $200 for the unauthorized extraction of one lower tooth, and special damages in the sum of $200.

The doctor was found liable to indemnify the dentist in the sum of $5,000, the dentist's claim for indemnity in respect of damages awarded for the extraction of the lower tooth having been rejected.

This appeal is taken by the doctor, both from the judgment in the main action, as well as in the third-party proceedings.

The learned trial judge found upon consideration of the evidence of the plaintiff, the doctor, and of the dentist in which testimony there was considerable conflict—(1) that the teeth were extracted by the dentist "on the basis that the consent of the plaintiff had been given to the doctor, and through the doctor to him," *i.e.*, the dentist; (2) that the doctor "did not have the authority from the plaintiff that he led the dentist to believe he had"; (3) that the doctor's words and conduct constituted a representation of authority which he did not have, but which the dentist was quite justified in believing he had; (4) that "the doctor knew or ought to have known that the dentist in making the extractions was relying on the authorization which the doctor led the dentist to believe that he had from the plaintiff."

These findings were attacked before us by counsel for the doctor upon the grounds that as findings of fact they are not supported by the evidence, nor upon the evidence are the inferences open which the trial judge has drawn from it. The trial judge said in his reasons that where the evidence of the plaintiff is in conflict with that of the doctor he accepts the evidence of the plaintiff. Considering first the evidence adduced in the main action: In my opinion there is ample evidence to support the findings made by the trial judge in relation to the plaintiff's claim.

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The plaintiff says that she consulted the doctor for the purpose of the performance by him of an operation for tonsillectomy, that in addition she informed him of her desire to have two upper teeth extracted, when the doctor advised her to consult a dentist. It was finally arranged between them that the plaintiff would enter the hospital for the tonsillectomy operation and that the doctor would make the necessary arrangements, and in addition would arrange for attendance at the hospital at the same time by his brother the dentist, so that the plaintiff might consult the dentist in regard to the proposed extractions which could then be made at the time when the plaintiff was under anæsthetic for the purpose of the tonsillectomy operation. The plaintiff did not give to the doctor any authority relative to the extraction of any teeth, the understanding between them being limited to the doctor arranging for the dentist's attendance at the hospital as before mentioned. It is common ground that the plaintiff did not know the dentist, nor did she see him at any time prior to the time of the operation. She was taken to the operating-room at the time fixed for the operation. Then the doctor administered the anæsthetic. When she regained consciousness she discovered that her teeth had been extracted.

The evidence of the doctor and of the dentist appears to me clearly to establish that the dentist extracted the teeth with the assistance of the doctor, who administered the anæsthetic and while the extractions were being made, operated the saliva device.

The dentist in his evidence does not suggest that any direct authority was given to him by the plaintiff to extract any teeth. He relies solely upon the authority which he believed that the doctor had from the plaintiff, as expressed by the doctor to him. That the doctor had no authority to extract nor to cause teeth to be extracted was conceded by him in the answers made under cross-examination by counsel for the plaintiff, *viz.*:

Did you think she was authorizing you to tell your brother he was at liberty to pull out all her upper teeth? No.

You knew you never had any such authority? Yes.

You would know when she was on the operating-table and under the anæsthetic that your brother the dentist had never examined her teeth? Yes, I inferred that from a certain remark he made.

And didn't it strike you as strange that he should go to work and extract

all her upper teeth without having her consent? It didn't strike me as strange because I was under the impression she wanted her upper teeth out.

You knew of course that she hadn't authorized you to instruct anyone to have her upper teeth out? Yes.

And again:

Now Doctor, you also knew before any of these teeth were extracted that Mrs. Yule hadn't authorized the extraction at all? Is that right? She hadn't authorized me.

And you knew she hadn't authorized the dentist? Yes.

Then taking it to be established on the evidence of the defendants alone that the dentist assisted by the doctor extracted the plaintiff's teeth without her knowledge or consent at a time when she had been rendered unconscious by anæsthetic administered by the doctor, can it be said that the findings so made by the trial judge and his judgment for the plaintiff founded thereon are open to question? I would have thought not. The principle to be applied here has in my opinion been most aptly expressed in an American case—*Schloendorff* v. *Society of New York Hospital* (1914), 211 N.Y. 125, at p. 126; 105 N.E. 92, at p. 93 by Cardozo, J. in these words:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. . . . This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.

a statement which was quoted, I take it, with approval by Chisholm, C.J. in *Marshall* v. *Curry,* [1933] 3 D.L.R. 260, at p. 272.

However, counsel for the doctor urges on the authority of *Stanley* v. *Powell,* [1891] 1 Q.B. 86, that here there is no liability for trespass since neither a wilful nor a negligent act was proved.

Assuming *Stanley* v. *Powell* to have been rightly decided, which is perhaps too broad an assumption in view of the criticism directed to the reasoning of Denman, J. by numerous text-writers including the learned authors of Beven on Negligence, 4th Ed., Vol. 1, p. 710 *et seq.,* Underhill on Torts, 13th Ed., 59, and Charlesworth on Negligence, 170. Then I do not consider that the principle there laid down is one to be applied here, since in my opinion the acts complained of constitute *prima facie* a trespass to the plaintiff's person for which no reasonable or

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justifiable excuse is given by the defendants. Moreover, if *Stanley* v. *Powell* be accepted as good law, then I consider that the evidence establishes that the doctor was negligent in that he failed to inform the dentist of the fact that the plaintiff desired to discuss the proposed extractions with him, and had not consented to or authorized the making of the extractions. Further, that knowing the dentist had not seen the plaintiff he not only permitted the dentist to proceed with the extractions but assisted him in the operation. I would infer from the evidence that the doctor had control in the operating-room.

In these circumstances I consider that the judgment appealed from was right. I would accordingly dismiss the appeal in the main action.

Turning then to the appeal from the judgment on the third-party issue: The trial on this issue proceeded on the footing that the evidence led in the main action was applicable to this issue along with additional evidence introduced in the third-party proceedings.

The trial judge found in the main action that the teeth were extracted by the dentist "on the basis that the consent of the plaintiff had been given to the doctor and through the doctor to him, *i.e.*, the dentist. That finding is materially fortified by the additional evidence adduced on this issue, particularly by the written statement signed by the doctor shortly before the action was brought. Therein is found over the doctor's signature, the statement "I authorized the extraction of all upper teeth." It is true that upon the trial under cross-examination on that statement the doctor endeavoured to qualify the statement in the answers made to the questions following:

And did you not say in that written statement that you authorized the extraction of all the upper teeth? Yes, it was in the statement and I had signed it.

Now was that not true? No, I do not feel I authorized the extraction of all the upper teeth.

Then why did you sign the statement? Well I was hurried. I didn't have a chance to read it.

And later:

You won't deny you did read it before you signed it? No.

And again:

Didn't you see the words "I authorized the extraction of all upper teeth"? I probably did.

If this evidence is to be taken as a repudiation of the doctor's earlier written statement then I find it unconvincing. I prefer to accept the written statement. It appears reasonable to me to assume that the doctor's recollection of the incident was likely to be clearer one month after the event, when the statement was signed, than seven months later when the evidence was taken. No express reference is made to this additional evidence by the trial judge in his reasons for judgment.

In my opinion the evidence of both the doctor and the dentist on the subject of the events which led up to the extraction of the plaintiff's teeth, considered in relation to the acts and conduct of each of them up to the time of and during that operation, is to be interpreted as establishing the existence of an agreement for employment of the dentist to extract the plaintiff's upper teeth, made between the dentist and the doctor, who in so doing purported to act on behalf of the plaintiff and with her authority. I think there must be implied from the words and conduct of each of them that the doctor affirmed that he had such authority from the plaintiff and that the dentist made the extractions with the doctor's assistance, relying upon the authority which he believed the doctor had. That the dentist would not have made the extractions but for that belief, is, I think, clearly established.

It now appears that the doctor did not have any such authority. Consequently the dentist has been found liable in damages to the plaintiff.

I am therefore of opinion that the dentist is entitled to be indemnified by the doctor upon the principle stated by Lord Esher, M.R., in *Firbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54, at p. 60 in these words:

> The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

The same principle was approved in the House of Lords in *Starkey* v. *Bank of England,* [1903] A.C. 114, wherein it was held to apply to a claim for indemnity on the breach of an implied warranty of authority. Lord Davey there referred to the rule (pp. 118-9)

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As a separate and independent rule of law . . not confined to the bare case where the transaction is simply one of contract, but extends to every transaction of business into which a third party is induced to enter by representation that the person with whom he is doing business has the authority of some other person.

In my opinion the appeal should be dismissed.

Appeal dismissed, O'Halloran and Sidney Smith, JJ.A. dissenting.

Solicitor for appellant J. R. Parmley: *W. S. Lane.*
Solicitor for respondent Yule: *Chas. F. R. Pincott.*
Solicitor for respondent T. F. Parmley: *Charles W. Tysoe.*

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Jan. 31; *Feb.* 9.

REX v. WEIGHILL.

Criminal law—Arson—Evidence—Confession—Whether free and voluntary —Admissibility.

The farm upon which the dwelling-house in question was situated was purchased under agreement for sale by accused's father. After the father's death, the agreement for sale was carried on by accused's older brother Richard. The dwelling-house was destroyed by fire on the 1st of October, 1944. At this time there was about $800 owing under the terms of the agreement for sale. The accused had the use of and lived in the dwelling-house up to the time of the fire. On July 15th, 1944, the accused had the dwelling-house insured in The Milwaukee Mechanics' Insurance Company for $1,000, any loss being made payable to the accused and his brother Richard. After the fire accused and his brother Richard called at the office of the insurance agent for payment of the insurance money, but it was not paid. The accused had previously sold sheep and hay off the farm and spent the proceeds for his own use instead of handing it over to Richard to reduce the indebtedness. On November 9th, 1944, the accused was questioned by the fire marshal for two and one-half hours at an inquiry as to the origin of the fire and accused denied all knowledge of what had caused it. A few minutes after the inquiry had adjourned accused approached one Nichols, assistant fire marshal, and told him he had made a mistake in his testimony regarding certain matters. Nichols warned him and suggested he should see his brother and sister and later see Nichols at his hotel at 7 o'clock in the evening, but accused did not call on Nichols in the evening. On November 15th, Nichols and one Ward, an insurance investigator, visited accused. The three of them sat in a motor-car and

after both questioned the accused, Nichols said "Do you want to tell me anything more about the fire?" Accused said he did and admitted he had set the fire deliberately in order to collect the insurance to clear the indebtedness so that his brother Richard would not have to pay it. Nichols then warned him and took down what he said in the form of a statutory declaration. Nichols read it over to him, then handed it to him to read over which he did and then signed it. On the charge of having set fire to a dwelling-house with intent to defraud The Milwaukee Mechanics' Insurance Company, the said confession was allowed in evidence on the trial and he was sentenced to two years and six months' imprisonment.

Held, on appeal, affirming the decision of HARRISON, Co. J., that under the circumstances the learned judge, after what is not questioned was a proper "trial within a trial," came to the conclusion that the prosecution had affirmatively proven that the confession was voluntary and admitted it in evidence. There is undoubtedly evidence that the accused was motivated in making and signing the confession by a desire to shield his brother. He was afraid his brother might be held responsible for burning the house and then attempting to collect the insurance money, but there is no evidence whatever that Nichols, Ward or any one else said or did anything which could reasonably lead the accused to believe that if he confessed, his brother might escape responsibility. There is nothing to show that Richard could in any wise be held responsible for the fire.

Held, further, that the sentence should be reduced to two years less one day.

APPEAL by defendant from his conviction by HARRISON, Co. J. on the 21st of December, 1944, on a charge of having on or about the 1st of October, 1944, set on fire a dwelling-house, the property of the John Weighill estate with intent to defraud The Milwaukee Mechanics' Insurance Company. The dwelling-house was situated on farm land purchased under agreement for sale from one Beck by the late John Weighill, deceased. After John Weighill's death, the agreement for sale was carried on by his son Richard Weighill, brother of the accused. Up to the time of the fire, the accused lived in the dwelling-house. At the time of the fire there were certain moneys due and in arrear under the terms of said agreement for sale, the same being then due and payable to the vendor Beck. On July 15th, 1944, the accused had said dwelling-house insured in The Milwaukee Mechanics' Insurance Company in the sum of $1,000 against the risk of damage or destruction by fire and the accused paid the insurance premium therefor. By the terms of the policy any loss was made payable to the accused and his brother Richard. At the time of

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the fire the insurance was in force and effect. After the fire the accused and his brother Richard called at the office of the agent for said insurance company with the view of receiving payment of the insurance moneys, but they were not paid. On November 9th, 1944, an inquiry was held by the Provincial fire marshal concerning the fire and the accused, who was the only witness. His examination was a lengthy one, but he consistently denied all knowledge of the origin or cause of the fire. Immediately after the adjournment of the inquiry accused accosted one Nichols, an assistant fire marshal and told him he had made a mistake in his evidence regarding certain matters, including a certain cheque, but he made no reference as to the origin of the fire. Nichols told him he had better see his brother and sister first and then meet Nichols at his hotel in the evening, but accused did not turn up at the hotel in the evening. On November 15th, 1944, Nichols and one Ward, an investigator for the Fire Underwriters Investigation Bureau of Canada, interviewed the brother Richard and the sister and Richard told them that accused had sold a certain number of sheep belonging to the estate and used the money for his own purposes, also regarding some hay that he had sold. The same evening Nichols and Ward went in their car to where accused was living. Accused sat in the car with them and Nichols questioned him as to the sale of the sheep. Then Nichols asked him if he had anything to say as to the fire and when he replied in the affirmative, Nichols warned him and then informed him that he was not making any threats or offering him any promises or inducements and upon accused saying he understood that, Nichols further informed him that he should understand that the statement must be voluntary and to this accused replied in the affirmative whereupon Nichols asked him if he still wanted to tell him and on his replying in the affirmative, Nichols then said "I want you to tell me how you set the fire and what you did and why." Nichols then wrote down what he referred to as the formal opening of the statement and then he wrote down in such statement what the accused then told him. Nichols then read the statement over to him and accused said it was correct. It was then handed to accused and he signed it. The confession included the words

that on the 1st day of October about 5 o'clock p.m. set fire to a felt mattress on a bed in a downstairs bedroom by means of a match and that he left the same smouldering and went to his sister's place where he stayed that night and that the reason he set fire to the mattress was with the intention of burning the house in order to obtain the insurance.

The appeal was argued at Victoria on the 31st of January, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Arthur Leighton, for appellant: The whole question in this case is whether an alleged confession by accused should be admitted in evidence. The house accused lived in was burnt down on October 1st, 1944. On October 9th, following, an inquiry was held in the police office by the fire marshal. His deputy, two policemen and an insurance investigator were present. Accused was put through a gruelling examination lasting two hours. He denied any knowledge of the fire. Later the deputy fire marshal, one Nichols, and one Ward, an investigator for the insurance company, sought him where he lived and questioned him again when the alleged confession was obtained. It was obtained by one in authority without a warning and was not voluntary. There were no reasons for judgment: see *Rex* v. *Anderson* (1942), 58 B.C. 88; *Sankey* v. *Regem* [1927] 4 D.L.R. 245, at p. 257; *Gach* v. *Regem* (1943), 79 Can. C.C. 221; *Rex* v. *Godwin,* [1924] 2 D.L.R. 362, at p. 368; *Rex* v. *Baschuk* (1931), 56 Can. C.C. 208; Phipson on Evidence, 8th Ed., 249.

Harman, for the Crown: Accused admitted that the confession was voluntary. He was very carefully warned before he gave the confession. A confession will not be excluded by questions he need not have answered, having been put to him by a private person or by police before arrest.

Leighton, replied.

Cur. adv. vult.

9th February, 1945.

O'HALLORAN, J.A.: The appellant was convicted by HARRISON, Co. J. of arson with intent to defraud an insurance company under Code section 511, and sentenced to two and a half years' imprisonment. The appeal concerns the admissibility of a written statement in the form of a statutory declaration wherein the

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O'Halloran, J.A.

appellant confessed that he had deliberately set fire to the house. He appears to have been amply warned that it would be used in evidence against him. He was not under arrest at the time, but he had been, and then was under questioning by a person in authority. As I understand the submission of his counsel, the appeal is confined to a determination as to whether the appellant was induced to confess by the hope, (a) of shielding his brother from a similar prosecution and (b) that if he confessed, a charge of perjury would not be preferred against him in respect of false statements he had made at the fire marshal's inquiry.

In July, 1944, the appellant insured the house for $1,000 with loss payable to himself and his brother Richard. On 1st October following the house was destroyed by fire, and shortly after the appellant and Richard attempted to collect the insurance. At the time of the fire, there was some $800 in arrears owing on the property payable by their father's estate which Richard was administering. It also appeared that the appellant, without Richard's knowledge, had sold sheep and hay off the farm, and had spent the proceeds for his own purposes, instead of handing it over to Richard to reduce the indebtedness. Up to the time of the fire the appellant had occupied the house and farm.

On 9th November the appellant was questioned for some two and half hours at an inquiry before W. A. Walker, fire marshal, regarding the origin of the fire. The appellant then denied all knowledge of what had caused the fire. A few minutes after the inquiry had adjourned, the appellant approached the assistant fire marshal W. P. Nichols on the street, and mentioned several things he had stated at the inquiry and said they were not true. Nichols warned him he did not have to say anything, but anything he did say could be used against him in evidence. He also told the appellant:

> You are not in a fit state to tell me anything. You go home and talk with your brother and sister or anyone and if you want to see me come and see me at the hotel.

The appellant arranged to come and see him at his hotel at 7 that evening. Nichols waited at the hotel until half past 9, but the appellant did not appear. Six days later on the 15th of November Nichols was in Nanaimo again for the purpose of

checking up several of the statements the appellant, in the conversation to which I have referred, had told him were untrue. With W. J. Ward a fire-insurance investigator who was interested in the origin of the fire he visited the appellant's brother and sister, and then went to the farm to see the appellant. The three of them sat in the motor-car. After Ward had finished questioning the appellant, Nichols asked him why he had not come to see him at the hotel on the evening of the 9th as he had promised, and after some further questioning Nichols said:

> Do you want to tell me anything more about the fire?

The appellant said he did and admitted he had set the fire deliberately in order to collect the insurance, to clear off the indebtedness so his brother Richard would not have to pay it. Nichols then gave him ample and proper warning and finally took down what he said in the form of a statutory declaration. Nichols read it over to the appellant, and then handed it to him to read over, which he did, and then signed it. In the introductory part of the declaration the appellant solemnly declared that he was

> . . . warned that I am not obliged to say anything, but anything I do say may be used as evidence. No threats have been made, no inducements offered and no promises have been made and I make this statement voluntarily.

Under these circumstances the learned judge, after what is not questioned was a proper "trial within a trial," came to the conclusion that the prosecution had affirmatively proven that the confession was voluntary and admitted it in evidence.

In *Rex* v. *Anderson* (1942), 58 B.C. 88, in which no warning had been given, it was said at p. 95 that the presence or absence of a warning did not *eo ipso* determine the voluntary character of a confession. Obviously, despite repeated warnings, a person may still believe himself surrounded by a compulsory atmosphere of authority to such an influencing degree, that he may in fact be betrayed into confession by fear of prejudice or hope of advantage which he regards as exercised or held out by a person in authority. In the *Anderson* case, it was also observed, at p. 95, that the distinction between a confession elicited before and one elicited after arrest ought not to be drawn too narrowly, since in some cases the distinction may be of importance, while

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in others it may be of little if any significance. Each case must be decided on its own facts.

But the foregoing observations are not to be interpreted as minimizing the importance of a warning or as failing to recognize the *onus* upon the prosecution to prove affirmatively that the confession is voluntary and *cf. Sankey* v. *Regem,* [1927] S.C.R. 436, at p. 440, and *Rex* v. *Byers* (1942), 57 B.C. 336, at p. 340. The appeal was framed as one of law only. But upon it being pointed out that while the admission or rejection of a confession is undoubtedly a question of law, nevertheless, the supporting findings of fact and the legitimate inferences therefrom may be questions of fact or of mixed law and fact, *cf. Rex* v. *Anderson* (1942), 58 B.C. 88, at p. 96, counsel for the appellant moved and was granted leave to appeal against those findings of fact or mixed law and fact.

There is undoubtedly evidence that the appellant was motivated in making and signing the confession by a desire to shield his brother. He was afraid his brother might be held responsible for burning the house and then attempting to collect the insurance money. But there is no evidence whatever that Nichols, Ward, or any one else said or did anything which could reasonably lead the appellant to believe that if he confessed his brother might escape responsibility. For that matter there is nothing to show that Richard could in any wise be held responsible for the fire. This case appears to be close in principle to that aspect of *Rex* v. *Byers* (1942), 57 B.C. 336, which I found necessary to discuss at pp. 338-40, wherein it was asserted that the police led the accused to believe that the girl would be freed if he confessed.

The appellant may easily have had in his mind the fear that his brother would be arrested if he did not confess, or the hope that his brother would not be blamed if he did confess. But that fear or hope, so far as the evidence discloses, never advanced beyond the subjective stage, and was not instilled into his mind by Nichols or Ward. The appellant never did assert that Nichols or Ward said or did anything which would arouse that fear or hope, nor does the record disclose anything which could reasonably lead him to believe they did. The appellant nowhere said, nor may it be legitimately inferred, that Nichols or Ward said

or did anything from which he could reasonably believe as happened in *Rex* v. *Myles,* [1923] 2 D.L.R. 880, that if he made a clean breast of it his brother would not suffer.

Counsel for the appellant interjected a theory that the appellant confessed in the hope of escaping a prosecution for perjury in respect to the false answers he had given at the fire marshal's inquiry on the 9th of November, and which Nichols had checked and found were false. It is true that could easily happen. The suggestion is thinly veiled in several questions directed to Nichols, but I find nothing in the evidence to indicate that such a threat, promise or inducement was held out to the appellant expressly or by implication. The appellant himself never said so, and *cf. Rex* v. *Byers, supra,* at pp. 338-40, to which I have already referred.

In this last aspect *Rex* v. *Hammond* (1941), 28 Cr. App. R. 84 was touched on indirectly. If that decision reflects the final judicial view held in England, the point will no doubt arise in the future whether it marks a significant divergence from the jurisprudence upon the admissibility of confessions and "trials within trials" which has been built up in Canada for the most part within the last 25 years. As I understand the trend of decision in Canada a confession is not evidence until the trial judge decides that it is voluntary and admits it as evidence, and also that the object of a "trial within the trial" is to discover not whether the confession is true (which is alone for the jury or fact-finding tribunal), but whether it is voluntary and hence admissible as evidence.

There is also an appeal against the sentence of two and a half years' imprisonment in the penitentiary. The appellant is 27 years of age and without previous record. The report of Dr. J. G. McKay dated 18th January, 1945 (which was not before the learned judge), discloses the appellant is of low-grade mentality, and advances the opinion that imprisonment in Oakalla prison where he could be occupied in farm work of which it is said he has a slight knowledge, would be more suitable to his mentality than the more severe routine of the penitentiary. In view of the appellant's previous good record, we are disposed to act upon these representations and reduce his sentence to two years less one day.

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For the foregoing reasons the appeal from conviction is dismissed but the appeal from sentence is allowed to the extent stated.

ROBERTSON, J.A.: I agree with my brother O'HALLORAN.

SIDNEY SMITH, J.A.: I agree with my brother O'HALLORAN.

Appeal dismissed; sentence reduced.

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Feb. 25, 26, 27; *Mar.* 2, 17.

SHAW v. JANCOWSKI.

Gift inter vivos—Undue influence—What relations raise presumption.

Where a gift is attacked as obtained by undue influence, and there is no direct evidence of this, undue influence may still be presumed from the relationship of donor and donee. The presumption arises from the relationship of solicitor and client, physician and patient, trustee and *cestui que trust*, and also arises where any dominating influence is proved. But the presumption does not arise from every fiduciary relationship, nor from close and constant association, nor the existence of strong affection; there must be a dominating influence. Such influence will not be presumed from the donor's being old and bedridden and dependent on the donee for many services that no one else will render.

ACTION by executors of a deceased donor to set aside a gift *inter vivos* of bonds worth $17,000, made by the donor, aged 94, three months before his death, to the defendant, a stranger in blood. At the date of the gift donor was boarding in defendant's boarding-house, and was bedridden, being looked after by defendant, who had been a practical nurse. The donor was a widower without children, and had no relatives living in the same city, his next of kin being nieces and nephews, who took benefits under his will. Defendant first met the donor in 1937 some four and a half years before his death, when she nursed him, and soon after he gave her $1,000 to buy a car. The acquaintance was kept up, and defendant often took him for drives and had meals with him. He had practically no friends. In 1939 he gave her $1,000 to buy a boarding-house. In 1940 he went to board in this for three months, paying board, and during

that time defendant rendered him many gratuitous services. He then went first to an hotel, then to the hospital and then to a nursing-home. Later defendant took him into her boarding-house. He remained there bedridden till his death, defendant nursing him and rendering many gratuitous services. The bonds were transferred by assignment, which was prepared by a solicitor instructed by defendant. He did not see the donor at the time, but had previously heard the donor state his intention of benefiting the defendant. The solicitor, the doctor, and the witness to the assignment testified as to the donor's mental capacity. Other material facts are set out in the reasons for judgment. Tried by ROBERTSON, J. at Victoria, on the 25th, 26th and 27th of February and the 2nd of March, 1942.

Beckwith, for plaintiffs.
Davey, for defendant.

Cur. adv. vult.

17th March, 1942.

ROBERTSON, J.: This is an action by the executor of the will of Thomas H. Johnston to set aside, upon the ground of undue influence, an alleged voluntary assignment, dated the 24th of June, 1941, by the deceased to the defendant of certain bearer bonds which she sold shortly after the transfer for $17,170.62. The plaintiff bases his case on two grounds: 1. Express undue influence; and 2. The relations between the defendant and Johnston on or shortly before the gift were such as to raise a presumption that the defendant had exercised undue influence over Johnston.

The relevant principles of equity are laid down in the cases to which I now refer.

In the recent case in the Supreme Court of Canada *McKay* v. *Clow et al.*, [1941] S.C.R. 643, in which the donor sought to set aside a gift to donees upon the ground of undue influence, Crocket, J., speaking for the majority of the Court, said at p. 664:

> The question, however, was not, whether the complainant had trusted a friend, but whether his execution of the deed and collateral agreement was the result of the domination of the mind of someone else, rather than the free, independent and unfettered expression of his own. Or, as Lord Chan-

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cellor Eldon expressed it in *Huguenin* v. *Baseley* (1807), 14 Ves. 273, at 300: "The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf."

As regards that vital question, the established rule of equity is that, whenever it appears that any party to a transaction, from which he or she derives some large or immoderate benefit, occupies such a position in relation to his or her supposed benefactor as to give the recipient a dominating influence over the latter, that benefit is presumed to have been obtained by the exercise of some undue influence on the part of the recipient. In all such cases, whatever be the nature of the transaction, whether a gift *inter vivos* or a contract alleged to have been made for a good and sufficient consideration, the *onus* of proof lies on the party who seeks to support it.

The dissenting judges did not disagree with the law as laid down by him but were of the opinion that the finding of fact of the trial judge should not be disturbed.

Sir Lyman Duff, then Duff, J., said in *Bradley et al.* v. *Crittenden,* [1932] S.C.R. 552, at p. 559:

The rule and the presumption may be thus stated: If it be proved that there exists a relation between two persons, A and B, of such a nature as to give rise to a presumption that A possesses over B an influence which may, in operation, deprive him of his independence of judgment, then if, in any transaction B acquires from A property by gift or contract, the court will presume that the transaction has been the result of that influence and will set it aside, unless the donee (because in this case we are concerned with the case of gift) establishes, to the satisfaction of the court "that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will . . ."

If the relationship is one of the "protected" class (*see MacKenzie* v. *Royal Bank of Canada,* [1934] A.C. 468, at p. 475) such as solicitor and client, physician and patient, trustee and *cestui que trust,* and the like the rule and presumption apply, without more. See Halsbury's Laws of England, 2nd Ed., Vol. 15, pp. 279-81.

The presumption does not arise in every case of fiduciary relationship: see *Smith* v. *Kay* (1859), 7 H.L. Cas. 750, at p. 771. Nor in every case of confidential relationship: see *In re Coomber. Coomber* v. *Coomber,* [1911] 1 Ch. 723. It is clear therefore where the dominating influence is shown to exist over the donor no matter what the relationship, the presumption does

arise. See *McKay's* case, *supra,* p. 665; *Huguenin* v. *Baseley* (1807), 14 Ves. 273, at pp. 275 and 276; *Dent* v. *Bennett* (1839), 4 Myl. & Cr. 269, at p. 277.

In the *Huguenin* case it was said that the relationship stands upon a general principle applying to all varieties of relationships in which domination may be exercised by one person over another. If there is no proof of dominating influence arising from the relationship no presumption arises. In which case the plaintiffs to succeed must prove express undue influence. I turn now to the facts.

Johnston died at 25 Cook Street, Victoria, on the 4th of September, 1941, being then 94 years of age. His wife had predeceased him ten years ago. Johnston had not had any children; his brothers and sisters had predeceased him. He had nephews and nieces living in Ontario and a nephew, the plaintiff, living in Vancouver, B.C. At all material times he appears to have been on good terms with all of them. In January, 1937, Johnston, while living at the St. James Hotel in Victoria, was taken ill. The defendant, a practical nurse, was also living there and was called in to attend him. She had not known him before. She found him quite ill; his room, bed and person in a "deplorable condition." She nursed him for a period of two or three weeks for which he paid her. He was lonely and hard of hearing. She says he "got to understand how I talked," which led to her going to spend some time with him during the day or evening when she was not busy. She did his mending. She says that sometime prior to June, 1937, Johnston said that he would like to see the country; that his niece living in Victoria at that time had never taken him out in her car. She said if she had a car she could take him for lovely drives. He then asked her would she like a car to which she replied it was out of the question. One day when the defendant was visiting Johnston she got a car and took him out for a drive, asking the plaintiff, at the same time, if he would like to go. Shaw says that the defendant told him a friend of hers had "left her the car." The defendant however says that about a month after this Johnston bought a Chevrolet coupe for her which cost about $1,000. Shaw says that Johnston always denied to him that he had given the

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car to the defendant. She was accustomed to take him out twice a week when she was not working. She says she would tell him when she got a job and he often said "It is a lot of work for a little lady."

In 1938 the defendant took Johnston out about three times a week in her car. She says she paid for the up-keep of the car and part of the gasoline. In May of that year Johnston moved from the St. James Hotel to the house of a Mrs. Gardner where he stayed for some three weeks; then he went to the Ritz Hotel for three months; and then back to the St. James. While at Mrs. Gardner's, he met Mr. *Courtney,* a barrister and solicitor of this Court, who was living there. Mr. *Courtney* says that the physical condition of Johnston was exceptionally good; that he was in good shape mentally and physically up to the last time when he saw Johnston; that he was unable to fix this time but says he saw him half a dozen times after May; that one afternoon while at Mrs. Gardner's Johnston told him the only one who took any interest in him was the defendant; that if it wasn't for her he would be a very lonely man and his intention was to place her in a position where she would not have to work again. In cross-examination *Courtney* said that he, the witness, knew Johnston had relatives in Ontario and that on the occasion mentioned Johnston had told him his relatives were in comfortable circumstances and required nothing from him. That afternoon the defendant had taken him out for a drive. He says that in his opinion Johnston was not a man who could be easily persuaded against his judgment. The defendant admits that in 1938 Johnston gave her a present of $50. She says that relations between her and Johnston were practically the same in 1939, that she took him out driving several times a week; and that his health was practically the same. At Christmas, 1939, Johnston gave her a fur coat. In December, 1939, she says that Johnston asked her why she did not get a house like Mrs. Gardner's, that is a boarding-house, and she said she had not enough money to start one. He then asked her "If I give you some would you start one?" She replied by asking him if he would come and board with her in such an eventuality and he said he would. Then Johnston and the defendant selected a

house at 25 Cook Street, "close to his favourite haunts" and Johnston gave her $1,000 to buy the necessary furniture and pay the rent. He did not come to stay with her at first, saying he wanted a little time to see how she got along. Johnston's nephew George Shaw and his wife and a Mrs. McDonald, another relative, were here at Christmas time, 1939. Now up to this time Johnston had paid for all her services as a nurse, had given her a motor-car, had entertained her at lunch or dinner on various occasions, had given her a present of $50 in cash and a fur coat and $1,000 to buy furniture for the boarding-house. On the 5th of January, 1940, he made a will in which he appointed the plaintiff and another nephew as executors; made bequests of two watches and then divided up the rest of his property amongst his nephews and nieces. The defendant was not mentioned in the will. He had apparently dropped his intention mentioned to Mr. *Courtney* in 1938 of placing her in a position where she would not have to work again.

From the 2nd of March, 1940, to the 18th of March, 1940, Johnston was ill in St. Joseph's Hospital in Victoria. From there he went for the first time to reside at the Guest House, 25 Cook Street, kept by the defendant. He remained at 25 Cook Street until June, 1940. During that time he paid the defendant $60 a month. Then he went to the St. James Hotel where he remained until the 20th of August, 1940, when he again became a patient at St. Joseph's Hospital where he remained until the 1st of October, 1940. On the latter date he went to live at the Lebanon Nursing Home in Victoria where he remained until the 7th of November, 1940. Before he went there the defendant says that Johnston asked her if she had a room for him. She had not at that time. Upon his instructions she made enquiries and finally selected the Lebanon, the charge to be $70 a month, medicines to be extra. In the meantime she gave notice to quit to tenants occupying a bedroom, with bathroom, on the ground floor so that Johnston could have these rooms. He returned to 25 Cook Street on the 7th of November, 1940, and remained there until his death. During the latter period he paid the defendant $70 a month and an additional sum each month to cover his small bills, and for additional services which the de-

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fendant rendered to him. It is clear that at all times Johnston paid the defendant for all the services which were rendered him. She says that while he was not able to go out while at the Lebanon he was able to do so after the New Year; that she took him out for drives; that he was getting better gradually and was able to walk; that from the time he came from the Lebanon until his death she dressed and undressed him, shaved and bathed him every day, and had to give him several washes a day. She had frequently to change and wash his bed linen and she carried his meals to him. Early in June Johnston took to his bed where he would remain most of the day. She says that shortly after she first knew Johnston he said from time to time that she should not work so hard and that it was too bad that she had to go out working. In 1937 he suggested that she marry him so that she should have his money. He thought she was a widow. He told her that he had quite a bit of money and that he would like to give her some and she told him not to be foolish. Sometimes he would ask her what she would do with any money left to her and she would tell him.

Johnston had had a safety-deposit box in the Bank of Montreal since the 22nd of July, 1939. Johnston gave the defendant authority to open this box. On September 5th, 1940, while he was a patient at St. Joseph's Hospital, the defendant attended the bank and opened his box and put in a gold watch and chain. On October 7th, 1940, while Johnston was at the Lebanon Nursing Home she again visited his safety-deposit box, presumably to cut his coupons. She made other visits to it on the 2nd of December, 1940, 25th January, 1941, 25th March, 1941, and a final visit on May 1st, 1941. Johnston himself visited his box on April 15th, 1940. She then tells how it was Johnston gave her the bonds. She says that Johnston said he wanted his bonds which were in the deposit box; he wanted them at the house; that he had had them in his trunk before. She said that when "he wanted anything he wanted it." Then she got them apparently on the 1st of May, 1941, and took them to Johnston. He looked them over and gave her one the same day, saying "Here's a bond for a good girl for doing what I ask you." She says she did not ask for it. She said that she did not know at this time

that he would give her the balance of the bonds. She sold it on the 10th of June, 1941, for $1,024.22.

On the 24th of June, 1941, she took the bonds to Mr. *Courtney* and instructed him to draw an assignment from Johnston to herself of the bonds in question. Mr. *Courtney* said he inserted the recitals in the assignment having in mind his talk with Johnston in 1938, and the statement made by the defendant to him that she had promised to look after Johnston for the rest of his life. She says that at least a week before this date Johnston said he wanted to give her some of the bonds for taking care of him and he wanted to know if she would take care of him for the rest of his life. She replied the bonds would make no difference, she would take care of him in any event. He asked her to "write a paper" and she said that "would be no good anyway." The next day he again mentioned the bonds. She said nothing was done then as she was more concerned about his health. The day she went to Mr. *Courtney,* and, before doing so, Johnston put his foot down. He said "If I am going to give you these bonds I want it done now." Then she said "Alright I will see what I can do about it." He told her to take the bonds. He insisted she "should have an annuity with them." He said "You know the way you women spend money. I want this to last your lifetime." Mr. *Courtney* prepared an assignment, and it was returned to her house in the afternoon. Johnston asked her to read it to him, which she did. Johnston then said "That is fine." She said he perfectly understood it. He then asked her where were the bonds and she showed a receipt for them which she had obtained from Mr. *Courtney.* She then brought in Colonel A. Davidson as a witness and introduced him to Johnston. Colonel Davidson said when he came into the room the document was lying open on the bed. He asked Johnston if it was a will and Johnston shook his head. Then Johnston signed it and said "That is a bum signature." He thought Johnston seemed "very much all there" and impatient to get the matter done. His voice was quite strong. He could express himself perfectly well. He looked ill and frail.

On the 26th of June, 1941, the defendant sold these bonds for $17,170.62 and paid $14,373 for an annuity. She spent the

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balance by 15th October, 1941. No part of it was spent on Johnston or for his maintenance. She continued to receive her monthly charge out of Johnston's annuity cheque, and on one occasion out of his savings account. She said that Johnston was exceptionally alert for a man of his age, that he talked rationally and that he "always wanted his newspaper"; that no pressure or persuasion or influence was brought to bear upon Johnston and that the transaction was a free and voluntary one on the part of the deceased who was perfectly competent mentally. She says that although on the 24th of June he was going down hill he knew what he was doing. He could tell her what he wanted done and when he wanted to be moved. He could eat his meals and converse with her about every-day matters. She says after the 24th of June he got a little bit weaker. He did not want to get out of bed so much or sit in his chair. She slept in his room all the time from the 8th of June. She says she kept in touch with Shaw and Johnston's relatives during this time. She did not tell anyone about the gift of the bonds at the request of Johnston. On the 4th of November, 1940, the defendant wrote Helena Johnston saying Johnston could "walk out enough to get in the car," that he was holding his own, and there was no hope of his getting better; he "would be gradually worse." On August 22nd, 1941, she wrote the plaintiff as to Johnston's condition, saying "His mind wanders around a great deal, he talks of the people he knew long ago; he is never in the same place two days in his own mind."

I can see no object in going over the evidence of Johnston's condition after the 24th of June. The best evidence up to that date is that of Dr. Janowski who first knew Johnston in September, 1940, when he was an interne at St. Joseph's Hospital, and Johnston was a patient there. Dr. Janowski saw him on his morning rounds. He said at that time his mental faculties were perfectly good. On the 8th of June, 1941, he was called in to see Johnston who was suffering from bed burns on his heels caused by the chafing of the bed-clothes. He says his general physical condition was good. While he was not called there to consider his mental condition he says that he "brushed up the old acquaintance," talked about the hospital and the people who

had been there and that he "could not tell any real difference in his mental condition." He says that Johnston was a stubborn old fellow and he did not think he could be influenced to do what he did not want to do; even as late as the 1st of September, 1941, when he was asked to sign a cheque he would not do so until he was sure of the identity of the document. He says that after the 8th of June he saw him on the 25th of July, 1941, the 3rd of August, the 10th, 13th, 17th and 24th of August, once a day and from the 1st to the 4th of September each day. He said that on the 25th of July he did not think Johnston was susceptible to being influenced to do something which he did not wish to do. He also told him "someone was wishing him to die." He told him that the defendant had been very good to him. He said he might leave her something for her services to him and he mentioned there would be an annuity for her. He said that his relatives had not come to visit him not that he wanted them. He thinks this conversation was not earlier than the 25th of July. He speaks of the good care that was taken of Johnston by the defendant.

Colonel Davidson in the very short time he saw Johnston formed a favourable opinion of his mental condition. While no doubt Johnston was gradually getting weaker there was nothing in his illness, until the latter part of August at least, which would affect his mind.

It would appear from December, 1939, until early in May or June, 1941, at least, Johnston did not make any further gifts to the defendant.

At the time of his death Johnston had $1,656.88 to his credit in a savings bank account. Of course he always had his annuity of $100 per month so that notwithstanding the transfer to the defendant he had plenty to keep him.

There is nothing in the evidence to show any express undue influence, nor, in my opinion, is there sufficient evidence to show the defendant had a dominating influence over Johnston. In view of his age, his rapidly failing condition of health and his annuity and moneys in the bank the gift to her was not improvident. Further his conversation with Mr. *Courtney* shows he felt that his relatives were well provided for although it appears,

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as a matter of fact, that one of them was blind and not at all well off. Nor does the concealment of the gift until the day after Johnston's funeral point to the said position if she did so at Johnston's request. The consideration in the assignment is not correct. The defendant had been paid for all her services; but Mr. *Courtney* says this was inserted by him of his own volition, because of his conversation with Johnston in 1938. There is no direct corroboration of much of the defendant's evidence but there is independent evidence showing Johnston's intention. There is no doubt that Johnston came to depend entirely upon the defendant. She admits she was the one person he relied upon when he needed help. This obviously refers to his physical requirements, for she did not do any business for him in respect of which he required advice. Now in 1937 Johnston, when he was fairly well, came to have a great regard for the defendant. During this time they did not live in the same house except for the period when they both lived at the St. James Hotel. As is shown by his conversation with Mr. *Courtney* in May, 1938, he had formed the intention of benefiting her substantially giving his reasons for this course. He did not make her any gifts in 1938 or until December, 1939. Then he apparently made up his mind that he had done enough for her and made the will which has been mentioned. Then in 1940 his health was failing. He was in St. Joseph's Hospital twice that year, and also in the Lebanon Nursing Home and when he went to live in the defendant's house in November he was not very strong, and no doubt he felt he would not recover. Finally, the idea of assisting the defendant must have returned to him and this led to the gift in question. He told Dr. Janowsky in July that he might leave her something and "there would be an annuity for her." While this rather points to his intention to do something in the future the latter part may have reference to the annuity which he had already given her.

After careful consideration of all the facts I am unable to find the defendant had a dominating influence over Johnston. I think the only relationship established was one of affection and of the high regard in which Johnston held the defendant and that "provided a good reason" for the gift: see *Bradley's* case, *supra,* p. 556.

Re Estate of Henry Daniel Cleveland; Dixon v. *Brand* (1941), 15 M.P.R. 368.

The facts in that case are very similar to the facts in this case and there Harrison, J. held there was no dominating influence.

The action is dismissed with costs.

Action dismissed.

REX v. BELT.

Criminal law—Charge of buggery—Pleads "guilty"—Sentenced to life imprisonment—Appeal from sentence—Criminal Code, Sec. 202.

On a charge of buggery with a human being the accused pleaded guilty and admitted nine other offences of gross indecency. He was sentenced to life imprisonment. On appeal from sentence:—

Held, that from all the circumstances, drastic as the sentence is, the only way to protect society from the continued criminal activity of accused is to remove him from the scene until such time as the Minister of Justice is satisfied he is no longer a menace to the community.

APPEAL by accused from sentence on his conviction by H. S. Wood, Esquire, police magistrate, Vancouver, on a charge of buggery with a boy.

The appeal was argued at Vancouver on the 19th of December, 1944, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Burton, for appellant.
Des Brisay, for the Crown.

The judgment of the Court was delivered by

SLOAN, C.J.B.C.: The appellant with a long and continued record of unnatural offences involving many small boys and youths has given every indication that leniency has had in the past and will have in the future no salutary effect upon the tendency with which he is afflicted. No doubt bearing this factor in mind and with the purpose of protecting young people from his

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corrupting influence the convicting magistrate sentenced him to life imprisonment for the last series of offences of which he was guilty.

From that sentence an appeal was taken and in order to learn for ourselves whether or not there was any possible chance of reducing the life sentence without danger of a further recurrence of his abnormal activities upon his release, we asked counsel to furnish us with reports from psychiatrists as to if and when, in their own opinion, it would be safe to allow him his freedom. During their examination of him he suggested that he was willing to undergo a surgical operation so that his unnatural propensities might thereby be cured. This suggestion of the appellant was duly reported to us by the doctors. We have given it the full consideration that such a situation demands and have reached the conclusion that the suggestion is one which we cannot take into account in reaching our decision upon the question of reduction of sentence. It must be borne in mind that the proposal to submit to the said operation emanated from the appellant himself. Should we now in turn express our willingness to reduce the sentence in the light of the proposed physical change in the appellant we would be placed in the position of attempting to strike a bargain with him in that regard. We consider such a position highly improper and one in which the Court must in consequence refuse to be placed. There are other authorities who may, if the occasion arises, review the sentence on that basis with propriety, but we cannot do so.

That situation not being before us we are then facing the matter free from that complication. From all the circumstances of the case we feel that, drastic as the sentence is, the only way to protect society from the continued criminal activity of this man is to remove him from the scene until such time as the Minister of Justice is satisfied he is no longer a menace to the community.

The appeal is therefore dismissed.

Appeal dismissed.

"COURT RULES OF PRACTICE ACT."

"Divorce Rules, 1943."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and amendments thereto, and all other powers thereunto enabling, the "Divorce Rules, 1943," made by Order of the Lieutenant-Governor in Council on the 9th day of March, 1943, be amended by striking out the words "delivered to" in Rule 36, and substituting therefor the words "served upon."

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., July 25th, 1945.

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Feb. 2, 7; *March* 6.

Criminal law—Theft—Evidence — Corroboration — Appeal — Report under section 1020 of Criminal Code—Effect of in absence of reasons for judgment.

On a charge of theft the trial judge found accused guilty, but gave no reasons for judgment. In his report under section 1020 of the Criminal Code he gave elaborate reasons supporting his conclusion of guilt. It was held that a report under section 1020 given after notice of appeal has been filed must be confined to the purpose for which it is permitted, and cannot be regarded as reasons for judgment or a substitute therefor.

On appeal from a conviction it was contended that the trial judge misdirected himself in not appreciating that it would be unsafe to convict on the uncorroborated evidence of the main witness and that there was no corroboration. It was held that the test in this case as to whether or not the judge misdirected himself, is to ascertain if there is testimony in the record which, in the true legal sense, may be properly regarded as corroboration of said evidence and in the present case the testimony corroborates the main witness because it furnishes some additional evidence rendering it probable that her story is true and it is reasonably safe to act upon it.

Evidence to be corroborative need not be sufficient *eo ipso* to establish guilt without the evidence of the principal witness. Its purpose is to fortify the credibility of the principal witness and is not in itself to prove the guilty act.

APPEAL by accused from his conviction by WOODBURN, Co. J. on the 12th of December, 1944, on a charge that at Dawson Creek in the county of Cariboo on the 18th of October, 1944, he stole $1,400 from the person of John P. Pleice. He was sentenced to three years' imprisonment.

The appeal was argued at Victoria on the 2nd and 7th of February, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Schultz, for appellant: The conviction was unreasonable and cannot be supported on the evidence. Accused was convicted on the evidence of three Indians and the learned judge did not caution them as required by section 145 of the Indian Act: see *Rex* v. *Louie Hong* (1920), 33 Can. C.C. 153, at p. 155. The main witness, an Indian girl of 17 years, a child of tender years, was not asked whether she understood the nature of an oath and whether it was binding on her conscience: see *Rex* v. *Sankey,* [1927] S.C.R. 436, at pp. 439-40. It is a question not so much

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as to age, but as to the intelligence of the child: see *Rex* v. *McKevitt* (1936), 66 Can. C.C. 70; *Rex* v. *Surgenor* (1940), 27 Cr. App. R. 175, at p. 177; *Attorney-General* v. *O'Sullivan*, [1930] I.R. 552; *Rex* v. *Fitzpatrick* (1929), 51 Can. C.C. 146. The girl Florence was either the thief or an accomplice and accused was convicted on the uncorroborated evidence of Florence and there is nothing in the judge's notes to show whether he was cognizant of the danger of so convicting; In *Rex* v. *Bush* (1938), 53 B.C. 252 this Court did not follow *Rex* v. *Ambler*, [1938] 2 W.W.R. 225; see also *Rex* v. *Joseph* (1939), 72 Can. C.C. 28; *Rex* v. *Kagna*, [1943] 1 W.W.R. 33; *Rex* v. *Frank* (1910), 16 Can. C.C. 237; *Rex* v. *Meimar* (1943), 80 Can. C.C. 134; *Rex* v. *Disano*, [1944] 3 D.L.R. 528. There should be something to show the learned judge knew the rule. Florence got some of the money and was an accomplice: see *Rex* v. *Jennings* (1912), 7 Cr. App. R. 242; *Rex* v. *Reynolds* (1927), 20 Cr. App. R. 125. There was no corroborative evidence: see *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81. The learned judge should not have accepted the evidence of Florence as it was inconsistent and not sufficient to convict: see *Rex* v. *Harris* (1927), 20 Cr. App. R. 144. The conviction cannot be sustained without the evidence of Florence: see *Rex* v. *Kadishevitz* (1934), 61 Can. C.C. 193, at pp. 199-200; *Rex* v. *McIntosh* (1937), 52 B.C. 249, at p. 261; *Rex* v. *Atkinson* (1934), 24 Cr. App. R. 123, at p. 128; *Moreau* v. *Regem* (1943), 80 Can. C.C. 290; *Rex* v. *Francis and Barber*, [1929] 3 D.L.R. 593, at pp. 599-600. There was not sufficient evidence to convict accused having regard to the degree of proof required: see *Rex* v. *Long* (1944), 60 B.C. 356. The evidence other than that of Florence was circumstantial evidence only: see *Fraser* v. *Regem*, [1936] S.C.R. 296; *Rex* v. *Dawley* (1943), 79 Can. C.C. 140; *Rex* v. *Asplund*, [1943] 1 W.W.R. 757. In the tent where the alleged stealing took place, Florence was alone for 15 minutes with complainant. She may have got the money: see *Rex* v. *Hong* (1944), 60 B.C. 382; *Rex* v. *Searle* (1929), 51 Can. C.C. 128. The record of accused has relation to small matters only: see *Rex* v. *Wilson* (1944), 82 Can. C.C. 65. The conviction is unreasonable having regard to the evidence in which the wit-

nesses contradict each other and made inconsistent statements: see *Rex* v. *J.* (1929), 52 Can. C.C. 72; *Rex* v. *George Hubley* (1925), 58 N.S.R. 113.

H. W. R. Moore, for the Crown: The women who gave evidence are not Indians. They do not belong to a particular band and do not live the Indian mode of life. Section 145 of the Indian Act does not apply. These girls are half-breeds and they have not Indian names. They are non-Indians: see *Rex* v. *Louie Hong* (1920) 33 Can. C.C. 153, at p. 155. Florence was not an accomplice and does not come within the definition in sections 69-71 of the Criminal Code. She did not assist in any way in the theft. There was corroboration in the statement of accused that he was going to St. John when in fact he went to Edmonton: see *Peterson* v. *Regem* (1917), 28 Can. C.C. 332, at p. 335. He had no money previous to going to the tent and committing the robbery, as he could not buy a bottle of whisky, but afterwards he paid $12 for a bottle and gave Florence $300.

Schultz, in reply, referred to *Rex* v. *Galsky* (1936), 67 Can. C.C. 108, at p. 111; *Rex* v. *Joseph* (1939), 72 Can. C.C. 28; *Rex* v. *Jennings* (1912), 7 Cr. App. R. 242, at p. 244.

Cur. adv. vult.

6th March, 1945.

O'HALLORAN, J.A.: The appellant was convicted of stealing $1,400 from the person of one Pleice, and was sentenced to three years' imprisonment by WOODBURN, Co. J. at Pouce Coupe. A 17-year-old half-breed Indian girl, Florence Testawich, testified she saw the appellant rob Pleice while the latter was in a drunken stupor. She also testified the appellant gave her $300 of the stolen money which she spent on clothes and jewellery. Prior to the preliminary hearing the girl told the police she did not see the appellant take the money from Pleice. But at the preliminary hearing and at the trial she swore she did see him rob Pleice.

Counsel for the appellant submitted that the learned judge failed to appreciate, that because of her change in story coupled with her receipt of part of the stolen money, it would be unsafe to convict on the girl's uncorroborated evidence. Counsel further

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submitted there was no corroborative evidence. Unfortunately the learned judge did not give his reasons for finding the accused guilty. All that appears in the appeal book is "Court finds accused guilty." In his report under Code section 1020 the learned judge gave elaborate reasons supporting his conclusion of guilt. But I think it obvious that a report under section 1020, given, as it is, after notice of appeal has been filed, must be confined to the purpose for which it is permitted, and cannot be regarded as reasons for judgment or as a substitute therefor.

However, even in the absence of reasons for the conviction as found, this Court cannot conclude that the trial judge did not direct himself properly, unless error on his part becomes manifest in the record of the proceedings or in the conclusion he has reached, *cf. Rex* v. *Bush* (1938), 53 B.C. 252. To my mind the test in this case as to whether or not the learned judge misdirected himself as alleged, is to ascertain if there is testimony in the record which, in the true legal sense, may be properly regarded as corroborative of the girl's evidence. Since in my judgment such corroborative evidence does appear in the record, I must conclude that no substantial wrong or miscarriage of justice has actually occurred within Code section 1014, subsection 2 and *cf. Rex* v. *O'Leary* (1943), 59 B.C. 440, and hence the conviction must stand.

The nature of corroboration will necessarily vary according to the particular circumstances of the offence charged, *per* Viscount Reading, L.C.J. speaking for the Court in *Rex* v. *Baskerville* (1916), 86 L.J.K.B. 28, at p. 34. Shortly before the theft took place as described by Florence Testawich, the appellant, according to his own evidence, could not pay $12 the price demanded for a bottle of whisky, because he said he had only $8 on him. Yet shortly after the theft took place, two witnesses testified he had considerable money. Mrs. Big Charles' evidence was that he took a big roll of bills from his pocket and wanted to lay her a 20-dollar bet. Boyce, a United States soldier swore the appellant wanted to buy whisky, and, pulling money out of his pocket in the form of mixed bills, said he could pay for what whisky he could get.

The foregoing evidence read with the appellant's close asso-

ciation with Pleice during the material interval and his conduct then and afterwards points toward his connection with the theft. For evidence to be corroborated it need not be sufficient *eo ipso* to establish guilt without the evidence of the principal witness as if the latter evidence did not exist. It is not necessary that the girl should have been corroborated as to the very act of theft itself, but it is enough that the evidence is such as would confirm the trial judge in the belief that the girl was telling the truth, and *cf.* Wightman, J. in *The Queen* v. *Boyes* (1861), 1 B. & S. 311, at p. 320; 121 E.R. 730, at p. 734, approved in *Peterson* v. *Regem* (1917), 55 S.C.R. 115, at p. 119.

The purpose of corroborative evidence as enunciated in the *Baskerville* case, *supra,* pp. 33 and 34, is to fortify the credibility of the principal witness, and is not in itself to prove the guilty act, even though it may do. The statement of Maule, J. in *Reg.* v. *Mullins* (1848), 3 Cox, C.C. 526, at p. 531 was there approved (p. 33), that it does not mean that there should be independent evidence of that which the principal witness relates, for then the evidence of the latter would be unnecessary. In my judgment the testimony to which I have referred corroborates the girl's story, because in the language of the *Baskerville* case, p. 33, it furnishes

> . . . some additional evidence rendering it probable that the story of the accomplice [my note: or principal witness] is true, and that it is reasonably safe to act upon it.

And evidence of the kind to which I have referred naturally and reasonably tends to connect the appellant with the crime.

In *Rex* v. *Daun* (1906), 12 O.L.R. 227, Maclaren, J.A. (with whom Moss, C.J.O. and Garrow, J.A. concurred) said at p. 233:

> What is required is corroboration in some material respect, that will fortify and strengthen the credibility of the main witness, and justify the evidence being accepted and acted upon, if it is believed and is sufficient.

This was acted upon in *Magdall* v. *Regem* (1920), 61 S.C.R. 88. And see also decisions of this Court in *Rex* v. *Iman Din* (1910), 15 B.C. 476, IRVING, J.A. at p. 483 and MARTIN, J.A. at p. 487 and also *Rex* v. *McGivney* (1914), 19 B.C. 22, MARTIN, J.A. at p. 30 and GALLIHER, J.A. at p. 32.

In sustaining the conviction on the foregoing grounds, it has not been found necessary to say that the learned judge could quite properly have found the appellant guilty without any cor-

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roborative evidence at all, if he believed the girl's story, as his report under Code section 1020 clearly declares that he did. Nor is it overlooked that in giving the evidence she did, the girl, as Crown counsel pointed out, may have laid herself open to a serious criminal charge under Code section 399.

I do not find it necessary to discuss other grounds of appeal which were argued before us. The sentence to three years' imprisonment was also appealed. But I see no merit in it. The appellant has a lengthy criminal record. He betrayed a man who had befriended him and robbed him of all his savings.

I would dismiss both appeals.

ROBERTSON, J.A.: I agree that the appeals should be dismissed.

BIRD, J.A.: I would dismiss both the appeal from conviction as well as the appeal from sentence for the reasons given by my brother O'HALLORAN, in which I concur.

Appeals dismissed.

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SLATER v. SLATER.

Divorce—Children of marriage—Right of access of guilty wife—R.S.B.C. 1936, Cap. 76.

On the petition of the husband a decree absolute dissolving the marriage was granted with custody of the children to the father and denying the mother access thereto. From the record it appeared that the only issue upon which evidence was led on either side was that of adultery. It further appeared that the trial judge immediately after granting the decree absolute and without consideration of any evidence, other than that led on the issue of adultery, granted custody of the children to the father and denied the mother access thereto notwithstanding the fact that since the alleged adultery in 1941 to the date of the decree in 1944 the mother had had by family arrangement sole custody of one child, a boy now eight years old. On appeal from the order relating to custody of and access to the infant children of the marriage:—

Held, that in general the Court would not view with favour an application for a rehearing based solely on the present plea of the appellant, but this case involves the welfare of children which is paramount, and all other principles must give way so that justice may be done to them.

Because of that dominating principle and because counsel for the respondent was permitted to supplement his material, the interests of the infant children would best be served by allowing the appeal on this branch of it and ordering a rehearing of the issue relating to custody of and access to the children, so that this whole question may be thoroughly investigated below in the light of all the facts.

APPEAL by the respondent from the decision of MANSON, J. of the 29th of May, 1944, on the petition of the husband for dissolution of marriage. Petitioner and respondent were married in Bellingham, State of Washington, U.S.A., in 1935. They have since lived in Vancouver and two children were born, one in 1936 and the second in 1939. The husband, becoming suspicious as to his wife going out at night, followed her on the night of the 28th of February, 1941, and found her in a room in the Holburn Hotel with one James Till. The petition was granted and the marriage was dissolved, the custody of the children being given to the husband and the wife was denied access thereto.

The appeal was argued at Vancouver on the 11th of December, 1944, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

D. J. McAlpine, for appellant: Our submission is first that there was no evidence of the marriage. The validity of a foreign marriage cannot be admitted. A certificate is not evidence of the validity of a foreign marriage: see Halsbury's Laws of England, 2nd Ed., Vol. 16, p. 605; *Abbott* v. *Abbott and Godoy* (1860), 29 L.J.P.M. & A. 57; *Lyell* v. *Kennedy, Kennedy* v. *Lyell* (1889), 14 App. Cas. 437, at pp. 448-9; *Rex* v. *Naguib,* [1917] 1 K.B. 359; *Bater* v. *Bater,* [1906] P. 209; [1907] P. 333. With reference to the custody of the children, the wife was denied access when no evidence whatever was submitted on this branch of the case and the wife by previous arrangement was given custody of the older child from 1941 until the hearing of the petition in 1944.

Tufts, for respondent, referred to the Equal Guardianship of Infants Act, R.S.B.C. 1936, Cap. 112.

Cur. adv. vult.

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On the 8th of March, 1945, the judgment of the Court was delivered by

SLOAN, C.J.B.C.: The application of the respondent for leave to file a supplemental affidavit in support of proof of the marriage is granted. Counsel for the appellant concedes that the affidavit now tendered is sufficient in form. In consequence, on that branch of the appeal, the appellant must fail.

That leaves for consideration the appellant's appeal from the order below relating to custody of and access to the infant children of the marriage. The appellant frankly states his position to be that through inadvertence he failed to bring to the attention of the trial judge relevant evidence on this issue. From the record it is clear that the only issue upon which evidence was led below on either side was that of adultery. It would also appear therefrom that the learned trial judge immediately after granting the decree absolute dissolving the marriage, and without consideration of any evidence other than that led on the issue of adultery, granted custody of the children to the father and denied the mother access thereto notwithstanding the fact that since the alleged adultery in 1941 to the date of the decree in 1944 the mother had had by a family arrangement sole custody of the infant child Frederick, a boy now eight years of age—and see *Elvin* v. *Elvin* (1941), 56 B.C. 253.

It was, of course, not the fault of the learned trial judge that counsel failed to bring to his attention relevant evidence on the custody issue. Nor in general would this Court view with favour any application for a rehearing based solely upon the present plea of counsel for the appellant. We are, however, in this case faced with a situation which involves the welfare of children. In those situations their welfare is paramount and all other principles must give way thereto so that justice may be done to them according to the special and differing circumstances that exist in every case wherein custody and access is to be decided. Because of that dominating principle and because, too, we have permitted counsel for the respondent to supplement his material, we consider the interests of these infant children would best be served by allowing the appeal on this branch of it and ordering a rehearing of the issue relating to custody of and access to the

children so that this whole question may be thoroughly investigated below in the light of all the facts.

Owing to the peculiar circumstances of this case and bearing in mind that both counsel have had to seek the assistance of the Court because of the positions taken by them below, the proper order would be that there be no costs of the appeal to either side.

Appeal dismissed in part.

Solicitor for appellant: *D. J. McAlpine.*
Solicitor for respondent: *S. S. Tufts.*

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Criminal law—Charge of theft—Trial—Absence of Crown witness—Postponement—Change of venue—Original indictment quashed—New indictment—Autrefois acquit—Conviction—Appeal.

The accused, charged with stealing a truck rear end, appeared before WILSON, J. at the Spring Assize for the county of Cariboo held at Pouce Coupe, B.C., in February, 1944. Prior to arraignment the Crown applied for an order to traverse the trial to the next Assize for the county on the ground of absence of a material witness. This was opposed by counsel for accused on the ground that he had five trucks in operation and he had four local witnesses present and it would entail much expense to have the trial elsewhere. It was ordered that an adjournment be granted on condition that it be traversed to the next sittings of the Court at Pouce Coupe. Counsel for accused was later notified by the Attorney-General that the trial would take place at the Fall Assize at the city of Prince George. Subsequently at the Fall Assize for the same county held at Prince George in September, 1944, the Crown applied, before the accused had been arraigned, to quash the indictment preferred at Pouce Coupe and substitute a further indictment. This was opposed by the defence on the ground that the Crown was bound by the order of WILSON, J. to proceed with the trial at Pouce Coupe, that the defendant was present but had no witnesses and would be prejudiced. He further raised the defence of *autrefois acquit*. An order was made quashing the original indictment and granting the Crown the right to prefer a new indictment which was precisely the same as the original except that "City of Prince George" was marginally noted in lieu of "Town of Pouce Coupe." The accused was then arraigned, the trial proceeded and he was found guilty.

Held, on appeal, that the appeal be allowed and a new trial ordered.

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Per O'HALLORAN and BIRD, JJ.A.: The main ground of appeal was that a miscarriage of justice under Code section 1014 resulted from the making of said orders. The material shows that the order of WILSON, J. was made conditional upon the adjourned trial taking place at Pouce Coupe for the protection of the accused against additional expense. The Crown acted on that order and it is not open to the Crown to say that the condition as to the place of trial was not operative. The situation contemplated by WILSON, J. developed at Prince George in that the accused appeared, but without witnesses. Notwithstanding the objection that he was thereby prejudiced he was required to stand trial. In that there was a miscarriage of justice, the appeal is allowed and a new trial directed.

Per SIDNEY SMITH, J.A.: With reference to the ground of appeal that the trial should have taken place at Pouce Coupe, by the original indictment the place of trial was set at Pouce Coupe and this could not be changed except as provided by section 884 of the Criminal Code which alone gives the right to apply for a change of venue. No application was made under this section and therefore the Crown could not, by switch of indictments, change the place of trial from Pouce Coupe to Prince George. Apart altogether from the special terms of the order of WILSON, J. this submission is sound and must prevail.

APPEAL by defendant from his conviction by MACFARLANE, J. and the verdict of a jury at the Prince George Fall Assize on the 28th of September, 1944, on a charge that

he . . . unlawfully did steal one truck rear end, complete with tires and wheels, the property of the Government of the United States of America.

Accused was sentenced to two years' imprisonment. The grounds of appeal were that there was error in permitting Crown counsel to proceed on a fresh charge or indictment after the former charge for the same crime had been ordered quashed on the application of Crown counsel. That there was error in permitting the Crown to proceed to try the appellant on the new indictment at the Prince George Assize when by the order of WILSON, J. of June, 1944, at the Spring Assize at Pouce Coupe it was ordered that the appellant be tried at the next sitting of the Assize Court at Pouce Coupe. That there was error in ordering the trial to go on at Prince George when the order of WILSON, J. was still effective. That there was error in permitting Crown counsel to ignore the order of WILSON, J. to the prejudice of accused. That there was error in not affording any opportunity to accused to elect his mode of trial. That there was error in assuming jurisdiction to try accused on the second charge and

not giving effect to the plea of *autrefois acquit* and on other grounds.

The appeal was argued at Vancouver on the 6th and 7th of December, 1944, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Bull, K.C. (*Hugo Ray,* with him), for appellant: The county of Cariboo is very large with inconvenient transportation. There are two points here: First, that the accused has the legal right to be tried at the place first named and secondly, the quashing of the indictment was a disposition of the case which in the result is *res judicata* or *autrefois acquit.* Sections 871, 898 and 1007 all deal with the right of the accused to quash by reason of any defect in the indictment. There is no legal authority to do what was done in this case. As to changing the venue see section 844 of the Criminal Code; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 65, par. 82 and note (*l*), p. 65 and p. 145; *Regina* v. *Carroll* an unreported case referred to by Robertson, J. in *Regina* v. *Ponton* (1898), 18 Pr. 210, at p. 218; *Rex* v. *Sweetman,* [1939] O.R. 131; *The King* v. *Holden* (1833), 5 B. & Ad. 347; *Rex* v. *Spintlum* (1913), 18 B.C. 606; *Lachance* v. *Regem* (1930), 49 Que. K.B. 190; 13 Can. Abr. 1248. Here we had no intimation of change of venue at all. The conviction was bad and should be set aside: see *Rex* v. *Macdonald,* [1942] 4 D.L.R. 782; *Sayers* v. *Regem,* [1941] S.C.R. 362. There is no right to try this man elsewhere than at Pouce Coupe. There is absence of jurisdiction and an unjust way of dealing with the venue: see Tremeear's Criminal Code, 5th Ed., 1139. There is miscarriage of justice under section 1014 of the Criminal Code. They must first go to Pouce Coupe to obtain a change of venue. Secondly, the quashing of the conviction on the first charge was sufficient to create *autrefois acquit*: see *Rex* v. *Somers* (1929), 41 B.C. 190. The new charge is identical with the first one and is a discharge on the merits. It is distinguished from the *Somers* case: see *Regina* v. *Stamper* (1841), 1 Q.B. 119; *Vaughton* v. *Bradshaw* (1860), 9 C.B. (N.S.) 103; *Tunnicliffe* v. *Tedd* (1848), 5 C.B. 553; *In re Henderson, Stewart, Broder and Joe Go Get,* [1930] S.C.R. 45; *The Queen* v. *Church Knowle*

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(1837), 7 A. & E. 471. Section 844 gives the right of venue and is only altered by application under section 884.

Pepler, K.C., D.A.-G., for the Crown: The Crown has the right to quash an indictment. The Attorney-General may enter a stay of proceedings under section 962 of the Code and he may prefer a new indictment under section 873. Entering a stay and quashing amounts to the same thing. Fresh proceedings can be commenced: see *The Queen* v. *Sirois* (1887), 27 N.B.R. 610. Quashing an indictment has the same effect as a *nulli pros*: *Rex* v. *Carver* (1917), 29 Can. C.C. 122; *Reg.* v. *Bird et uxor* (1850), 5 Cox, C.C. 20; *Sir William Withipole's Case* (1629), 79 E.R. 730; *The King* v. *McIntyre* (1913), 21 Can. C.C. 216. The *Somers* case [*supra*] is in our favour. He was not even arraigned in this case: see *Rex* v. *Roos* (1932), 46 B.C. 235; *Rex* v. *Spence* (1919), 45 O.L.R. 391; *Re Rex v. Ecker* (1929), 64 O.L.R. 1; *Rex* v. *Morin* (1917), 28 Can. C.C. 269; *Rex* v. *Robert (No. 2)* (1910), 17 Can. C.C. 196; *Rex* v. *Kelly* (1916), 10 W.W.R. 1345; *Rex* v. *McAuliffe* (1906), 17 Can. C.C. 495. As to change of venue, there was no ulterior motive in changing the place of trial. There was no order changing the venue, but he was tried by a jury in his own county. The accused was tried and raised no objection: see *Sayers* v. *Regem*, [1941] S.C.R. 362, at p. 367; *Collins* v. *Regem* (1921), 62 S.C.R. 154; Tremeear's Criminal Code, 5th Ed., 1044; *Rex* v. *Dick* (1942), 78 Can. C.C. 363; *Regina* v. *Malott* (1886), 1 B.C. (Pt. 2) 212, at p. 214.

Bull, replied.

Cur. adv. vult.

9th January, 1945.

SLOAN, C.J.B.C.: I agree with my brother BIRD.

O'HALLORAN, J.A.: I agree with my brother BIRD.

ROBERTSON, J.A.: At an Assize held in February, 1944, at Pouce Coupe counsel for the Attorney-General, pursuant to section 873 of the Code, preferred a formal charge in writing against the accused in the margin of which appeared the words "Province of British Columbia, County of Cariboo, Town of Pouce Coupe." Section 884 of the Code provides that the place

named in the margin shall be the "venue" for all the facts named in the body of the indictment. The word "venue" in this section does not mean the venue for the trial but means the place where the crime is charged to have been committed. See *Smitheman* v. *Regem* (1905), 35 S.C.R. 490, at p. 493. So that the words in the margin merely advise the accused where it is alleged the crime was committed. In this case in the body of the charge the crime was alleged to have been committed at Dawson Creek. The Crown applied to have the trial adjourned because of the absence of a material witness.

Counsel for the accused object, mainly, upon the ground that he had the accused and four witnesses there ready to proceed and "that it would be a great extra expense to have the trial elsewhere." WILSON, J. evidently agreed that it would be a hardship on the accused to have the trial "elsewhere," for he granted the application "definitely on the condition that it is traversed to the next sittings of this Court at Pouce Coupe," giving as his reason that the accused would not be put to any extra expense. The Crown accepted this condition. There does not appear to be any section in the Code expressly providing where the trial of a criminal offence is to take place, but at common law the accused has the right to be tried in the county where the offence was alleged to have been committed. See Tremeear's Criminal Code, 5th Ed., 1106.

In my opinion the effect of the learned judge's order was to fix the place of trial "definitely" at Pouce Coupe. No application was made to change the venue. At the Autumn Assize held at Prince George, which is also within the county of Cariboo, counsel for the Attorney-General applied to quash the charge which had been preferred at Pouce Coupe

for the reason that a new indictment had been prepared and will be presented at the sittings of the Assize Court held at Prince George today so that the trial may proceed.

Counsel for the accused said that to permit the quashing of the charge would be in effect to overrule the order made by WILSON, J., and submitted the Court had no jurisdiction to do this.

The learned judge quashed the charge. Then counsel for the Attorney-General preferred a new charge exactly the same as the one preferred at Pouce Coupe, except the words "City of Prince

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George" were substituted in the margin for the words "Town of Pouce Coupe." Counsel for the accused then said he was relying upon a plea of *autrefois acquit* and that the order quashing "overruled an order of the highest Criminal Court in the Province"; that his client did not have his witnesses there and would be prejudiced. The learned judge decided to proceed with the trial. The accused was convicted. In my opinion the plea of *autrefois acquit* is not tenable as the accused was never in jeopardy. Then as to the second point: section 884 gives power to change the venue when it appears to the satisfaction of the Court or judge that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, and such order may be made upon such conditions as to the payment of any additional expense thereby caused the accused as the Court or judge thinks proper to prescribe.

As everyone knows, there are three places in the county of Cariboo at which Assizes are regularly held, namely, Prince George, Quesnel and Williams Lake. They are all hundreds of miles from Pouce Coupe. The section contemplates a change from some district to another district, from some county to another county, or some place to another place other than that in which the offence would otherwise be triable.

In my opinion, in view of the order of the learned judge, the offence in this case would be triable at Pouce Coupe, and therefore the offence could not be tried at Prince George without an order granting a change of venue.

In *Regina* v. *Malott* (1886), 1 B.C. (Pt. 2) 212, the facts were that the offence was committed in Kootenay District and the trial was before a jury at Kamloops (another district) summoned from the Kamloops District. There had been no previous order for the removal of the trial from the Kamloops District. Section 11 of the Criminal Procedure Act, 1869, is the same as section 884 of the Code. The Court there held that the proceedings at Kamloops were null and void. It seems to me the principle in this case applies to the case at Bar. Under the special circumstances of this case, the place of trial having been fixed

definitely by the Court at Pouce Coupe, the trial could not be held at any other place without an order changing the venue even though in the same county.

I would allow the appeal and direct a new trial.

SIDNEY SMITH, J.A.: At the Spring Assize, 1944, held at Pouce Coupe, B.C., the appellant was charged with theft of one truck rear end, the property of the Government of the United States of America. The marginal statement at the commencement of the indictment reads "Canada, Province of British Columbia, County of Cariboo, Town of Pouce Coupe." Such marginal statement is the venue, and represents the place where the crime is charged to have been committed. (*Smitheman* v. *Regem* (1905), 9 Can. C.C. 17). We were not referred to any section in the Code prescribing the place of trial of a criminal offence, and must therefore fall back upon the common law. There seems to be no doubt that at common law the place of trial was the venue, laid in the margin of every indictment (Halsbury's Laws of England, 2nd Ed., Vol. 9, pp. 65, 66 and notes (*k*) and (*l*). Pouce Coupe, having been expressly stated in the marginal note, thus became the proper place for the trial of the accused. The offence was in fact committed some 20 miles from the town.

Upon the case being called, and before arraignment, counsel for the Crown asked for a postponement of the trial on account of the absence of one of his witnesses. Counsel for the accused opposed this. He said his witnesses were on hand for the trial, and that it would be a source of great extra expense to the accused if the trial were postponed. Mr. Justice WILSON, the presiding judge, granted the postponement, but "definitely on this condition that it is traversed to the next sittings of this Court at Pouce Coupe."

Counsel for the accused was later notified by the Attorney-General that the trial would take place at the Fall Assize at the city of Prince George, which is about one thousand miles by rail and two hundred by plane from Pouce Coupe and on the other side of the Rocky Mountains. On 24th September, 1944, the case was duly called at Prince George, Mr. Justice MACFARLANE

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presiding. Counsel for the Crown moved that the original indictment be quashed as he had instructions to present a new indictment for trial at Prince George. Counsel for the accused objected at once, related the circumstances already mentioned, and submitted that there was no jurisdiction to hold the trial at any place other than Pouce Coupe. He also pleaded *autrefois acquit* and pointed out that his witnesses were not then available. His submission did not prevail and the original indictment was quashed.

Another indictment was then presented by Crown counsel. This new indictment was in all respects the same as the original except that "City of Prince George" was marginally noted in lieu of "Town of Pouce Coupe." The accused was arraigned, pleaded not guilty, and the trial proceeded. He was found guilty and sentenced to two years in the penitentiary. The matter now comes before us by way of appeal on two main grounds: (1) That the trial should have taken place at Pouce Coupe and (2) that the trial judge should have given effect to the plea of *autrefois acquit.*

I think the second submission untenable. It seems to me that in the circumstances I have recited there was no trial on the merits, no breakdown of the Crown's case, nothing coming within any of the authorities cited under this head which would warrant a dismissal on this ground (*Rex* v. *Somers* (1929), 41 B.C. 190).

But I am of opinion that the first submission must prevail. It seems to me that by the original indictment the place of trial was set at Pouce Coupe, and that this could not be changed except as provided by section 884 of the Criminal Code, which alone gives the right to apply for a change of venue (the word used at the heading of the section as being synonymous with "place of trial"). No application was made under this section and therefore the Crown could not by a switch in indictments change the place of trial from Pouce Coupe to Prince George, both of which, in my view, come within the term "place" as used in the section. The matter is simply one of a right founded on the common-law rule that an offence should be tried by a jury drawn from the district where it was committed. It may well be that the Crown

had the right to select some other place of trial in the same district, as this was the first time a criminal assize had been held at Pouce Coupe. But be that as it may, it seems to me that the place of trial having originally been fixed at Pouce Coupe, an order under section 884 of the Code should have been obtained to warrant the trial which took place at Prince George (*cf. Regina* v. *Malott* (1886), 1 B.C. (Pt. 2) 212).

I think the true position is set out in *Regina* v. *Ponton* (1898), 18 Pr. 210, at pp. 218-19 by ROBERTSON, J., who had before him an application for change of venue. He quoted from the unreported case of *Regina* v. *Carroll* on a similar application as follows:

> Sir Adam Wilson, the Judge of Assize, in his judgment said: "In determining this question I am not acting under a common law power, but am exercising a strictly statutory jurisdiction. And on this motion the Crown and the prisoners stand upon equal ground; there is no prerogative or privilege to be considered . . . To effect a change of venue, or, more correctly, to change the place of trial, the Court must be specially moved for the purpose; it does not rest with the Crown to select the place for trial by suggestion or otherwise, as it may desire."

I am therefore of opinion that, apart altogether from the special terms of the order made by WILSON, J., this second submission is sound and must prevail. This appears *a fortiori* when the definite nature of the terms of that order are remembered. The effect of the proceedings adopted by the Crown, were they to prevail, would be to circumvent both the provisions of section 884 of the Code and the provisions of the order of WILSON, J. I do not think such procedure capable of justification.

For these reasons the trial and all proceedings at Prince George are null. The prisoner is in the same position as if he had never been tried; and he will be remanded in custody to be tried on the charge on which he has been committed (*Regina* v. *Malott, supra,* at p. 217).

Before leaving the case I think it right to mention that the learned trial judge in his report deals with the matter of prejudice to the accused in these words:

> The prejudice under which counsel for the accused professed to be labouring was, as I see it, based on convenience only. No application was made to me for an adjournment, and upon hearing the case I do not think that the accused was prejudiced or hampered in presenting his defences to the Court or in the presentation of his evidence.

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From this it is quite clear that it was never brought home to the mind of the trial judge that there was evidence for the defence not then available; otherwise he would have dealt with the matter so as to ensure that justice might be fully and manifestly done.

BIRD, J.A.: This is an appeal from conviction by MACFARLANE, J. and a jury at the Fall Assize for the county of Cariboo held at Prince George, B.C., on September 28th, 1944, whereby the accused was convicted upon the following indictment:

That at Dawson Creek, in the County [of Cariboo, Province of British Columbia], on the twenty-fourth day of January, in the year of our Lord one thousand nine hundred and forty-four, he the said David Gordon Dunn unlawfully did steal one truck rear end, complete with tires and wheels, the property of the Government of the United States of America.

In the month of February, 1944, the accused had appeared before WILSON, J. at the Spring Assize for the county of Cariboo, held at Pouce Coupe, B.C., to stand trial upon an indictment identical in terms to the indictment upon which he was later convicted at Prince George, B.C., except for substitution in the caption or place of trial of "Pouce Coupe" for "Prince George."

Prior to arraignment of the accused at Pouce Coupe the Crown applied for an order to traverse the trial to the next Assize for the county on the ground of the absence of a material witness. This application was opposed by counsel for the accused upon two grounds: First, "That the accused is a trucker on the highway and operates five trucks and to keep him in jeopardy and hanging around was unjust" and, secondly, "that we were ready to go on. In addition to the accused I had four local witnesses there and it would be a great extra expense to the accused to have the trial elsewhere."

WILSON, J. then made an order in the following terms:

I feel very sorry for the accused and feel strongly. I want to dismiss this case but in view of the fact that the witness is not present I think I must adjourn it but I will do it definitely on this condition, that it is traversed to the next sittings of this Court at Pouce Coupe.

Subsequently, as before mentioned, at the Fall Assize for the same county held at Prince George in September, 1944, counsel for the Crown made application to the presiding judge MACFARLANE, J., before the accused had been arraigned, for an order to quash the indictment preferred at Pouce Coupe, the trial of

which had been traversed under the order of WILSON, J., and to substitute the indictment upon which the accused was later convicted.

This application was opposed by counsel for the defendant on the ground that the Crown was bound by the order of WILSON, J. to proceed with the trial of the accused at Pouce Coupe, B.C.

After argument MACFARLANE, J. made an order quashing the Pouce Coupe indictment, but before any direction or ruling was made as to the right of the Crown in the circumstances to prefer the proposed new indictment, counsel for accused repeated the objection of the defence to the substitution of the new indictment and said "I am here but we have not our witnesses. We would be prejudiced."

In the course of this argument defence counsel raised the defence of *autrefois acquit* but elected with the Court's permission to present argument thereon later.

Thereafter, and without further reference to the objection made on the ground of prejudice due to the absence of defence witnesses, the presiding judge ruled that the Crown was entitled to prefer a new indictment. The accused was then arraigned upon the new indictment, entered a plea of not guilty and was placed in charge.

Subsequent to arraignment on the new indictment no further objection was taken to trial at Prince George on behalf of the accused. The trial proceeded and the accused was found guilty.

Counsel for the accused before us founded the appeal on various grounds, but in the view that I take of the appeal it is not necessary to deal specifically with the submissions of counsel on other than one ground, *i.e.*, "that a miscarriage of justice under Code section 1014 resulted from the making of the orders before mentioned and the proceedings subsequently had in consequence thereof."

The material before us in my opinion clearly shows that the order of WILSON, J. was made conditional upon the adjourned trial taking place at Pouce Coupe, B.C., for the protection of the accused against the additional expense in the conduct of his defence, to which he would be put if the trial were held elsewhere in the county of Cariboo.

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Though there is no evidence on the subject, one cannot close one's mind to the knowledge that prevailing transportation facilities between Pouce Coupe and Prince George require either a rail journey in excess of one thousand miles or a flight by a specially-chartered plane, there being no regular air service—a factor which I have no doubt influenced WILSON, J. in making the order.

The Crown acted upon that order. Consequently it appears to me that it is not now open to the Crown to say that the condition as to place of trial was not operative. *Scott* v. *Fernie* (1904), 11 B.C. 91.

The situation apparently contemplated by WILSON, J. developed at Prince George in that the accused appeared but without his witnesses.

Notwithstanding objection by his counsel that he was thereby prejudiced, he was required to stand trial. In that I consider there was a miscarriage of justice, in consequence of which I would allow the appeal and direct a new trial.

In this disposition of the appeal I have not overlooked the submission of counsel for the Crown that the accused had waived his right to object to trial upon the new indictment in that he failed to take the objection after arraignment but pleaded thereto and proceeded with the trial.

Such an objection had been taken by counsel for the accused immediately before arraignment, which was overruled by the presiding judge. I do not consider that there was any occasion for the objection to be repeated in view of that ruling.

There was here no "standing mute" as Rinfret, J. said of the conduct of the accused in *Sayers* v. *Regem,* [1941] S.C.R. 362, at p. 367. Quite the reverse. The accused cannot be said to have waived the right to put forward this objection simply by his failure to repeat after arraignment the objection made almost immediately before and rejected.

Appeal allowed; new trial ordered.

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Jan. 9, 10, 11, 12; *March* 6.

Criminal law—Murder—Trial—Charge to jury—Whether verdict of manslaughter should have been left open to jury—Criminal Code, Sec. 259 (c).

The accused and one Helen Lee lived together from August, 1943, to December, 1943, when they quarrelled and she left him. He persisted in looking for her from one boarding-house to another and finally she, with one Doris Olson, obtained rooms 501 and 502 in Mayli Rooms in Vancouver with a communicating door between them. She occupied room 501 and Doris 502. At about 12.30 a.m. on the 7th of May, 1944, Helen was sitting on her bed playing cards with the deceased Lennox in room 501 and Doris was on her bed in room 502 with a six-months-old child of her sister, when accused forced his way into room 501. He had a rifle under his overcoat strapped to his shoulder. He took the gun out and while swinging the rifle around said "everybody stand back" several times and, according to Helen's evidence, the gun went off and the bullet hit Lennox in the lower part of his body. Helen then grabbed the rifle and in the struggle they went into room 502 where Lennox followed them and seized accused from behind and they fell on Doris' bed. Doris, on first seeing the rifle, ran downstairs to telephone the police. In the struggle on the bed Lennox was stabbed in the groin by a sharp pointed file which accused had brought into the room with him. The evidence of accused was that the gun was discharged during the struggle with Helen after they had entered room 502. Lennox died two hours after the shooting. Accused was convicted of murder.

Held, on appeal (*per* SLOAN, C.J.B.C., ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.), that the learned judge misdirected the jury with reference to section 259 (*c*) of the Criminal Code and failed to instruct them as to a possible verdict of manslaughter under that subsection. The appeal is allowed and a new trial directed.

Per O'HALLORAN, J.A.: I would substitute a verdict of manslaughter and impose a sentence of 20 years' imprisonment with hard labour.

APPEAL by accused from his conviction by COADY, J. and the verdict of a jury on the 26th of October, 1944, at Vancouver, on a charge of murder. The principal witness is one Helen Lee. She had been married, then went to the United States, but came back to Vancouver shortly after and was employed as a waitress in restaurants. She met the accused in June, 1943. They became friends and lived together from August until December, 1943, when they quarrelled and she left him. Shortly after she met him at a place on Richards Street at night when he made an attack on her. Two days later she saw accused at her sister's

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room where he threatened her and said he would get her sometime. He saw her again just before she moved to the Mayli Rooms on Hastings Street where the murder took place when he told her he had two guns and would get her. Shortly prior to this he had borrowed a 22-calibre rifle with ammunition. She, with one Doris Olson, had two adjoining rooms with door between on the fifth floor of the Mayli Rooms numbers 501 and 502. On the night of the 7th of May, 1944, Mrs. Lee was sitting on the bed in room 501 with the deceased Clifford Lennox, playing cards with him, and Doris Olson was on the bed in room 502 with the six-months-old child of her sister's when at about 12.30 a.m. the accused came into room 501. He had a rifle under his overcoat strapped to his shoulder. He took the gun out and pointed it in the direction of the two occupants. Mrs. Olson in room 502, when she saw the gun, jumped up and shut the door between the two rooms and ran downstairs to telephone the police. The accused made some remark such as "stand back" or "stand quiet" and he then fired the gun. The bullet hit deceased in the lower part of his body. Helen then grabbed the gun. She and Harrison in struggling with it went through the door into room 502. Lennox followed them in and he seized Harrison from behind. They fell on the bed and Lennox was badly wounded in the lower part of his body by a three-cornered file which was sharpened at the point, the file having been brought into the room by accused. Helen was also badly cut by the file and spent some time in the hospital. In the struggle the gun broke and with part of the stock Helen struck the accused on the legs. The police then appeared and accused was taken in charge. Accused was convicted and sentenced to be hanged.

The appeal was argued at Victoria on the 9th to the 12th of January, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Schultz, for appellant: There was error in admitting in evidence the testimony of Helen Lee and her sister relating to threats allegedly made by accused to Helen Lee. The evidence is irrelevant to the charge and prejudicial to a fair trial. There was error in withdrawing from the jury the question of provocation. He instructed the jury that there was no evidence of

provocation arising out of the facts which would reduce murder to manslaughter and that if there was evidence of provocation, it emanated from Mrs. Lee and was not provocation that would reduce murder to manslaughter; further it extended over a period of time and would not reduce murder to manslaughter. That the threats had no relation to the charge see *Koufis* v. *Regem,* [1941] S.C.R. 481; *Rex* v. *Bond,* [1906] 2 K.B. 389, at p. 401; *Rex* v. *Ball,* [1911] A.C. 47, at p. 68; *Rex* v. *Barbour,* [1938] S.C.R. 465; *Allen* v. *Regem* (1911), 44 S.C.R. 331; *Markadonis* v. *Regem,* [1935] S.C.R. 657; *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57; *Rex* v. *Brooks,* [1927] S.C.R. 633; *Chapdelaine* v. *Regem,* [1935] S.C.R. 53, at pp. 57-8; *Gouin* v. *Regem,* [1926] 3 D.L.R. 649, at pp. 653-4. That there is evidence of provocation on the record see *Rex* v. *Hopper,* [1915] 2 K.B. 431, at p. 435; *Rex* v. *Krawchuk (No. 2)* (1941), 56 B.C. 382, at p. 386; *Rex* v. *Gross* (1913), 23 Cox, C.C. 455; *Rex* v. *Jackson,* [1941] 1 W.W.R. 418. The trial judge did not direct the jury as to provocation: see *Rex* v. *Manchuk,* [1938] S.C.R. 18; *Rex* v. *Harms* (1936), 66 Can. C.C. 134, at pp. 141-2; Tremeear's Criminal Code, 5th Ed., 297 and 299; *Rex* v. *Illerbrun* (1939), 73 Can. C.C. 77, at p. 79. The defence was not properly put to the jury. There is grave doubt as to how Lennox was killed. Was it the bullet or was he killed when struggling with accused? He might have caused his own death. There was nothing in the charge as to this. The mental condition of accused is of grave importance and was improperly dealt with: see *Rex* v. *West* (1925), 44 Can. C.C. 109. There are the following cases on insanity and matters incidental thereto: *Rex* v. *West* (1925), 44 Can. C.C. 109, at p. 112; *Rex* v. *Johnston* (1931), 57 Can. C.C. 132; *Rex* v. *McKenzie* (1932), 58 Can. C.C. 106, at p. 115; *Rex* v. *Finch* (1916), 12 Cr. App. R. 77; *Rex* v. *Boak* (1925), 44 Can. C.C. 218; *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77; *Rex* v. *Hewston and Goddard* (1930), 55 Can. C.C. 13, at pp. 16 and 22; *Rex* v. *McCarthy* (1940), 74 Can. C.C. 367; *Rex* v. *Warner* (1908), 1 Cr. App. R. 227; *Rex* v. *Keating* (1909), 2 Cr. App. R. 61. The judge did not warn the jury not to be influenced by the evidence of Helen Lee: see *Rex* v. *Parkin*

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(1922), 37 Can. C.C. 35; *Rex* v. *Sampson* (1934), 63 Can. C.C. 24, at pp. 26-7. On question of insanity see *Rex* v. *Brockenshire* (1931), 56 Can. C.C. 340, at p. 343; *Rex* v. *McCoskey* (1926), 47 Can. C.C. 122.

Bull, K.C. (*A. deB. McPhillips,* with him), for the Crown: As to the actual cause of death and the intention of accused when he came into the rooms, he had a gun and a sharp-pointed file and he said "if you won't live with me, you won't live with anyone else." If you have acts tending to establish motive for the commission of a crime such evidence is admissible to prove the intent and to prove the fact: see *Rex* v. *Barbour,* [1938] S.C.R. 465, at p. 469. Here the evidence tends to prove the intent and falls within the class of cases referred to by Duff, C.J. in that case: see also *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, at p. 65; *Rex* v. *Bond,* [1906] 2 K.B. 389, at p. 401; *Rex* v. *George* (1934), 49 B.C. 345, at p. 364. The trial judge was right in admitting that evidence, applying the principle to the present case. There was the presence of the accused armed with a gun and a dagger. The learned judge need not refer to provocation: see section 261, subsection 3 of the Code. Helen Lee was not accountable to the accused; she was absolutely free. After he was in her room nothing she did could be a provocative act. The case of *Rex* v. *Gross* (1913), 23 Cox, C.C. 455 and *Rex* v. *Manchuk,* [1938] S.C.R. 18 do not apply here. Helen Lee had a right to do what she did and *Rex* v. *Simpson* (1915), 11 Cr. App. R. 218 applies. As to the theory of the defence not being put by the judge, we say the judge put it carefully; he gave the essential facts as put forward by accused. The jury could find on the evidence that he should have known he was likely to cause death. The evidence and effect of insanity were carefully explained to the jury. The stabbing of Helen Lee has nothing to do with the stabbing of Lennox: see *Rex* v. *Parkin* (1922), 37 Can. C.C. 35, at p. 37; *Rex* v. *Sampson* (1934), 63 Can. C.C. 24. When he gave evidence accused practically admits his guilt. Accused brought himself within section 259 (*d*) of the Code and any imperfection in the charge as to the other facts of the case all disappear. Even if the shooting of the gun was an involuntary act, still in the cir-

cumstances it is murder. There is ground in this case for invoking section 1014 of the Code and evidence to support a conviction under section 259 (*d*).

Schultz, replied.

Cur. adv. vult.

6th March, 1945.

SLOAN, C.J.B.C.: In my view the learned trial judge misdirected the jury as to the effect of section 259 (*c*) of the Criminal Code and therefore, because I cannot say that no substantial wrong or miscarriage of justice has occurred thereby, with deference, I would allow the appeal and direct a new trial.

Having reached this conclusion, I find it unnecessary to deal with the other points raised in the able and exhaustive argument of Mr. *Schultz,* counsel for the appellant.

O'HALLORAN, J.A.: Helen Lee the estranged mistress of the appellant Harrison lived in room 501, Mayli Rooms in Vancouver. It had a communicating door opening into room 502 occupied by her friend Doris Olson. That door was open on the night Harrison armed with a knife and a 22 single shot rifle entered Helen Lee's room. In room 501 were Helen Lee and Lennox, while Doris Olson was alone in room 502 with a baby on the bed. Lennox was shot and stabbed. Helen Lee and Harrison received knife wounds. Lennox died later and the bullet was recovered from his body. Harrison was convicted of his murder.

According to the prosecution evidence Harrison forced his way into room 501 and said "everybody stand back" several times while swinging the rifle around. Nothing else was said or done according to Helen Lee before the rifle "went off and the bullet hit Mr. Lennox." Thereupon she grabbed the rifle barrel and the struggle carried the two of them into room 502, where Lennox seized Harrison from behind and the two men fell backward on Doris Olson's bed. Doris Olson had gone downstairs to telephone the police when she saw Harrison come into room 501 and heard him say "stand back." Helen Lee did not see Lennox stabbed. The prosecution also adduced evidence of threats by Harrison to cause Helen Lee serious bodly injury on at least three previous occasions. The case for the prosecution was built

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upon the previous serious threats and his entry into Helen Lee's room with a knife and cocked rifle.

Harrison gave evidence in his own defence. He denied the previous threats; he said he did not know Lennox was in the room, and did not even know him; his purpose in taking the rifle and knife was not to do Helen Lee bodily injury, but to scare her into talking to him, as she had refused to talk to him for some time past despite his repeated attempts to get her to do so. He testified that after some conversation between the three of them, he went into room 502 (Doris Olson having left) when Helen Lee cursed him, advanced on him threateningly and seized the rifle, and in the ensuing struggle with her the rifle was discharged and Lennox shot, but without any intention on his part to kill or injure Helen Lee or Lennox.

Harrison swore that after the rifle was discharged, and while he had the knife in his left hand, Lennox seized him from behind, pulled him backward on to the bed, and while holding him there, Lennox grabbed his left wrist and tried to force his hand in such a way that the knife would enter his (Harrison's) body. During that struggle Harrison said Lennox called on Helen Lee to kill him; she tried to shoot him and when the rifle did not go off (being a single shot) she clubbed him with it until it broke. Lennox was stabbed in that struggle.

An important divergence between the two stories is that Helen Lee said the rifle was discharged in room 501 before any struggle took place, while Harrison said it was discharged during his struggle with her in room 502. Both agree Lennox seized Harrison in room 502 and that this occurred after Lennox was shot. Helen Lee testified the rifle was discharged while Harrison was swinging it around in room 501, but this does not jibe with her later statement in cross-examination:

> The gun was in my face to start with, and it was pointing at me the rest of the time in the room.

The case for the prosecution and the case for the defence brought into clear issue the elements of murder comprised in Code section 259 (*c*), that is to say, whether Harrison being reckless whether death ensued or not, meant to cause Helen Lee bodily injury known to him to be likely to cause her death, and by accident or mistake killed Lennox, although he did not mean

to hurt Lennox. In truth, the case for the prosecution was largely founded upon the previous threats by Harrison to do Helen Lee bodily injury known to him to be likely to cause her death. Unfortunately, this important, if not crucial aspect of murder under section 259 (*c*) received but glancing notice. Its legal bearing upon the case was almost completely lost to sight in what is revealed as a major effort in the learned judge's charge to harmonize the evidence with the elements of murder as defined in section 259 (*d*).

Out of this situation arose two substantial points in the appellant's case, either of which when related to the other, is in my judgment sufficient to set aside the verdict: (1) Section 259 (*c*) although read to the jury, was not explained to them; and (2) the learned judge in his brief summary of its legal effect, misdirected the jury in such clear terms they could not fail to misunderstand the true meaning of murder. In the result, what they were told clearly was murder, was not murder at all, but manslaughter. Reference to a third substantial point can hardly be avoided. It concerns misdirection in respect to sections 252, subsection 2 and 259 (*d*) and arises out of a misapplication of what was said in *Rex* v. *Hughes, Petryk, Billamy, Berrigan,* [1942] S.C.R. 517.

Not much need be said on the first point involving the failure to explain section 259 (*c*) to the jury. The learned judge's charge to the jury speaks for itself. It must be read as a whole in the light of all the facts in evidence examined with due appreciation of the Code sections relating to murder, and in particular section 259 (*c*). This subsection requires careful explanation to a jury, since its phraseology tends more to obscurity than to clarity. It contains two confusing "as aforesaids" which were never explained to the jury. The true meaning of section 259 (*c*) as a whole was not explained to the jury directly or indirectly. The nature of the evidence made its application inescapable, and it ought to have been expounded to the jury in such clear terms they would understand its legal significance to the evidence before them. To illustrate what has been said of it, section 259 (*c*) reads:

> 259. Culpable homicide is murder,
>
> (*c*) if the offender means to cause death, or, being so reckless as afore-

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said, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed.

In consequence the jury in this case were not adequately instructed to enable them to pass upon the essential elements in section 259 (*c*) in order to determine whether or not the accused was guilty of murder. In particular, manslaughter was thereby effectively withdrawn from the jury in respect to section 259 (*c*). Nowhere in the charge were the jury instructed upon manslaughter in respect to section 259 (*c*), although they were so instructed in respect to section 259 (*a*) and (*b*), and in respect to section 259(*d*). In practical effect the jury were told that it was murder or nothing under section 259 (*c*). The failure to instruct the jury adequately upon section 259 (*c*), with respect, was a grave omission to direct them upon a vital point of the law of murder, directly applicable to the nature of the case for the prosecution and the case for the defence.

On the second point, the learned trial judge gave the jury the legal definitions of murder as they appear in Code section 259 (*a*), (*b*), (*c*) and (*d*). Immediately thereafter he said "now to refer back to these definitions that I have given you and to summarize them," and again quoted section 259 (*a*) and (*b*) *verbatim,* but as to section 259 (*c*) all he said before proceeding to section 259 (*d*) was:

> The third definition I gave you where he means to cause bodily injury to some person and by accident or mistake kills another, even though he did not mean to hurt the other person, that is murder.

Counsel for the appellant submitted that was a fatal misdirection, and relied on *Rex* v. *Rennie* (1939), 55 B.C. 155, where this Court directed a new trial because the learned trial judge had told the jury that "if they went up to this man's room and assaulted him and his death ensues, that of course is murder," and *cf.* also the excerpts from the judge's charge in *Graves* v. *Regem* (1913), 47 S.C.R. 568, at pp. 584-5.

It does not appear from the judgments in the *Rennie* case whether the trial judge as in this case had previously read to the jury the Code definitions of murder in section 259. But the *Rennie* case is founded not on the failure to read section 259, but on the failure to "instruct" the jury in the elements of murder under that section. Counsel for the Crown sought to minimize

the effect of the misdirection in the case at Bar by describing it as merely a summary of section 259 (*c*) which had been read to the jury *verbatim* a few moments before. In answer to the learned Chief Justice, counsel was unable to deny that it was an incorrect summary of section 259 (*c*). To my mind, the jury were far more apt to understand and be governed by that clear-cut summary of the law than by the technical legal language of section 259 (*c*) which had been previously read to them but not then or later explained to them. As already stated the meaning of that subsection is confused by two "as aforesaids" which were never explained to the jury.

The influence of the complained of misdirection in the summary of section 259 (*c*) upon the minds of the jury was in fact intensified a few lines later, when the learned judge in explaining "intent" said:

> I think I should tell you that every person is presumed to intend the reasonable consequences of his own act.

That observation tended to have a prejudicial effect upon the minds of the jury because it followed so closely after the grave misstatement of the law of murder appearing in the summary of section 259 (*c*). It had the effect of reaffirming the error of law in the summary which was the only explanation of the meaning of section 259 (*c*) which the jury ever received. It informed the jury in practical effect that, under section 259 (*c*), if they thought Harrison meant to cause bodily injury to Helen Lee and instead killed Lennox by accident or mistake, it was murder. It led the jury to believe that if Harrison killed Lennox accidentally in the course of carrying out his intention to cause bodily injury to Helen Lee, he would be presumed in law to have intended to kill Lennox. But that cannot be murder unless the jury were also instructed (which they were not) that they must be satisfied that Harrison meant to cause death, or being reckless whether death ensued or not, meant to cause such bodily injury to Helen Lee as was known to him to be likely to cause her death.

What occurred here bears no comparison with the perjury decision of *Rex* v. *De Bortoli,* 38 B.C. 388; affirmed [1927] S.C.R. 454. In that case, the learned judge in summing up stated the substance of the third count correctly, but a few moments later in giving a short recapitulation of the three counts,

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he misdescribed the substance of the third count. The counts had been read over to the jury at the opening of the trial, the evidence had been led to each count, the learned judge had stated the third count to the jury properly and had instructed the jury upon each count, before the misdescription occurred, from which it was concluded the jury could not reasonably have been misled (MACDONALD, C.J.A. at p. 391). There was not, as there is in this case, a grave error in stating the law of murder and a failure to explain the law coupled with the effective withdrawal from the jury of an important defence such as manslaughter. An example of an obvious slip in this case to which *Rex* v. *De Bortoli* applies, is the confusion between motive and intention found in the charge, upon which counsel for the appellant also relied, but I think it clear from reading the whole of the charge, that the jury could not reasonably have been misled thereby. Furthermore *Rex* v. *De Bortoli* did not involve murder in which considerations *propter favorem vitæ* naturally arise.

I agree that the language in the learned judge's charge ought not to be examined through a magnifying glass, but I agree also that where the language of the charge is so easily and naturally capable of being understood in a way prejudicial to the accused, as the language in the cited summary undoubtedly is in the light of its surrounding circumstances, a conclusion of substantial misdirection cannot be escaped. In *Bigaouette* v. *Regem,* [1927] S.C.R. 112, at p. 114 Duff, J., as he then was, speaking for the Court, quoted with approval these applicable observations of Stuart, J. in *Rex* v. *Gallagher* (1922), 37 Can. C.C. 83:

> . . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.

Counsel for the Crown submitted that the misdirection is not of any consequence, since he says, Harrison upon his own evidence in the witness box, "convicted himself" under section 259 (*d*). But I am unable to accept that as a good answer, since it fails to recognize that it may be not at all unlikely (see *Bigaouette* v. *Regem, supra*), that it was due to this very mis-

direction upon what constitutes murder, that the jury were led to convict Harrison of murder. The jury were not charged under section 259 (*d*) alone. They were charged under section 259 (*a*), (*b*), (*c*) and (*d*). And section 259 (*c*) was not withdrawn from the jury. Hence it must follow no matter how perfect the case may appear to have been under section 259 (*d*), nevertheless if there was, as here, substantial misdirection under section 259 (*c*), the verdict of murder cannot stand. In effect there was no legal trial of the real issue of murder, and *cf. Graves* v. *Regem* (1913), 47 S.C.R. 568, Anglin, J. at p. 581. Substantial misdirection arises because the jury were given under the latter subsection a wrong definition of murder, manslaughter was effectively thereby withdrawn from their consideration thereunder, and in practical effect they were led to believe it was murder or nothing under section 259 (*c*).

In any event, under Code section 1014, subsection 2, the submission of counsel for the Crown is not tenable unless it may be said that a jury properly instructed under section 259 (*c*) could not have found Harrison guilty of manslaughter under that subsection, but must necessarily have convicted him of murder thereunder. But of necessity that contemplates manslaughter could have been properly withdrawn from the jury under section 259 (*c*). It was not explained why it should be so, when it is accepted that manslaughter was properly put to the jury under section 259 (*a*), (*b*) and (*d*). Certainly it cannot be said there was no evidence of manslaughter to go to the jury under section 259 (*c*). It was for the jury to find as a fact under that subsection whether Harrison was reckless, whether death ensued or not and whether he meant to cause Helen Lee any bodily injury which was known to him to be likely to cause her death. Harrison's evidence in defence as stated at the outset was that he did not mean to cause Helen Lee any bodily injury. That was for the jury to determine upon proper instructions under section 259 (*c*) which they never received. If they had been so charged and they had believed it, as of course they could have, a verdict of manslaughter would have resulted.

Examination of that portion of the charge relating to section 259 (*d*), discloses a third substantial misdirection. It appears

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to arise from a misunderstanding of what *Rex* v. *Hughes, Petryk, Billamy, Berrigan*, [1942] S.C.R. 517 really decided. The learned trial judge charged the jury in relation to section 259 (*d*):

> If you thought that the gun was discharged by accident—even if you thought that the gun was discharged by accident, and the stabbing likewise done by accident, you might still properly find a verdict for murder, if you were satisfied that the conduct of the accused was such that he ought to have known it to be likely to induce—that is, his conduct—likely to induce such a struggle as that which actually occurred, and that somebody's death was likely to be caused thereby, and that such was the actual effect of his conduct and of the struggle.

That is almost word for word what Sir Lyman Duff, C.J., said in the *Hughes* case at pp. 522 and 524-5. But Sir Lyman Duff grounded his observations upon a combination of section 259 (*d*) and that part of section 252, subsection 2 which he quoted at p. 521 as follows, but upon which the jury were not charged in this case:

> "Homicide is culpable when it consists in the killing of any person . . . by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death. . . ."

The words ["causing" to "death"] are the foundation for what Sir Lyman Duff said in the *Hughes* case, as they were also the foundation of the judgment in *Graves* v. *Regem* (1913), 47 S.C.R. 568 (Anglin, J. at pp. 581 and 583) upon which the *Hughes* case was based. Both in the *Hughes* case and in the *Graves* case, it was the person killed whom the accused "caused by threats or fear of violence to do an act which caused his death." That is not the case here. Helen Lee who struggled with Harrison (according to the defence evidence) when the rifle was discharged, was not killed. There is no evidence whatever that Lennox, who was killed, was caused by threats or fear of violence to do any act which caused his death from the rifle bullet.

It is true there is evidence that he was so "caused" in his struggle with Harrison during which he was stabbed. But the learned judge told the jury that the medical evidence was to the effect that death was caused by a combination of shooting and stabbing. Adopting what Anglin, J. said in the *Graves* case at pp. 580-1, it is impossible to know whether the jury's verdict rested upon a combination of shooting and stabbing or upon only one of them, and if upon one only, it is impossible to know which.

Misdirection as to the essential constituents of the crime of murder upon either a combination of the two, or upon one only, would therefore as stated in the *Graves* case amount to such a substantial miscarriage of justice that the verdict could not stand, although the case had been properly presented upon its other aspect.

If the jury held the cause of death was the rifle shot, or a combination of shooting and stabbing, then the principle applied in the *Graves* and *Hughes* decisions is not applicable here, and this case must stand on its own bottom. The learned judge seems to have recognized this, for he did not read to the jury nor instruct them upon that portion of section 252, subsection 2 which was relied on in the *Hughes* case, and which I have quoted above, but sought instead to apply section 252, subsection 2 to section 259 (*d*) in another way which will now be examined. The learned judge told the jury:

> Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined.

That is part only of section 252, subsection 2 and leaves out that portion thereof which I have already quoted as the foundation of the *Graves* and *Hughes* decisions. Having said what I have just quoted, the learned judge went on immediately:

> I will direct your attention specifically to the first part of that definition. "Homicide is culpable when it consists in the killing of any person by an unlawful act."

Under section 252, subsection 2 homicide is culpable if it occurs in any of five ways (a) by an unlawful act; or (b) by an omission without lawful excuse to perform or observe any legal duty; or (c) by (a) and (b) combined; or (d) by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death; or (e) which is not relevant here. The *Graves* and *Hughes* cases come under (d) thereof which provides the groundwork for the reference to the "conduct of the accused" which is the decisive part of the *Hughes* case in the aspect of murder that case was concerned with. The learned judge, as shown above, confined the jury in this case to an "unlawful act" (which is the aforesaid (*a*) of section 252, subsection 2. The learned judge repeated this:

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Homicide is culpable when it consists in the killing of any person by an unlawful act.

Then, in the course of instructing the jury at length upon the meaning of section 259 (*d*), which reads:

259 . . . (*d*) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

and having explained to them that if the "act" therein ("does an act") is accidental or involuntary, the verdict must be manslaughter, the learned judge continued:

There are, perhaps, two unlawful acts in this case, and you may so find on the evidence, the act of shooting, and the act of the stabbing. I think the medical evidence was to the effect that death was caused by a combination of those two. The fact that there are two acts, assuming that they are both accidental, does not affect the principle that I have laid down for you, keeping in mind what I told you about the definition of culpable homicide, and keeping in mind the section [my note section 259 (*d*)] I have referred you to with regard to what is murder.

That is followed immediately by the language from the *Hughes* case cited at the introduction to this point, in which the jury is told that even if they thought that the shooting and the stabbing were accidental yet they might still properly find a verdict of murder,

if you were satisfied the conduct of the accused was such that he ought to have known it was likely to induce . . . such a struggle. . . .

The "unlawful acts" referred to in the second last quotation are the unlawful acts constituting culpable homicide (*viz.*, shooting and stabbing) as the learned trial judge has made very clear. The "conduct" to which the learned judge refers in the last quotation relates to the two "unlawful acts" in the previous quotation and both relate to the "act" in section 259 (*d*) which he mentions. The learned judge has thus identified the "act" in section 259 (*d*) with the shooting and stabbing. This is fallacious because section 259 (*d*) confines itself to "an act" which is not interchangeable with "conduct" in the sense of behaviour, as it is used in the *Hughes* case, that is to say, the previous threats and entering the room with a rifle and a knife ready for action. But a second objection is equally grave. For if the shooting and stabbing constitute "an act" within section 259 (*d*) and are found to be involuntary, and they also constitute the "conduct" to which the learned judge refers in reliance on the *Hughes* case,

then what is said in the *Hughes* case would become unintelligible because of a confusion between "conduct" and the "act" mentioned in section 259 (*d*).

The *Hughes* case depends on a distinction between "an act" under section 259 (*d*) and "conduct" under section 252, subsection 2, and I think Sir Lyman Duff's language makes that perfectly clear. The learned Chief Justice of Canada was drawing a clear-cut distinction between Hughes' involuntary act during the struggle, and his conduct prior to the struggle. The learned judge's charge does not make that distinction, and his cited observations could easily, and I think must have naturally, led the jury to believe that the "unlawful act" under section 252, subsection 2, to which he refers repeatedly, may be one and the same as the "act" (the shooting and stabbing) to which section 259 (*d*) must refer. This dilemma was occasioned by confining culpable homicide in the charge to an "unlawful act," and by failing to instruct the jury upon any other definition of culpable homicide under section 252, subsection 2 which could properly include "conduct" as it was used in the *Hughes* case.

I think this is a case where it ought to be said that if culpable homicide is to be treated as the foundation of murder in section 259, as the definitions there require, it is with respect, not sufficient to give merely one of the legal definitions of culpable homicide in section 252, subsection 2, and then pass on to an explanation of the definitions of murder in section 259 and a discussion of the facts which the jury must find in order to apply those definitions of murder. The jury ought also to be told what they must find factually in order to come to their first conclusion whether there is culpable homicide under section 252, subsection 2. If that is not done, then in a complicated case like the present, there is every danger that factual findings which extend no further in legal effect than culpable homicide, may be treated by the jury as sufficient to constitute murder.

In view of the nature of the argument addressed to us, it is in point to say that it is error, in my opinion, to extend the application of the *Hughes* case and the *Graves* case beyond their own factual scope. The facts in the *Graves* case upon which the *Hughes* case was founded appear to be briefly that, bothered by

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Graves and other noisy loiterers drinking on his lawn, who refused to leave at his request, the deceased came out of his house with a loaded gun and ordered them away. They swore at him and advanced upon him. He hit one of them over the head with the gun which was thereby discharged and the deceased received the bullet in the groin and died two days later. Graves and companions were convicted of murder charged under section 259 (*a*) and (*b*). It did not relate to section 259 (*c*). If Helen Lee (strange as it may seem, and perhaps it was also regarded strange in the *Graves* case) and not Harrison, had been convicted of the murder of Lennox, then perhaps the reasoning in the *Graves* case would be easier to apply in this case.

The character of this case compels me to add, it must be readily apparent that the constituent elements of murder comprised in section 259 (*d*) cannot be identical with those comprised in section 259 (*c*), even after allowing for application of the various definitions of culpable homicide in section 252, subsection 2. Quite apart from the manifest distinctions to be found in their language, it must be a compelling inference that Parliament, in enacting 259 (*c*) and 259 (*d*) distinctively, did not intend the two subsections to be identical in legal effect, nor that such a purpose was to be achieved, by whittling down or enlarging the meaning of apt words in either subsection or in section 252, subsection 2. Perspective consideration of this case emphasizes the view that the Code sections relating to murder stand much in need of improvement, not only in phraseology, but in recasting and defining the degrees of guilt with appropriate penalties, for what it is hoped, everyone must recognize are in fact different degrees of murder. Such a step ought to free trial judges and juries from much perplexity and eliminate the occasion for many new trials or substituted verdicts by appellate Courts.

Having reached the conclusion that the verdict of murder cannot stand, the question arises, ought we to direct a new trial or substitute a verdict of manslaughter? An appellate Court has jurisdiction under Code section 1016, subsection 2 to substitute a verdict of manslaughter for that of murder. This Court did so recently in *Rex* v. *Barilla,* 60 B.C. 511; 82 Can. C.C. 228;

[1944] 4 D.L.R. 344 and [1944] 3 W.W.R. 305, and *cf.* also *Rex* v. *Manchuk,* [1938] S.C.R. 341, at pp. 349-50. If I were satisfied there was any reasonable evidence at all upon which Harrison could have been acquitted I would unhesitatingly direct a new trial. Nor am I satisfied that if a properly-instructed jury believed Harrison's evidence, he would be inevitably convicted of murder. For the evidence indicates very strong grounds for believing (with what that belief may easily entail) that the fatal shot was fired in room 502 and not in room 501 as Helen Lee testified. However, I am convinced by the evidence, that no jury properly instructed, and not acting perversely, could reasonably have acquitted Harrison of manslaughter.

I am therefore of opinion that instead of directing a new trial, and thus compelling the accused to stand trial a second time for his life, we ought to hold, *propter favorem vitæ,* that the interests of justice have been satisfied by one unsuccessful attempt to hang him, and accordingly now substitute a verdict of manslaughter. It is to be observed that the retrial of murder cases twice and sometimes three times is not sanctioned in England, the cradle of our criminal jurisprudence.

I would substitute a verdict of manslaughter and impose a sentence of 20 years' imprisonment with hard labur.

ROBERTSON, J.A.: I agree that there should be a new trial. With deference, I think the learned judge misdirected the jury with reference to section 259 (*c*) of the Code and failed to instruct them as to a possible verdict of manslaughter under the subsection.

SIDNEY SMITH, J.A.: I have had the advantage of reading the judgment of my brother O'HALLORAN and agree that this appeal must be allowed upon the ground that the learned judge did not, in so many words, leave it open to the jury to find manslaughter under section 259 (*c*).

I think there should be a new trial.

BIRD, J.A.: In my opinion, with respect, the directions of the trial judge upon Code section 259 (*c*) had the effect of withdrawing from the consideration of the jury the possibility of a verdict of manslaughter under that subsection.

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I am unable to say that the withdrawal of that factor from the jury's consideration did not result in any substantial wrong or miscarriage in view of the nature of the case presented both by the prosecution as well as the defence.

I would allow the appeal and direct a new trial.

Appeal allowed; new trial ordered; O'Halloran, J.A. would substitute a verdict of manslaughter.

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Jan. 22, 23;
March 6.

PANOSUK v. McQUARRIE AND McQUARRIE.

Negligence—Automobile in collision with bicycle—Conflict of evidence—Findings of trial judge—Damages.

The Pacific Highway in the municipality of Surrey runs north and south. There are two pavements 18 feet wide each with a gravel strip six feet wide between them, the east pavement being for north-bound traffic and the west pavement for south-bound traffic. On the west side of the westerly pavement is a gravel shoulder. About 10 a.m. on the 6th of June, 1942, the plaintiff says he was travelling south on the shoulder on the west side of the westerly pavement intending to turn east across the pavement at a point (not an intersection) opposite his home which was on the east side of the highway, that when about 94 paces from the point where he intended to turn he held out his left hand and continued to do so until after he turned. The defendant *G. R. McQuarrie*, who was driving his co-defendant's automobile in a southerly direction behind the plaintiff, says he did not see the plaintiff giving any signal by holding out his hand and when the plaintiff suddenly turned across the pavement it was too late to stop and the plaintiff ran into the right side of his car at the rear part of the door. The plaintiff's evidence was corroborated by a girl who lived on the east side of the highway. She said she saw the plaintiff making the turn and saw his hand out. The plaintiff's evidence and that of the girl witness was accepted by the trial judge who found in favour of the plaintiff.

Held, on appeal, affirming the decision of COADY, J. (BIRD, J.A. dissenting), that the learned judge made a finding of credibility in favour of the plaintiff and the soundness of the finding is not denied by anything which the record reveals.

Kasky v. *Senich*, [1939] 3 D.L.R. 632, applied.

APPEAL by defendants from the decision of COADY, J. of the 5th of June, 1944, in an action that arose out of an auto-

mobile accident at about 10 a.m. on the 6th of June, 1942, on the Pacific Highway in the municipality of Surrey. It was a clear day and not raining. The Pacific Highway runs north and south and is straight and level for one mile both north and south of where the accident occurred. There is a strip of pavement 18 feet wide on the west side for south-bound traffic divided into two traffic lanes by a yellow line running down the middle. Immediately to the east of this 18-foot pavement is a gravel strip six feet wide. Immediately to the east of the gravel strip is another paved road 18 feet wide for north-bound traffic with a yellow line running down the middle. At the westerly edge of the westerly strip of pavement is a gravel shoulder. The plaintiff was riding his bicycle in a southerly direction. He says he was riding on said gravel shoulder. The defendant *G. R. McQuarrie,* who was driving his co-defendant's automobile in a southerly direction behind the plaintiff, says the plaintiff was riding his bicycle on the pavement. At a point other than an intersection the plaintiff made a left turn across the pavement easterly and ran into the right side of the automobile at the rear part of the door. The defence was that the plaintiff turned to his left without giving any signal when the automobile was so close that a collision could not be avoided. The plaintiff says he gave a signal, by holding out his left hand continually, for 94 paces before reaching the point of impact. This *G. R. McQuarrie* denies. The learned trial judge accepted the plaintiff's evidence and held that *G. R. McQuarrie* was negligent in failing to see the bicycle; but also held the plaintiff was partly to blame for not looking behind him for approaching traffic. He found the defendant three-quarters to blame for the accident and the plaintiff one-quarter to blame, awarding the plaintiff $5,124, being 75 per cent. of the total damages.

The appeal was argued at Victoria on the 22nd and 23rd of January, 1945, before O'Halloran, Sidney Smith and Bird, J.J.A.

Tysoe, for appellants: The case turns on whether or not the plaintiff made a proper signal before turning to his left across the highway and it was found by the trial judge that *McQuarrie* failed to observe the signal. The plaintiff has to prove: (a) That

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he gave a proper signal and (b) that the plaintiff was keeping a proper look-out for vehicles approaching from behind him. The learned judge accepted the plaintiff's evidence as to the signal because of the evidence of Nina Somolenko, but her evidence does not assist in determining whether a signal was given by the plaintiff before he turned, as she did not see him until he was about to turn: *Western Motors Ltd* v. *Gilfoy & Son* (1915), 9 W.W.R. 770, at p. 775. The plaintiff does not deny that *McQuarrie* sounded his horn as stated by him and his passenger as he approached the plaintiff. For the principles applicable here see *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462. Nina Somolenko's evidence does not corroborate the plaintiff's evidence: see *Clarke* v. *Babbitt,* [1927] S.C.R. 148, at p. 157. Reliance cannot be placed upon the plaintiff's evidence as there is doubt as to whether he has any real memory of the facts of the accident. The plaintiff's failure to see the defendant's car when so close behind amounts to gross negligence.

L. St. M. Du Moulin, for respondent: It was found as a fact that the plaintiff had his hand out for some time before making the turn. The girl Nina in fact saw the plaintiff from 25 or 30 feet before he was struck and he had his hand out all the time. She did not hear the defendant's horn. Generally speaking when one car runs into another from behind the driver must satisfy the Court the collision was not owing to his negligence: see *Beaumont* v. *Ruddy,* [1932] 3 D.L.R. 75, at p. 77; *Irvine* v. *Mussallem* (1935), 50 B.C. 72. As to a bicycle being near the kerb see *Ottawa Brick & Terra Cotta Co.* v. *Marsh,* [1940] 2 D.L.R. 417. In case of conflicting evidence, the findings of fact by the learned trial judge should be accepted: see *"Hontestroom" (Owners)* v. *"Sagaporack" (Owners)* (1926), 95 L.J. P. 152, at p. 154; *Wood and Fraser* v. *Paget* (1938), 53 B.C. 125, at p. 132; *Ingram* v. *United Automobile Services, Ltd.,* [1943] 2 All E.R. 71, at p. 72; *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.* (1927), 39 B.C. 241, at pp. 245-6; *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304, at p. 307.

Tysoe, replied

Cur. adv. vult.

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

SIDNEY SMITH, J.A.: About 10 a.m. on the 6th of June, 1942, the plaintiff was riding his bicycle in a southerly direction on the Trans-Canada Highway, in the municipality of Surrey. The defendant was driving an automobile in the same direction and overtaking the plaintiff. The plaintiff was going to his home which is on the east side of the highway at the point where the collision occurred. To reach his home it was necessary for the plaintiff to make a left-hand turn across the highway from west to east. The plaintiff says, and his evidence on this point has been accepted by the learned trial judge, that when he was about 94 paces from the point where he intended to turn to cross the highway he put his left hand out to signal for a left-hand turn and that he kept it out until the moment of collision. The defendant denies that the plaintiff had his hand out at any time before he made the turn, but is unable to say whether or not it was out during the turn. Such is the narrow issue of this case. The judge accepted the plaintiff's evidence, but found him 25 per cent. to blame for not having seen the defendant's car coming up behind him. He found the defendant 75 per cent. to blame.

The defendants base their appeal on the ground that the judge made no finding on credibility and founded his acceptance of the plaintiff's evidence upon the mistaken belief that his evidence was corroborated by an independent witness, Nina Somolenko.

In his reasons the learned judge says this:

> On the point as to whether the plaintiff put out his hand to indicate his intention to turn, we have the evidence of an independent witness, Nina Somolenko, whose evidence I accept. She saw the plaintiff making the turn and saw his hand out. This corroborates the evidence of the plaintiff to the extent at least that he had his hand out when making the turn, and I have no hesitation in accepting the evidence of the plaintiff that he had his hand out for some time before commencing his turn. Unfortunately the defendant driver did not see it, and was negligent in this regard.

After anxious consideration I find myself unable to say with that degree of conviction mentioned in *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462 that the learned trial judge misconceived the evidence on this point. I doubt if the language used by the learned judge means any more

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than this—that the evidence of Nina Somolenko was more consistent with the evidence of the plaintiff than with what the defendant said, and accordingly in balancing the probabilities in the narrow field which the case presented, he felt himself driven by even slight support of the plaintiff's testimony to accept the latter's evidence. In other words, I am of opinion the learned judge did make a finding of credibility in favour of the plaintiff, and I conclude further, that the soundness of the finding is not denied by anything which the record reveals, and *cf. Kasky* v. *Senich,* [1939] 3 D.L.R. 632, at p. 633.

Having come to this conclusion I have no alternative but to dismiss the appeal.

BIRD, J.A.: The plaintiff (respondent) when riding a bicycle in a southerly direction on the Pacific Highway at about 10 a.m. on June 6th, 1942, sustained serious personal injuries when run down by a motor-car driven by the defendant appellant *George R. McQuarrie,* then proceeding in the same direction. The highway is straight and level for about one mile both north and south of the point where the accident occurred.

At and immediately preceding the time of the accident there was not within that level stretch of highway anything to obscure the view of either of the parties.

The accident occurred while the plaintiff was engaged in making a left turn from the extreme right or west side of the highway, at a point on the highway where there was not any intersecting or connecting road.

The plaintiff says that he signalled his intention to turn to the left by extending his arm when he reached a point on the highway 94 paces north of the place where the turn was made, and continued that signal thereafter until the accident occurred. He says that before turning he looked to the rear and saw nothing. The defendant, on the other hand, said that while overtaking the plaintiff, defendant watched him constantly from the time when the car reached a point 400 feet behind him and thereafter until the plaintiff made the turn, during which period he did not give any indication of an intention to change course. Defendant says that he sounded his horn on two occasions when the car was within

approximately 100 feet of the plaintiff. The fact that defendant sounded his horn on two occasions was confirmed by a passenger in defendant's car and is not denied by the plaintiff.

Nina Somolenko, a bystander, called as a witness for the plaintiff, said that she saw the plaintiff when he was in the act of turning to the left and that the defendant's car then was 20 to 30 feet from the plaintiff who had his arm extended and kept it so until the point of impact. Her evidence relating to the giving of a signal at this time is not contradicted by the defendant who said that after the plaintiff turned he was engaged in an effort to manœuvre the car so as to avoid a collision and did not observe whether or not the plaintiff gave a hand signal when in the act of turning.

The learned trial judge found both parties guilty of negligence, the plaintiff in failing to keep an adequate look-out to his rear before making the turn, and the defendant in failing to see "that the plaintiff's hand was out to indicate his intention to turn" and to reduce the speed of his car. He accordingly assessed the respective degrees of fault at 25 per cent. by the plaintiff and 75 per cent. by the defendant.

Counsel for the appellant attacks the finding by the learned trial judge "that the plaintiff gave a hand signal for some time prior to commencing the turn" upon the ground that this finding was based upon a misconception of the evidence of the witness Somolenko, in that the language used by the trial judge shows that he found in the evidence of Somolenko some corroboration of the evidence of the plaintiff as to the giving of a hand signal prior to the turn, whereas, as counsel submits, no such corroboration can be found in Somolenko's evidence. He therefore urges that in the absence of corroboration of the plaintiff's evidence on that point and in view of the defendant's denial that the plaintiff gave any warning of his intention to turn before doing so, the matter was left as oath against oath. He submits further that since no finding has been made as to the relative credibility of plaintiff and defendant the plaintiff must be held to have failed to discharge the burden of proof which was upon him, namely, that the defendant was guilty of an act of negligence which caused the accident.

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In his reasons for judgment the trial judge refers to the contradiction between the evidence of the plaintiff and of the defendant in these words:

> The plaintiff says that he had put out his hand to indicate his intention to turn across the highway and had his hand out for a distance of what he terms 94 paces before starting to make the turn, and that his turn was at first a very gradual one. The defendant driver denies that the plaintiff put his hand out, as stated, or put his hand out at all, but that the plaintiff turned abruptly, without notice or without warning of any kind.

It is to be observed that the trial judge's comment that the defendant denied that the plaintiff "put his hand out at all" is not supported by the evidence of the defendant.

He then makes the following comment upon the evidence relating to the hand signal incident: [already set out in the judgment of SIDNEY SMITH, J.A.].

I take it from this language that the learned trial judge found in Somolenko's evidence some corroboration for the plaintiff's statement in regard to the hand-signal incident upon a point in which the learned judge believed, I think erroneously as previously indicated, that there was conflict between the evidence of plaintiff and defendant. I am, with the greatest respect, unable to find any such corroboration.

I do not find in Somolenko's evidence anything which touches upon the giving of a hand signal by the plaintiff prior to making the turn. Her evidence relates solely to a signal given when plaintiff was engaged in turning, that is to say, after he had turned. She says:

> I noticed him . . . with his hand stretched out.
>
> What part of the road was he on? Well, he had started turning in. He was half way over. . . .

Evidence that a signal was given subsequent to the turn cannot be taken as corroboration of the giving of a signal at the only time in my opinion when one could effectively or usefully be given, *i.e.*, at a time when the giving of the signal would indicate to others on the highway an intention to turn.

It appears to me that the trial judge's acceptance of the plaintiff's evidence "that he had his hand out before making the turn" was founded upon or influenced by his belief that corroboration of the plaintiff's evidence was to be found in the evidence of Somolenko. Consequently the language used, in my opinion,

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is not to be interpreted as a finding on the relative credibility of plaintiff and defendant. Then there being no corroboration of the plaintiff's evidence and no finding on credibility, determination of the cause of the collision rests upon the testimony of the plaintiff on the one hand and that of the defendant on the other, which is in direct conflict upon all material points.

In those circumstances the plaintiff must be held to have failed to establish that the effective cause of the accident was the negligence of the defendant, the burden of proof of which was upon him.

I would therefore, with respect to contrary opinion, allow the appeal and dismiss the action.

Appeal dismissed, Bird, J.A. dissenting.

Solicitors for appellants: *Craig & Tysoe.*
Solicitor for respondent: *Hugh J. McGivern.*

STOCK EXCHANGE BUILDING CORPORATION LIMITED v. CITY OF VANCOUVER.

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April 3, 5.

Taxes—Assessment of property—Valuation—Board of Assessment Appeals—Appeal from—Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 39—B.C. Stats. 1931, Cap. 78, Sec. 8 (15)—B.C. Stats. 1940, Cap. 61.

The Stock Exchange Building in Vancouver was built in 1929 at a cost of $852,086.82, the land costing $300,000. The property was subject to a first mortgage bond issue of $534,000, carrying six per cent. interest. The earnings from the property were not sufficient to pay the interest on the bond issue and after suffering a loss of $300,000 in interest alone the bondholders took over the property and in 1944 sold it for $412,166.82. In the year 1945 the building was assessed at $570,000 and the land at $87,000. An appeal to the Court of Revision on the ground that the assessment was in excess of the actual cash value within the meaning of section 39 of the Vancouver Incorporation Act, 1921, was dismissed, and a further appeal to the Vancouver Board of Assessment Appeals was dismissed. On appeal to the Court of Appeal:—

Held, that in the circumstances upon the evidence the sum of $412,166.82 most accurately reflects the actual cash value of the property in the year 1945 within the meaning of section 39 of the Vancouver Incorporation Act, 1921.

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By section 56 (16) of that Act as amended by chapter 61 of 1940 it is provided that on any appeal taken to this Court "the assessment shall not be reduced in an amount greater than ten *per centum* from its assessment for the next preceding year." The assessment for 1945 was six per cent. less than the 1944 assessment. The Court therefore cannot reduce the 1945 assessment by more than four per cent.

APPEAL by plaintiff from the decision of the Board of Assessment Appeals of the 5th of March, 1945, in respect of the assessment of lots 11, 12 and 13, block 21, district lot 541, city of Vancouver for the year 1945. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Vancouver on the 3rd of April, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Clark, K.C., for appellant: The appeal is taken under section 56 (15) of the Vancouver Incorporation Act, 1921, as amended in 1931. Section 39 is in question. The assessor ignored elementary principles in assessing the property: (1) He gave too much weight to the cost of a new building; (2) his comparison between this and other properties of a similar type and site was improper; (3) failing to give proper consideration to capitalization of income on basis of earnings and assessed value; (4) he should have given consideration to the past record of earnings as shown in Exhibit 1 (the statement relative to revenues and expenses); (5) he erred in basing his assessment upon which he considered the building should earn in the future as distinguished from the past and present; (6) his method of computing net revenue is erroneous (a) making no allowances for vacancies; (b) incorrect method of estimating defalcations; (7) there has been discrimination against this building when compared with other buildings; (8) there has been discrimination against the land compared with the assessment of land similarly situated; (9) no attention was paid to the sale price; (10) no attention was paid to sales of other similar property. Under section 56 (11) he had no right to compare this with other buildings. The assessor's reference to another building is discrimination. A creditor who is offered a building for $500,000 would look to the record of the building to see the average of earnings; he would put himself in the position of a purchaser. The assessor does not

give allowance for vacancies. He is speculating on what the building may earn in the future. Ten per cent. is a fair estimate for vacancies. The Standard Bank Building has 50 per cent. more space and is assessed at $422,000 and the Stock Exchange at $470,000. The three lots on the opposite side of Pender Street are assessed at 15 per cent. less than the Stock Exchange lots. As to value for the purpose of taxation see *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361; *In re Vancouver Incorporation Act* (1902-03), 9 B.C. 373 and 495; *Pearce* v. *Calgary*, [1915] 9 W.W.R. 668, at p. 672. As to "actual value" see *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264; *In re Municipal Act and Dixon* (1940), 55 B.C. 546, at p. 551; *In re Mackenzie, Mann & Co. Assessment* (1915), 22 B.C. 15; *Re Vancouver Incorporation Act and C.P.R.*, [1930] 4 D.L.R. 80. On the word "value" see *Montreal Island Power Co.* v. *The Town of Laval des Rapides*, [1935] S.C.R. 304. He cannot look into the future in assessing: see *In re Municipal Act. In re Hudson's Bay Company's Assessment*, [1942] 2 W.W.R. 1. The earning value is the main point: see *In re Winnipeg Charter, 1940. In re Winnipeg (City) and T. Eaton Realty Co. Ltd.*, [1944] 2 W.W.R. 541.

McTaggart, K.C. (*Lord*, with him), for respondent: The value of rateable property is estimated as set out in section 39 of the Vancouver Incorporation Act, 1921. The Stock Exchange Building was assessed at $470,000. There is $600,000 insurance on the building and there had been an offer by the Dominion Government of $800,000 for the property. In *In re Charleson Assessment* (1915), 21 B.C. 281, it was held a *mandamus* would not lie unless the Court was satisfied the Board acted without *bona fides*: see also *Re The Bell Telephone Co. and City of Hamilton* (1898), 25 A.R. 351; *Re Queenston Heights Bridge Assessment* (1901), 1 O.L.R. 114; *In re Mackenzie, Mann & Co. Assessment* (1915), 22 B.C. 15, at p. 16; *Dreifus* v. *Royds* (1920), 61 S.C.R. 326, at p. 327; (1922), 64 S.C.R. 346.

Clark, replied.

Cur. adv. vult.

On the 5th of April, 1945, the judgment of the Court was delivered by

O'HALLORAN, J.A.: This appeal involves the interpretation

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of section 39 of the Vancouver Incorporation Act, 1921, and amending Acts and its application to the facts of this case. The section reads:

> All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

The Stock Exchange Building, a commercial office building in Vancouver, was built in 1929 at a cost of $852,086.82 upon land acquired for $300,000; a total stated cost of $1,152,086.82. It was assessed for the year 1945 at $470,000 for the building and $87,600 for the land, a total of $557,600. An appeal to the Court of Revision on the ground that assessment was in excess of the actual cash value within the meaning of section 39, *supra,* was dismissed. A further appeal to the Vancouver Board of Assessment Appeals consisting of a lawyer as chairman and two real-estate agents, was also dismissed (the chairman dissenting), but without stated reasons. The present appeal is taken therefrom to this Court under section 56 (15) of the Vancouver Incorporation Act, 1921, *supra.*

The building was completed subject to a first mortgage bond issue of $534,400, carrying six per cent. interest, but has not been able to earn interest on the mortgage from the time it was built. The bondholders have suffered a loss of some $300,000 in interest, and have had to take over the entire property. They sold it in 1944 for the equivalent of $412,166.82 although as stated its cost in 1929 was $1,152,086.82. This represents a capital loss of $739,980, plus loss of interest to the bondholders of some $300,000 additional.

The true interpretation of section 39 depends upon the meaning to be attached to the words

> actual cash value as it would be appraised in payment of a just debt from a solvent debtor.

The additional descriptive words make it plain that "actual cash value" does not include a forced sale, a speculative sale price, or a sale at an excessively high or at an unduly low price. "Actual cash value" clearly contemplates the value represented by the price obtainable in a sale by a willing vendor to a willing purchaser both alive to commercial realities, for cash and not upon extended or unsecured terms. Compare *Grampian Realties Co.*

v. *Montreal East,* [1932] 1 D.L.R. 705. To my mind it relates to *bona-fide* investment as distinct from speculation. So described and understood "actual cash value" in section 39 reflects nothing more or less than "actual cash value," "fair market value" or "actual value," the latter term being employed in the general Municipal Act, section 223 (1), Cap. 199, R.S.B.C. 1936.

These phrases unless expanded or restricted by the context "all mean the same thing, and are designed to effect the same purpose." So said Miller, J., speaking for the majoritiy of the Supreme Court of the United States in *Cummings* v. *National Bank* (1879), 101 U.S. 153, at p. 162; 25 L. Ed. 903, at 906, which was quoted with approval by Sir Lyman Duff, C.J. in *Montreal Island Power Co.* v. *The Town of Laval des Rapides,* [1935] S.C.R. 304, at p. 306. In the latter case Sir Lyman Duff, at p. 305, speaking of "actual value," quoted also from Lord MacLaren in *Lord Advocate* v. *Earl of Home* (1891), 28 Sc. L.R. 289, at p. 293, that value

> means exchangeable value—the price which the subject will bring when exposed to the test of competition.

The learned Chief Justice then added that in Canada and generally throughout the United States the Courts have accepted "exchangeable value" as the most practical indication of the value of property for taxation purposes. In my judgment that expresses concisely an authoritative summation of the reasoning to be found in leading decisions frequently quoted, such as *Pearce* v. *Calgary* (1915), 9 W.W.R. 668 and *Dreifus* v. *Royds* (1920), 61 S.C.R. 326, and also (1922), 64 S.C.R. 346. Both these cases concerned unproductive or non-producing lands, for which there was apparently no market at that time.

Turning directly to the problem of ascertaining the "actual cash value" of a commercial office building as reflected in a sale by a willing vendor to a willing purchaser, that price is necessarily subject to keen and shrewd negotiation. How accurately the price ultimately agreed upon may represent the "actual cash value" does not depend upon the superior adroitness of one or other of the parties in obtaining a high or a low price, but it is governed basically by (a) past or present sales and *bona-fide* offers for the property as well as *bona-fide* sales of or offers to

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purchase surrounding comparable properties and by (b) the revenue-producing record of the property over a period of years in terms of net income return upon reasonable investment and after adequate provision for depreciation, and (c) present value of prospects within the immediate future.

The foregoing considerations may be absent in whole or in part in some cases, and then other *indicia* may have to be sought. For example, in *The Bishop of Victoria* v. *The City of Victoria* (1933), 47 B.C. 264 (The St. Louis College case) the school had no ascertainable present market value and was not a commercial building; and see also *Pearce* v. *Calgary, supra,* at p. 672. In the *Dunsmuir* case (1898), 8 B.C. 361 the house was very costly and it was said that no one was likely to accept it in payment of a debt. Again in *In re Vancouver Incorporation Act* (1903), 9 B.C. 495 the building was a very large stone residence and there was then no other house even approximately like it and *cf.* also *Grampian Realties Co.* v. *Montreal East, supra.*

But in the case of the commercial office building now under review we have unchallenged evidence the property was actually sold in 1944 for $412,166.82 following advertisements by the bondholders' committee in Vancouver, Toronto and Winnipeg. We have also unchallenged evidence extending back to 1932 in the form of audited statements prepared by Price, Waterhouse & Company, which show beyond question that if that sum is now accepted as the capitalized investment after depreciation the net income return thereon after provision for depreciation would be unattractively low for an investment of that character. The present value of future prospects—which for assessment purposes are necessarily limited to one year in the future (*cf. Grierson* v. *City of Edmonton* (1917), 58 S.C.R. 13)—gives no hopeful promise of change. The percentage of occupancy cannot be increased for it was 100 per cent. in 1944. The rentals are frozen. What future changes may be discernible tend more to the prospect of an increase in operating expense rather than increase in net revenue.

In the circumstances, upon the evidence before this Court, it is my opinion that the sum of $412,166.85 most accurately reflects the actual cash value of the appellant's property for the

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year 1945, within the meaning of section 39 of the Vancouver Incorporation Act, 1921. However, by section 56 (16) of that statute as amended by Cap. 61 of 1940, it is provided that on any appeal taken to this Court

> the assessment shall not be reduced in an amount greater than ten *per centum* from its assessment for the next preceding year.

As it was agreed by counsel that the assessment for 1945 was six per cent. less than the 1944 assessment, we cannot reduce the 1945 assessment by more than four per cent.

Nothing decided herein is to be interpreted as passing upon the question of depreciation, which of course is an influential element in determining the true net income return. The proper rate of depreciation is governed by many factors including the life, type and design of construction and tendency toward obsolescence of the particular building. The Court has not sufficient evidence before it on this appeal to make any judicial determination regarding the adequacy of the depreciation in this instance.

The 1945 assessment is reduced by four per cent. The statute does not permit more in the circumstances of this case. The appeal is allowed accordingly with costs.

Appeal allowed.

Solicitor for appellant: *J. A. Clark.*
Solicitor for respondent: *Arthur E. Lord.*

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April 13, 14; *July* 12; *Nov.* 10, 13, 14, 15, 16, 17.

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March 6.

Real property—Conveyance—Rights reserved to the grantor—"Interest in land"—"Easement"—Whether registrable under Land Registry Act—R.S.B.C. 1936, Cap. 140, Secs. 148 and 163.

The city of Vancouver sold to John Harrie and his wife certain lands in the city adjoining 7th Avenue, which is a public highway and under section 319 of the charter is vested in fee simple in the city of Vancouver. It was part of the bargain between the parties that the Harries: (a) Would not at any time require support for the said lands from any lands of the city adjoining the same at any time used for purposes of highway, school, park or any public place and would release the city

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from all liability for payment of compensation or damage for failure of such support; (b) that in the event of excavation at any time of the adjoining lands of the city, the Harries would take all steps necessary to prevent obstruction upon the lands of the city by earth or material falling thereon and (c) that in the event of failure of the Harries in this respect, the city would have the right to enter upon the lands and take such steps to remedy such failure and the costs thereof should be paid by the Harries and should be a charge upon the lands until paid, these terms to be binding upon the city, its successors and assigns and upon the Harries, their heirs, executors, administrators or assigns. Upon the city applying for registration by way of easement and indemnity the rights created in its favour under the terms of said conveyance claiming they were registrable under section 163 of the Land Registry Act as a charge or under section 148 of the Act by way of endorsement on the certificate of title to the Harries, the registrar refused registration under both sections on the ground that the aforesaid rights were not registrable. On petition by the city that the registrar be ordered to effect registration of the rights reserved to the grantor under the conveyance as a charge by way of easement and indemnity by endorsing the same upon the certificate of title in accordance with the provisions of sections 148 and 163 of the Land Registry Act, it was held that the question here is whether the language used in the conveyance contains a reservation of an interest in land. The language used in the conveyance in the light of the very wide language of section 148 as indicating what may be an interest in land and registrable as such clearly shows that the city has under the conveyance an interest in land and is entitled to registration under section 148.

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

Per SLOAN, C.J.B.C. and SIDNEY SMITH, J.A.: The appellant's argument was directed to showing that the rights created in favour of the city did not comprise an easement and was therefore not registrable. The authorities are not easy to reconcile, but the question whether or not an easement was created in the circumstances mentioned must be decided in the affirmative in view of the cases of *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348 and *North British Railway* v. *Park Yard Company*, [1898] A.C. 643; also in view of the decision in *Matheson* v. *Thynne* (1926), 36 B.C. 376 and the appeal should be dismissed.

APPEAL by the Registrar, Vancouver Land Registration District, from the decision of COADY, J. on a petition by the city of Vancouver, heard by him at Vancouver on the 13th and 14th of April, 1944, praying that the registrar be ordered and directed to effect registration of the estates or interests remaining in and the rights reserved to the grantor or imposed or created under conveyance made by the city of February 3rd, 1944, in favour of John Harrie and Mrs. Harrie by endorsing same upon the cer-

tificate of title issued to the grantees in accordance with the provisions of section 148 of the Land Registry Act or under section 163 of that Act. In the said conveyance the following are the provisions which the city asked to be recognized by the registrar and registered as a charge against the lands conveyed:

As part of the consideration hereof, the grantees with intent to bind all persons in whom the lands agreed to be sold hereunder (hereinafter called "the lands aforesaid"), or any interest therein, shall for the time being be vested, but not so that the grantees shall be personally liable for breach of any of the terms, covenants and conditions hereof after the grantees have wholly parted with their interest in the lands aforesaid hereby covenant and agree with, and do hereby grant to the grantor, its successors and assigns, rights, liberties, easements, restrictions, and charges against the lands aforesaid to the like effect as follows:—

(a) That the grantees, their heirs, executors, administrators, and assigns, notwithstanding any law or statute in that behalf, will not at any time require support for the lands aforesaid, or for any portion of the soil thereof, or for any building or structure at any time erected thereon, from any lands of the grantor adjoining the same at any time used for highway purposes, or for the purpose of any school or park, or any public place as defined by the "Vancouver Incorporation Act, 1921," whether by way of the construction of a bulkhead or retaining-wall or otherwise howsoever; and the grantees, their heirs, executors, administrators, and assigns, hereby releases and for ever discharges the grantor, its successors and assigns, from all liability for payment of compensation or damage for any failure of such support;

(b) That in the event of the excavation at any time hereafter of the said adjoining lands of the grantor, or any portion thereof for any of the purposes aforesaid, the grantees, their heirs, executors, administrators, and assigns, will take all steps upon the lands aforesaid, necessary at any time to prevent obstruction of or encroachment upon the said lands of the grantor by earth or other material falling thereon from the lands aforesaid;

(c) That in the event of failure of the grantees, their heirs, executors, administrators, or assigns, to perform or observe the terms, covenants, and conditions aforesaid, or any of them, the grantor, its successors and assigns, shall be at all times entitled to enter and take all steps upon the lands aforesaid, or on the said lands of the grantor which, in the opinion of the city engineer, are necessary to remedy such failure; and all costs, charges, and expenses thereby incurred, and all damages sustained by reason of such failure, shall be paid to the grantor, its successors and assigns, by the grantees, their heirs, executors, administrators, and assigns, and, until paid, the same shall be and remain at all times charged against the lands aforesaid, and all the interest of the grantees, their heirs, executors, administrators, and assigns, therein and thereto.

Upon registration of the conveyance the registrar, by notice dated March 10th, 1944, refused to endorse upon the new certificate of title the estates or interests reserved to the grantor in the

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said conveyance on the ground that these were not registrable. Thereupon the city made formal application for registration pursuant to section 163 of the Land Registry Act of these estates or interests as a charge by way of easement and indemnity and by notice of February 17th, 1944, the registrar again declined to register for the reason already given. It was held on the trial that the language used in the conveyance contains a reservation of an interest in land under section 148 of the Land Registry Act and the city is entitled to have the certificate of title issued to Harrie endorsed as provided for in said section.

J. B. Roberts, for petitioner.
Thomas E. Wilson, for the Registrar.

Cur. adv. vult.

12th July, 1944.

COADY, J.: This is a petition by the city of Vancouver praying that the Registrar of the Vancouver Land Registration District be ordered and directed to effect registration of the estates or interests remaining in and the rights reserved to the grantor or imposed or created under conveyance, made by the said city, dated 3rd February, 1944, in favour of John Harrie and Bernadett Maria Harrie, by endorsing the same upon the certificate of title issued to the grantees, in accordance with the provisions of section 148 of the Land Registry Act or under section 163 of that Act.

In the said conveyance the following are the provisions which the city now asks to be recognized by the registrar and registered as a charge against the lands conveyed: [already set out in statement].

Upon registration of the conveyance the registrar by notice dated March 10th, 1944, refused to endorse upon the new certificate of title the estates or interests reserved to the grantor in the said conveyance, on the ground that these were not registrable. Thereupon the city made formal application for registration, pursuant to section 163 of the Land Registry Act, of these estates or interests as a charge by way of easement and indemnity, and by notice dated 17th February, 1944, the registrar again declined to register for the reason already given.

The registrar submits, *inter alia,* that the covenants contained in the conveyance, and which the city claims registration as a charge against the lands, are personal, and give no interest in land, and cannot therefore be registered as a charge either under section 148 or section 163; that in any event the city is not the registered owner of any land which would be benefited by the covenant and that the lands to be benefited must be clearly described in the conveyance; that these covenants constitute at most a licence and are not registrable.

Section 2, subsection (1) of the Land Registry Act provides as follows:

2. (1.) In this Act, unless the context otherwise requires:—

"Charge" means any estate less than the fee-simple, and shall include any equitable interest in land, and any encumbrance upon land, . . .

Section 163 of the same Act provides for the registration of a charge upon application made therefor and for the endorsement of a memorandum thereof on the register and on the duplicate certificate of title if produced.

Section 148 provides as follows:

Upon any application to register a person as owner in fee-simple under an instrument whereunder any estate or interest in the land granted remains in the grantor, or whereunder or whereby any restrictive covenant is entered into by the grantee for the benefit of other land registered in the name of the grantor, or any condition, exception, or reservation, easement, right-of-way, or right of any kind soever in or upon the land covered by the application is imposed, reserved, or created, and which apart from this section could be registered as a charge pursuant to the provisions of section 163, the existing certificate of title shall be cancelled or a memorandum made thereon in the manner provided by section 157, and the estate or interest remaining in and the rights reserved to the grantor or imposed or created shall be endorsed upon the new certificate as a charge, and such endorsement shall have the same effect as if the grantor had applied for and obtained registration of a charge in respect thereof.

It is clear, it seems to me, from section 148 that no endorsement can be made by the registrar on the new certificate of title unless it relates to an interest in land. In other words, nothing less than an interest in land can be recognized under that section.

On analysis, the first part of this section 148 may be divided into three parts: The first is:

Upon any application to register a person as owner in fee-simple under an instrument whereunder any estate or interest in the land granted remains in the grantor . . . , the existing certificate of title shall be cancelled. . . . .

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The grantor under this part is entitled to registration of the estate or interest remaining in him whether other lands are registered in the name of the grantor or not.

The second part is:

> Upon any application to register a person as owner in fee-simple under an instrument . . . whereunder or whereby any restrictive covenant is entered into by the grantee for the benefit of other land registered in the name of the grantor, . . . , the existing certificate of title . . .

clearly indicates that the restrictive covenant there referred to must be for the benefit of other land registered in the name of the grantor. The city in the present case cannot rely on this part since it is not registered as the owner of any land to be so benefited.

The third part is:

> Upon any application to register a person as owner in fee-simple under an instrument whereunder . . . any condition, exception or reservation, easement, right-of-way, or right of any kind soever in or upon the land covered by the application is imposed, reserved, or created, . . . , the existing certificate of title shall be . . .

Under this part it is not necessary that the condition, exception, etc., be imposed, reserved or created for the benefit of other land registered in the name of the grantor. It is only under part two of section 148 that it is necessary that the grantor be the registered owner of other land in order to have the restriction endorsed on the title. That is not required under part one or part two.

Section 148, it will be noticed, provides that the estate or interest shall be marked on the certificate of title as a charge, and it can only be a charge, which, apart from section 148, could be registrable under section 163. The language of section 148 amplifies the definition of "charge" given in the definition section to which I have referred. Under part one of section 148, as I have for analysis divided it, it is described as "any estate or interest in the land granted remaining in the grantor." Under part three it is

> any condition, exception, or reservation, easement, right-of-way, or right of any kind soever in or upon the land covered by the application, . . . imposed, reserved or created.

All of these are entitled to registration if the language of the instrument creating them is sufficient for the purpose of creating or charging an interest in land. Section 148 only provides for an alternative method of registration of charges, to that provided

in section 163, so that when registration of the fee is completed in the name of the grantee whatever restrictions or conditions, etc., are imposed in the conveyance these, provided they are interests in land, are recognized without the necessity of a special application under section 163.

Section 149 of the Land Registry Act, it seems to me, has no application. This section provides that where the restrictions registrable under section 148 are entered into or created for the purpose of being annexed to or used and enjoyed together with other land for which a certificate of indefeasible title has been issued, these shall be endorsed on the existing certificate of title of these other lands. If no certificate of title to these other lands has been issued as in this case, it clearly has no application; it would apply to cases falling within part two of section 148 as I have divided the section, but has no application to the present case. Here 7th Avenue, which is the property of the city adjoining the lands conveyed to the purchasers, is vested in the city of Vancouver but the city is not the holder of a certificate of title to these lands. If it was it could ask to have these restrictions endorsed on its title. But can it be said that since it is not a registered owner and holds no certificate of title thereto, it can be deprived of its rights under section 148? Section 149, it seems to me, gives to a holder of a certificate of title to these other lands an additional right to have his certificate endorsed but does not deprive him of his rights under section 148 if he has no certificate.

The question here then, it seems to me, is this: Whether or not the language used in the conveyance contains a reservation of an interest in land. If it does, the city is entitled to have this recognized under section 148 and the certificate of title issued to Harrie endorsed as provided in that section. If it is not an interest in land the city is not so entitled.

Many authorities have been submitted in argument but it seems to me the answer must be found in the statute itself. I think the language used in the conveyance here, in the light of the very wide language of section 148 as indicating what may be an interest in land and registrable as such, clearly shows that

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the city has under the conveyance an interest in land and is entitled to registration under section 148.

The application of the city is therefore granted.

From this decision the Registrar of Titles appealed. The appeal was argued at Vancouver on the 10th and the 13th to the 17th of November, 1944, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Thomas E. Wilson, for appellant: Sections 84 and 163 of the city charter do not cover the acquisition of an easement and the power to acquire an easement will not be implied: see *Imperial Varnish and Colour Co. Ltd.* v. *City of Toronto* (1927), 60 O.L.R. 240, at p. 243; Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 128, par. 243; *Ottawa Electric Light Co.* v. *Corporation of Ottawa* (1906), 12 O.L.R. 290, at p. 299. Clause (a) does not reserve to the city an interest in land because the conveyance grants the grantees all the land with all rights, easements and appurtenances. There is in the deed after clause (c) the words "The said grantor releases to the said grantees all its claims upon the said lands"; clauses (a) (b) and (c) do not grant or reserve in the city any interest by way of easement or indemnity: see *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750, at pp. 754-5; *In re Nisbett and Potts' Contract,* [1905] 1 Ch. 391, at p. 397; *Zetland (Marquess)* v. *Driver,* [1939] Ch. 1, at p. 8. Section 148 of the Land Registry Act does not define an interest in land. The city has claimed an easement under clause (a). The learned judge does not specify the part or parts of clauses (a), (b) and (c) which create or reserve the interest in land constituting an easement claimed by the city. The question is whether clause (a) constitutes a valid easement. The word "easement" is not defined in the Act: see Craies' Statute Law, 4th Ed., 158; *Shuttleworth* v. *Le Fleming* (1865), 19 C.B. (N.S.) 687; Gale on Easements, 11th Ed., 10, 19 and 359; Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 265, par. 482. Clause (a) does not constitute a true easement: (1) The purpose is not to benefit the adjoining land of the city but to relieve the city from liability and expense; (2) the right to let down or withdraw support is not an easement: see *Elliott (Inspector of Taxes)* v. *J. H. and F. H. Burn* (1934), 103

L.J.K.B. 578; *Inland Revenue Commissioners* v. *New Sharlston Collieries, Ltd.* (1936), 106 L.J.K.B. 375; *Earl Fitzwilliam's Collieries Co.* v. *Phillips,* [1943] A.C. 570; *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348; *Great Northern Railway* v. *Inland Revenue Commissioners* (1901), 70 L.J.K.B. 336, at p. 343; (3) the city is not the registered owner of the street: see section 111 (1) of the Act; (4) to constitute a valid easement, the dominant tenement must be specifically described: see Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 266, par. 483; *Woodman* v. *Pwllbach Colliery Company Limited* (1914), 111 L.T. 169, at pp. 172 and 174; *London and South Western Railway Co.* v. *Gomm* (1882), 20 Ch. D. 562, at p. 583; *Re Ballard's Conveyance,* [1937] 2 All E.R. 691; *In re Union of London and Smith's Bank Ld.'s Conveyance. Miles* v. *Easter,* [1933] Ch. 611, at p. 625; *Re Heywood's Conveyance,* [1938] 2 All E.R. 230, at p. 234; (5) there cannot be an easement in gross: see Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 266, par. 483; *Todrick* v. *Western National Omnibus Co.,* [1934] Ch. 561, at p. 591; *Keppell* v. *Bailey* (1834), 2 Myl. & K. 517; (6) in a true easement the burden on the servient tenement must be certain: see Gale on Easements, 11th Ed., 464; *Colls* v. *Home and Colonial Stores, Limited,* [1904] A.C. 179, at pp. 202-3; *Wilson* v. *Willes* (1806), 7 East 121; *Dyce* v. *Lady James Hay* (1852), 1 Macq. H.L. 305; Goddard on Easements, 8th Ed., 346; (7) there cannot be an easement *in futuro*: see *Lord Dynevor* v. *Tennant* (1888), 13 App. Cas. 279; *Sharpe* v. *Durrant* (1911), 55 Sol. Jo. 423; (8) apart from 7th Avenue there is no evidence that the city has any interest in any adjoining land, therefore if clause (a) creates an interest in land, it is an executory interest: see *Smith* v. *Colbourne* (1914), 84 L.J. Ch. 112; (9) there cannot be a negative easement without a dominant tenement. "An easement is a right annexed to land, to utilise other land of different ownership in a particular manner": see Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 265, par. 482. The city seeks to encumber the land of a citizen and an ambiguous document should not be construed so as to throw upon the citizen any greater burden than is called for by the clear words of the document: see *Osborne* v. *Bradley*

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(1903), 73 L.J. Ch. 49, at p. 53. There is no covenant of indemnity and if there were, a covenant of indemnity is not registrable as a charge. A covenant of indemnity is merely a personal obligation and does not run with the land: see *Horsey Estate, Limited* v. *Steiger,* [1899] 2 Q.B. 79.

J. B. Roberts, for respondent: An easement has been defined as "a right annexed to land, to utilise other land of different ownership in a particular manner or to prevent the owner of such other land from utilising his land in a particular manner": see Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 265. The rights granted under clause (a) with clause (c) constitute a lawful common-law easement: see *Tulk* v. *Moxhay* (1848), 18 L.J. Ch. 83; *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.,* [1926] A.C. 108; Gale on Easements, 11th Ed., 90 and 369-70; *Matheson* v. *Thynne* (1926), 36 B.C. 376; *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348; Gale on Easements, 11th Ed., 89; *Williams* v. *Bagnall* (1866), 15 W.R. 272; *Sitwell* v. *Londesborough (Earl of),* [1905] 1 Ch. 460, at p. 464; *Hurst* v. *Picture Theatres, Limited,* [1915] 1 K.B. 1. The following authorities show the nature of a legal easement and the principles involved apply to this case: see *Dalton* v. *Angus* (1881), 6 App. Cas. 740, at pp. 795 and 830; *Pwllbach Colliery Company, Limited* v. *Woodman,* [1915] A.C. 634; *Simpson* v. *Godmanchester Corporation,* [1897] A.C. 696; *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited,* [1915] A.C. 599; *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699, at p. 710; *Keewatin Power Co.* v. *Lake of the Woods Milling Co.,* [1930] A.C. 640; *North British Railway* v. *Park Yard Company,* [1898] A.C. 643, at p. 646; *Thorpe* v. *Brumfitt* (1873), 8 Chy. App. 650; *Campbell, Wilson & Horne Ltd.* v. *The Great West Saddlery Co. Ltd.* (1921), 59 D.L.R. 322; *Smith* v. *Curry* (1918), 42 D.L.R. 225; *Ker* v. *Little* (1898), 25 A.R. 387; *Smith* v. *Thornton* (1922), 52 O.L.R. 492. As to an easement giving the right of entry to remedy default see Gale on Easements, 11th Ed., 444 and 514; *Jones* v. *Pritchard,* [1908] 1 Ch. 630; *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133; *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. 321; *Manning* v. *Wasdale* (1836), 5 A. & E. 758;

Rogers v. *Taylor* (1857), 1 H. & N. 706. The rights in question may be considered as equitable easements, that is to say, covenants enforceable on equitable principles. Registration would, it is submitted, afford the necessary notice so as to bind subsequent interests: see Halsbury's Laws of England, 2nd Ed., Vol. 13, pp. 125-6. The following authorities show the nature of an equitable easement and the principles involved are applicable here: Gale on Easements, 11th Ed., 31 and 90; *Rogers* v. *Hosegood* (1900), 69 L.J. Ch. 652; *In re Nisbet and Potts' Contract,* [1906] 1 Ch. 386; *McLean* v. *Gray* (1896), 40 N.S.R. 111; *Drake* v. *Gray,* [1936] Ch. 451; *Anderson* v. *Moran,* [1927] 3 W.W.R. 607; *Wanek* v. *Thols,* [1928] 2 D.L.R. 793; *Re Jamieson Caveat* (1913), 10 D.L.R. 490; *Sumner* v. *McIntosh* (1918), 40 D.L.R. 301. Clause (c) provides a good equitable charge against the lands sold for costs: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 115; Vol. 23, pp. 227, 238-9, 397; Fisher on Mortgages, 6th Ed., 119; *Rooker* v. *Hoofstetter* (1896), 26 S.C.R. 41; *Cradock* v. *The Scottish Provident Institution* (1893), 69 L.T. 380 and on appeal (1894), 70 L.T. 718. To constitute a charge in equity by deed it is not necessary that any general words of charge be used. For what is sufficient see *National Provincial and Union Bank of England* v. *Charnley,* [1924] 1 K.B. 431; *London County and Westminster Bank* v. *Tompkins,* [1918] 1 K.B. 515; *United Realization Company* v. *Inland Revenue Commissioners,* [1899] 1 Q.B. 361; *In re Hurley's Estate,* [1894] 1 I.R. 488; *Skene* v. *Cook,* [1902] 1 K.B. 682; *Baker* v. *Trusts and Guarantee Co.* (1898), 29 Ont. 456; *Abell* v. *Middleton* (1901), 2 O.L.R. 209; *Morland* v. *Cook* (1868), L.R. 6 Eq. 252; *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750; *Roach et al.* v. *Ripley* (1901), 34 N.S.R. 352. As to ownership of the street by section 319 (1) of the charter, the city, on filing subdivision plan, became vested in fee-simple in the street adjoining the lands sold: see *In re Calcott and Elvin's Contract,* [1898] 2 Ch. 460; *Besinnett* v. *White,* [1925] 3 D.L.R. 560, at p. 562; *Howard* v. *Miller,* [1915] A.C. 318, at pp. 326-7. As to city's power to acquire an easement on land see *Pim* v. *The Municipal Council of Ontario* (1860), 9 U.C.C.P. 304, at pp. 308 and 310; *Bernardin* v. *The*

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Municipality of North Dufferin (1891), 19 S.C.R. 581, at pp. 592-3; *The Fishmongers' Company* v. *Robertson* (1843), 5 Man. & G. 131; *McManus* v. *Cooke* (1887), 35 Ch. D. 681; *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699, at p. 710; *Attorney-General* v. *Smethwick Corporation,* [1932] 1 Ch. 562; *Kruse* v. *Johnson,* [1898] 2 Q.B. 91; *City of Halifax* v. *Read,* [1928] S.C.R. 605; *Hamilton St. Ry. Co.* v. *City of Hamilton* (1906), 38 S.C.R. 106; *The City of Montreal* v. *Morgan* (1920), 60 S.C.R. 393. That we are entitled to registration under section 148 of the Act see *Home Oil Distributors Ltd.* v. *Bennett* (1936), 50 B.C. 382; *In re The Land Registry Act* (1904), 10 B.C. 370; *Hurst* v. *Picture Theatres, Limited,* [1915] 1 K.B. 1; *Ross* v. *Hunter* (1882), 7 S.C.R. 289. The rule against perpetuities does not apply to interests held by corporations: see Halsbury's Laws of England, 2nd Ed., Vol. 25, p. 85, (7) and (8); *Morgan* v. *Davey* (1883), 1 Cab. & E. 114; *Daniel* v. *Stepney* (1874), L.R. 9 Ex. 185; *Ardley* v. *The Guardians of the Poor of St. Pancras* (1870), 39 L.J. Ch. 871; *Simpson* v. *Godmanchester Corporation,* [1897] A.C. 696; *Rooker* v. *Hoofstetter* (1896), 26 S.C.R. 41; *Mann, Crossman & Paulin* v. *Land Registry (Registrar),* [1918] 1 Ch. 202; *Carlson* v. *Duncan* (1931), 44 B.C. 14; *Re Canadian Pacific R. Co. Caveat and Land Titles Act* (1917), 36 D.L.R. 317; *Freeman* v. *Township of Camden* (1917), 41 O.L.R. 179, at p. 180; *In re Cassel. Public Trustee* v. *Mountbatten,* [1926] Ch. 358; *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. 321; *Jones* v. *Pritchard,* [1908] 1 Ch. 630; *Gilbertson* v. *Richards* (1860), 5 H. & N. 453; *In re The Land Registry Act* (1904), 10 B.C. 370. The city is entitled to have the rights and interests in question endorsed on the certificate of title.

Wilson, replied.

Cur. adv. vult.

6th March, 1945.

SLOAN, C.J.B.C.: I would dismiss the appeal, and am in agreement with the reasons of my brother SIDNEY SMITH.

O'HALLORAN, J.A.: I would dismiss the appeal. In my judgment the learned trial judge reached the correct conclusion.

ROBERTSON, J.A.: In my opinion the learned trial judge reached the correct conclusion. I would therefore dismiss the appeal.

SIDNEY SMITH, J.A.: The respondent city of Vancouver sold to John Harrie and his wife certain lands within the city known as lot 3 to which has been added the east half of lot 2, block 313, D.L. 526, group 1, New Westminster District, amendment plan 590. These lands adjoin 7th Avenue which is a public highway and, under section 319 of the charter, vested in fee-simple in the city of Vancouver. It was part of the bargain between the parties that the Harries (a) would not at any time require support for the said lands from any lands of the city of Vancouver adjoining the same (the city concedes that this means adjoining the same at the date of the conveyance) at any time used for purposes of highway, school, park or any public place, and would release the city from all liability for payment of compensation or damage for failure of such support; (b) that in the event of excavation at any time of the adjoining lands of the city the Harries would take all steps necessary to prevent obstruction upon the lands of the city by earth or material falling thereon and (c) that in the event of failure of the Harries in this respect the city would have the right to enter upon the lands and take such steps to remedy such failure and the costs thereof should be paid by the Harries and should be a charge upon the lands until paid. These terms were to be binding upon the city, its successors and assigns and upon the Harries, their heirs, executors, administrators or assigns, with intent that all persons in whom the lands might from time to time be vested, should be so bound, but not so that the Harries should be personally liable for any breach after they had wholly parted with their interest in the lands.

The sale on these terms was duly authorized by the council of the city of Vancouver and in due course a conveyance dated 3rd February, 1944, in the terms above mentioned, was executed by the parties and duly registered in the Land Registry office at Vancouver, B.C., whereby the Harries became the registered owners of the said lands. The city thereupon applied for registration by way of easement and indemnity of the rights created in its favour under the terms of the said conveyance, and which

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the city claimed were registrable either under section 163 of the Land Registry Act as a charge or else under section 148 of the same Act by way of endorsement on the certificate of title granted to the Harries. The learned registrar refused registration under both sections upon the ground that the aforesaid rights were not registrable. From this ruling the city appealed to the Supreme Court of British Columbia. Mr. Justice COADY, who heard the application, was of opinion that the rights represented an interest in lands in favour of the city and directed registration under section 148. From this decision the learned registrar now appeals to this Court. The Harries were not represented either on the hearing before us or in the Court below.

It will be convenient to set out here the relevant sections of the Land Registry Act, as follows:

2. (1.) In this Act, unless the context otherwise requires:—

"Charge" means any estate less than the fee-simple, and shall include any equitable interest in land, and any encumbrance upon land, and any estate or interest registered as a charge under section 143:

"Encumbrance" includes any Crown debt, judgment, mortgage, lien, or other claim to or upon land created, effected, or given for any purpose whatever, whether by the act of the parties or by or in pursuance of any statute or law, and whether voluntary or involuntary:

148. [already set out in the judgment of COADY, J.].

Section 163 simply provides for the registration of a charge upon application made therefor and for the endorsement of a memorandum thereof on the register and on the duplicate certificate of title if produced.

The appellant's main argument was directed to showing that the rights created in favour of the city did not comprise an easement in law and therefore were not registrable. It was admitted by him that if they did, they could be registered as a charge under section 163 and therefore under section 148. We were referred to a great many authorities upon the nature and incidence of an easement and the argument represented a flight into the higher altitudes of that topic. The authorities are by no means easy to reconcile and often deal with matters which are by no means pertinent to our own system of registration of lands. Moreover, it is important to remember that as stated in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*, [1915] A.C. 599 "easements must expand with the circumstances of mankind."

It seems to me, however, that the question whether or not an easement was created in the circumstances mentioned must be decided in the affirmative in view of the cases of *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348; 11 E.R. 463 and *North British Railway* v. *Park Yard Company,* [1898] A.C. 643. But even apart from these authorities I would be content to come to the same conclusion in view of the decision of this Court in *Matheson* v. *Thynne* (1926), 36 B.C. 376. There a release had been granted of the right to damages resulting from the flooding of adjoining lands, and the consequent depositing of earth and material thereon, and this release had been registered against these lands without any question of the right to register being raised. This Court held that the release constituted an easement valid against future owners. I am unable to distinguish that case from this and I see no reason why it should not now be followed.

The appellant also contended that the city, while the owner of its streets, has no registrable title thereto in view of section 111 (1) of the Land Registry Act. This argument does not appeal to me. The appellant, in effect, says that because of this provision in the Land Registry Act prohibiting registration, the city must be deprived of the benefits that would otherwise accrue to it from the registration of its streets. I cannot believe that such was the intention of the Legislature and I would be prepared to hold that as regards the city streets they become "registered" within the meaning and for the purposes of the Act, upon the deposit of the plan mentioned in said section 111 (1), which is as follows:

> 111. (1.) Where, on the subdivision of land, any subdivision plan or reference plan covering the land subdivided is deposited in any Land Registry Office, and any portion of the land subdivided is shown on the plan as a highway, park, or public square, and is not designated thereon to be of a private nature, the deposit of the plan shall be deemed to be a dedication by the owner of the land to the public of each portion thereof shown on the plan as a highway, park, or public square for the purpose and object indicated on or to be inferred from the words or markings on the plan. No certificate of title shall issue for any highway, park or public square so dedicated.

A further point raised by the appellant was that the city is without authority and capacity to acquire an easement. But it seems to me that section 338 of the city charter is against this

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view and confers on the city whatever authority and capacity may be necessary for that purpose.

For these reasons I think the city is entitled under section 148 to registration, and I would therefore dismiss the appeal.

BIRD, J.A.: I would dismiss the appeal. I consider that the learned trial judge reached the right conclusion.

Appeal dismissed.

Solicitor for appellant: *Thomas E. Wilson.*
Solicitor for respondent: *Arthur E. Lord.*

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REX *EX REL.* LOCKIE v. HASLAM.

Criminal law—Summary convictions—Case stated—Conviction—Evidence —Sufficiency.

In a case stated under section 761 of the Criminal Code which involves the sufficiency of the evidence on which the conviction was made, the question is not whether the magistrate arrived at a right conclusion, but whether there was any evidence to support his conclusion.

Whether a question relating to the admissibility of evidence is a point of law or not depends on whether the decision with regard to the admissibility "turned upon conflicting statements of facts made by witnesses." If it does, it is not a question of law.

APPEAL by way of case stated by police magistrate H. C. Hall, Esquire, for Victoria. The facts are set out in the reasons for judgment. Argued before MACFARLANE, J. in Chambers at Victoria on the 30th of October, 1944.

McKenna, for appellant.
R. D. Harvey, for respondent.

Cur. adv. vult.

15th February, 1945.

MACFARLANE, J.: This is an appeal by way of a case stated from His Worship H. C. Hall, Esquire, stipendiary magistrate in and for the county of Victoria.

I have to deal first with a motion to remit the case to the learned magistrate for amendment. The purpose of the proposed amendment is to have included in "the facts of the case" certain statements of fact in the evidence which the learned magistrate has struck out on the ground that these are not material to the points of law, the determination of which the appellant claims to be erroneous. It is clear, I think, that the magistrate is right in excluding from the case stated all evidence except the facts leading up to the conclusions of law which are to be determined. But in order to decide what facts lead up to such conclusions of law, the points of law to be considered have first to be settled. The learned magistrate has limited the case to one point of law, namely, whether he was "wrong in holding that the regulations made by Dominion order in council P.C. 2800 dated 10th April, 1942, as amended by Dominion order in council P.C. 3590 dated 30th April, 1942, applied." Four other points were submitted to him, namely, whether he (a) was wrong in admitting statements alleged to have been made by the defendant to the police officer; (b) was wrong in disbelieving the testimony of the defendant; (c) had or had not jurisdiction to make the said conviction; (d) was wrong in convicting the defendant of the offence charged.

With respect to point (a) counsel for the Crown calls my attention to the decision of Riddell, J., as he then was, in *Rex* v. *Dominion Bowling and Athletic Club* (1909), 19 O.L.R. 107 where that learned judge held that a ruling as to the admissibility of evidence did not fall within the words, "conviction, order, determination or other proceeding." That decision appears to have been subjected to some question. That decision seems to have overlooked the fact that while it is the conviction that it is open to review by case stated, the grounds on which it is open to review are that "it is erroneous in point of law or in excess of jurisdiction."

In *Rex ex rel. Mitchell* v. *Kiehl,* [1937] 1 W.W.R. 68, at pp. 71-2, Martin, J.A. says:

> Error in point of law might arise from a doubt as to the sufficiency of evidence or as to the misreception of evidence but in respect of questions arising upon the sufficiency of evidence, the question is not whether the justice has arrived at the right conclusion but whether there was any

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evidence to support the conclusion: Paley on [Summary] Convictions, 9th Ed., p. 746. . . . The credibility of the accused and his witnesses and the weight to be given to their testimony were, however, matters for the magistrate, and his judgment upon them is not open to review.

I quote the greater part of the passage now, because, in my opinion, it affects point (b) as well as point (a).

I think it disposes of point (b).

In *Rex* v. *Lai Ping* (1904), 11 B.C. 102, at pp. 108-9 there are *dicta* both by MARTIN, J. and DUFF, J. as they then were, from which I take it that whether a question relating to the admissibility of evidence is a point of law or not depends on whether the decision with regard to the admissibility "turned upon conflicting statements of fact made by witnesses." If it does, it is not a point of law. On examining the evidence here I find that there is a direct conflict. As an instance of this, the policeman said:

> I asked him why he was operating at a high rate of speed. He said that he had been in a hurry.

In the evidence of Haslam, in chief, the following occurs:

> Did you tell constable Lockie that you were in a hurry? No. He told me I was in a hurry and I said I didn't think I was.

The principal evidence was as to speed and there was conflict there. The magistrate put his decision on the fact that as to the speed alleged, which the constable said was 50 miles per hour and the appellant at 25 miles per hour, he accepted the evidence of the constable. I do not think that the admission of the remarks alleged to be made to the policeman materially affected the result. No argument was made as to point (c).

On the hearing I expressed my opinion that the magistrate was right in holding that the regulations made by order in council P.C. 2800 dated 10th April, 1942, as amended by order in council P.C. 3590 dated 30th April, 1942, applied.

The motion is refused and the conviction affirmed.

Costs will be taxed and paid by the appellant.

Motion refused; conviction affirmed.

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Husband and wife—Marriage—Separation agreement—Monthly allowance for wife's maintenance during the term of the agreement—No dum casta clause—No provision as to the term of the agreement—Absolute decree of divorce—Whether maintenance payable after divorce.

Appellant and respondent were married in 1912. In 1932 they entered into a separation agreement. It provided that the appellant should pay his wife $60 per month during the term of the agreement. The agreement does not contain a *dum casta* clause nor is there any provision as to the term of the agreement. On April 25th, 1944, the appellant procured an absolute decree of divorce on the ground of his wife's adultery. The husband then ceased making the monthly payments and the wife recovered judgment in an action for the payments she claims were due for the months of May, June and July, 1944, under the separation agreement.

Held, on appeal reversing the decision of BOYD, Co. J., that the separation agreement should be interpreted as being limited to the period during which the parties lived apart under it and ceased to operate upon the dissolution of the marriage between the parties. The appeal is allowed and the action dismissed.

Watts v. *Watts*, [1933] V.L.R. 52, approved.

Charlesworth v. *Holt* (1873), L.R. 9 Ex. 38, distinguished.

APPEAL by defendant from the decision of BOYD, Co. J. of the 3rd of November, 1944, in an action to recover the sum of $180, the amount of three monthly payments of $60, for the months of May, June and July, 1944, under a separation agreement between the parties made on the 5th of July, 1932. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 8th of March, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Ponsford, for appellant: The parties were married in Australia in 1912. In 1932 they entered into a separation agreement whereby the husband agreed to pay the wife $60 per month, but there was no time limit mentioned in the agreement. The husband procured an absolute decree of divorce from his wife on April 25th, 1944, and then ceased making further payments to her. The action is for three monthly payments for May, June and July, 1944. The learned judge gave judgment for the

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plaintiff following *Jasper* v. *Jasper,* [1936] O.R. 57, but that case is distinguished as the payments were to be made for the life of the parties. Here the agreement should be interpreted as being limited to the period during which the parties lived apart and ceased to operate upon dissolution of the marriage: see *Watts* v. *Watts,* [1933] V.L.R. 52; *Rowell* v. *Rowell,* [1900] 1 Q.B. 9, at p. 15. The agreement must be looked at as a whole: see *Garratt* v. *Garratt,* [1940] N.Z.L.R. 732.

Edith L. Paterson, for respondent: The agreement contains a clause that he was to pay the $60 monthly "during the term of this agreement": see *Charlesworth* v. *Holt* (1873), L.R. 9 Ex. 38; *May* v. *May,* [1929] 2 K.B. 386; *Jasper* v. *Jasper,* [1936] O.R. 57; *Kirk* v. *Eustace,* [1937] A.C. 491; *Rust* v. *Rust,* [1927] 1 W.W.R. 491; *Green* v. *Hammond,* [1941] 3 W.W.R. 161; *Adams* v. *Adams,* [1941] 1 All E.R. 334; *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.* (1875), L.R. 7 H.L. 550.

Ponsford, in reply, referred to *Crediton Gas Co.* v. *Crediton Urban Council,* [1928] Ch. 447.

Cur. adv. vult.

On the 23rd of March, 1945, the judgment of the Court was delivered by

BIRD, J.A.: The parties to this appeal are a former husband and wife whose marriage was dissolved upon the husband's petition alleging the wife's adultery, by decree of the Supreme Court of British Columbia, granted April 25th, 1944. On July 5th, 1932, a separation agreement was made between the parties, whereby they mutually agreed to live separate and the husband covenanted to pay to the wife a monthly maintenance allowance. The husband ceased payment of the monthly allowance from the date of the decree of dissolution of the marriage. Thereafter the wife entered suit upon the husband's covenant to compel payment of three monthly instalments alleged to have accrued subsequent to the date of the decree. She recovered judgment. The question for determination on this appeal from that judgment is one of interpretation of the separation agreement, and relates particularly to the term of the agreement or the extent or dura-

tion of the husband's obligation thereunder to pay the monthly allowance.

The agreement recites the existence of domestic differences and a mutual agreement to live apart "for the future." It contains covenants as follows: By the husband:

[1.] That the . . . wife shall and may at all times hereafter, . . . live separate and apart from the . . . husband.

[2.] To pay to the . . . wife a monthly allowance of $60 for her maintenance and support, . . . payable on the 1st day of each and every month during the term of this agreement.

And by the wife:

. . . that she will at all times hereafter, during the continuance of the said separation, indemnify . . . the said husband from all liabilities hereafter contracted . . . ; and further that the said wife . . . shall not . . . hereafter commence proceedings for compelling the said husband . . . to allow her any support, maintenance or alimony, save and except as in the manner hereafter provided.

And a mutual covenant as follows:

And it is further agreed that if the said husband and wife shall at any time hereafter by mutual consent agree to cohabit as man and wife, then in such case this agreement shall become null and void.

The agreement does not contain a *dum casta* clause, nor is there any further provision which in my judgment serves to throw any light on the intention of the parties as to the term of the agreement or the duration of the husband's liability thereunder.

The learned trial judge interpreted the agreement as imposing a continuing obligation upon the husband which remained in force notwithstanding dissolution of the marriage, and found the husband liable accordingly.

Counsel for the appellant submits that upon the true construction of the agreement the husband's liability under the covenant ceased upon dissolution of the marriage between the parties.

It is clear that the husband's obligation to pay the allowance was to be determined upon resumption of cohabitation by mutual consent, a situation which did not arise.

The husband's covenant to pay "during the term of this agreement" is indefinite as to the extent of the obligation imposed upon him, even when read with the recital of an agreement "to live separate from each other for the future." Nor is there to be

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found elsewhere in the agreement any provision whereby the term of the agreement or the duration of the husband's obligation thereunder is expressly fixed.

The inclusion of the word "alimony" in the wife's covenant to refrain from proceedings to compel the husband to pay, might be said to indicate that the parties intended that the husband's obligation should continue notwithstanding the subsequent dissolution of the marriage, but that covenant, in my opinion, must be read, along with the other covenants by the wife, as limited by what appears to me to be the controlling phrase "during the continuance of the said separation."

Then there being no express term fixed for the operation of the agreement or of the husband's obligation to maintain the wife, resort must be had to an examination of the whole agreement in order to determine what was in the minds of the parties as to the extent of the husband's liability under the covenant—*In re Jodrell. Jodrell* v. *Seale* (1890), 44 Ch. D. 590, at p. 605.

Considering the agreement as a whole and taking into account the absence of any provision which indicates an intention to extend the term beyond the period of the husband's obligation at law to provide for his wife, coupled with the fact that the wife's covenants are limited to the "continuance of the separation," I would draw from it an expression of intention on the part of a husband and wife to live apart pursuant to the terms of the agreement and so long as the marriage *status* continued and they so lived apart, as imposing upon the husband an obligation to maintain his wife by payment of $60 monthly; but that the obligation was to cease upon termination of that relationship. I think there can be no doubt that the husband had such an obligation so long as the marriage *status* between them continued, but I am unable to find anything in the agreement which indicates an intention to extend the term of the obligation beyond the period.

Counsel for the respondent, however, urges that the obligation of the husband must be taken as limited only by the lifetime of the parties and for that submission she relies upon a line of decisions founded upon *Charlesworth* v. *Holt* (1873), L.R. 9 Ex. 38, of which *May* v. *May,* [1929] 2 K.B. 386 and *Jasper*

v. *Jasper,* [1936] O.R. 57, referred to by the learned trial judge, are two. But it is to be observed that the separation deeds under consideration in each of those decisions contained a provision for payment over a fixed period. In the *Charlesworth* case the deed contained a covenant for the wife's support "during their joint lives and so long as they should live separate and apart." The husband's covenant in the *May* case was "that he would, during the life of the wife, pay to her an annual sum." Likewise, in the *Jasper* case, the Court of Appeal in Ontario had under consideration a covenant "during their joint lives to pay her $40 a month." It is true that in none of those judgments does it appear from the opinions expressed that the decision turned on the specific term fixed by the agreement under consideration, but in my opinion, since the Courts there had before them for interpretation a particular document, each of those decisions must be taken as founded upon the document containing the particular provisions there under review. In each of those decisions the Court, I think, because of the express language of the document, refused to imply a term limiting the obligation to the continuance of the marriage tie. It is worthy of note that Goddard, L.J. in *Adams* v. *Adams,* [1941] 1 All E.R. 334, at p. 342, wherein the Court of Appeal in England had under consideration a similar document, said:

> The husband is obliged to maintain his wife, and she has the right to pledge his credit for necessaries. While that obligation and right were subsisting, the parties separated, and the husband covenanted to make a periodical payment to his wife during their joint lives, not for the period during which she remained his wife.

Each of the Lords Justices there applied the reasoning in the *Charlesworth* case and declined to imply a limitation to the continuance of the marriage. Here, as before noted, there is no such specific term. Consequently in my opinion the decisions founded on the *Charlesworth* case have no application.

A separation deed, which was likewise indefinite as to the period for which it was to operate, was under consideration in Australia in *Watts* v. *Watts,* [1933] V.L.R. 52. There a judge of first instance, Macfarlan, J., held, distinguishing the *Charlesworth* line of decisions, that the deed should be interpreted as being limited to the period during which the parties

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lived apart under it and as ceasing to operate upon the dissolution of the marriage between the parties. That judgment was approved in principle by Myers, C.J. in *Garratt* v. *Garratt,* [1940] N.Z.L.R. 732, though he there followed the *Charlesworth* case since the agreement under consideration recited that the wife might live apart "during the life of the husband."

These decisions, although of no binding authority on this Court, serve to fortify me in the conclusion which I have reached upon the construction of this agreement. It may be desirable to add that even though the wife's covenant to refrain from proceedings to compel payment of maintenance, support or alimony by the husband be construed as operative notwithstanding dissolution of the marriage, a construction which, as I have said, in my opinion is not open in view of the controlling phrase; nevertheless the wife is not thereby left without remedy to compel payment of maintenance by the former husband in view of Divorce rule 65 and *cf. Hyman* v. *Hyman* (1928), 98 L.J.P. 81.

For the reasons given I would allow the appeal and dismiss the respondent's action with costs here and in the Court below.

Appeal allowed.

Solicitor for appellant: *Wallace Ponsford.*
Solicitor for respondent: *Hamilton Read.*

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Jan. 13;
Feb. 15.

REX v. RICHARDS.

Criminal law — Contributing to juvenile delinquency — Juvenile Court— Girl's reputation—Fine of $50—Appeal from sentence by Crown—Sentence increased by six months' imprisonment—Can. Stats. 1929, Cap. 46, Sec. 37.

The accused pleaded guilty to a charge of contributing to the delinquency of a juvenile, a girl 15 years of age and was fined $50. The chief reason given for fining accused and not giving him imprisonment was that the girl had been involved in other cases recently and the only inference was that the girl "was of a loose and promiscuous type and had been so for some time past." On appeal from sentence by the Crown:—

Held, that when the magistrate on the basis of what resulted after this

man's act, made the assumption that the responsibility for what happened rested on the girl of 15 and not on the man of 40, he proceeded on a wrong principle. In the circumstances as they are revealed here, it is essential in the public interest and also necessary for the due administration of justice that leave be granted to appeal. The effect of imposing a fine of $50 on a man in a position of this kind is to indicate that the offence is not serious. Any attempt of any man of mature years to consort in this manner with a girl of 15 years cannot be so regarded. The appeal is allowed and in addition to the penalty imposed the accused is committed to gaol at Oakalla for a period of six months to run from the date of arrest.

APPEAL by the Crown from sentence of accused, who pleaded guilty to contributing to the delinquency of a juvenile, a girl 15 years of age. The facts are set out in the reasons for judgment. Argued before MACFARLANE, J. in Chambers at Victoria on the 13th of January, 1945.

H. Alan Maclean, for the Crown.
Davey, and *Bowen-Colthurst,* for accused.

Cur. adv. vult.

15th February, 1945.

MACFARLANE, J.: In this case an accused, a man of 40 years of age, pleaded guilty to contributing to the delinquency of a juvenile, a girl 15 years of age, and the magistrate imposed a fine of $50 and costs.

The magistrate says that the chief reason he gave a fine and not imprisonment was that the girl had been involved in other cases recently and that the only inference was that the girl "was of a loose and promiscuous type and had been so for some time past." In addressing the accused he said

had you invaded the privacy of a family of a different character there would be no alternative but a gaol sentence . . . leniency can be shown if only for one reason, that is for your redemption and the salvation of your family.

Under these circumstances the Crown says that it is essential in the public interest and also for the due administration of justice that leave be granted to appeal. On its application for leave it alleges that the magistrate failed properly to assess the facts: that he erred in failing to take into consideration (a) the discrepancy between the age of the accused and the age of the

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girl; and (b) the citizen's responsibility to the community; also that the sentence is altogether out of line with sentences usually imposed for this offence in these circumstances.

By section 37 of The Juvenile Delinquents Act, 1929, the Supreme Court judge may, in his discretion, on special grounds, grant special leave to appeal from any decision of the Juvenile Court. The section also provides that:

> No leave to appeal shall be granted under the provisions of this section unless the judge . . . granting such leave considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that such leave be granted.

I agree with counsel for the Crown that in the circumstances, as they are revealed here, it is essential in the public interest, and also necessary for the due administration of justice, that leave be granted. The sentence to me seems entirely inadequate when regarded either as a deterrent or punishment and I feel that the magistrate has improperly taken as a metier of the girl's previous life the downward course which she followed after the happening which was the subject of this charge. It appears that after the offence in question this girl became involved in several cases with young soldiers on duty at Kamloops and away from their homes. It also appears that at the time of the offence she was not entirely of chaste character. Her departures previous to that time, however, had been of a much less serious character than they were afterward. Counsel urges that from what happened after this event the magistrate was justified in finding that before the event she was of a loose and promiscuous character. I do not think that he was justified in so finding. The very thing to which the accused has pleaded guilty is that of contributing to her delinquency. There is, in my opinion, however, no evidence of promiscuity before the event, although there is considerable after that time. I think the magistrate in so finding overlooks the purpose of the statute. It is intended to protect the younger members of the community and punish those who contribute to their delinquency. I do not think that the statute is intended to apply only where the juvenile involved is found to be entirely innocent of some previous misbehaviour. I think that when the magistrate on the basis of what resulted after this man's act, made the assumption that the responsibility

for what happened rested on the girl of 15 and not on the man of 40 he proceeded on a wrong principle.

Counsel also calls my attention to the fact that there is no justification for the magistrate to cast any slur on the family or the home of the child. There is nothing to indicate that the conditions in her home contributed to her delinquency. She was a country girl who had come a very short time before this to Kamloops, which, to her, was a city of some size and the first evidence we have of her being caught in a whirl of delinquent conduct is the evidence in connection with this occasion.

I think the effect of imposing a fine of $50 on a man in a position of this kind is to indicate that the offence is not serious, and I think any attempt of any man of mature years to consort in this manner with a girl of 15 years cannot be so regarded. No one can tell just how serious the result of such associations may be. One has to remember also this girl was given considerable liquor and taken to an hotel room in a neighbouring town to allow the commission of this offence. I think the very lowest sentence that should be imposed would be a sentence of six months in the common gaol at Oakalla, in addition to the penalty imposed by the magistrate. I would therefore not only grant leave to appeal but allow the appeal of the Crown and direct that in addition to the penalty imposed by the magistrate the accused be committed to the common gaol at Oakalla for a period of six months to run from the date of his arrest under this order.

Appeal allowed.

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March 29; *April* 6.

CLAGGETT v. CLAGGETT.

Practice—Divorce—Alimony—Default in payments—Order to commit—Omission to serve with notice of motion copies of affidavits in support—Appeal—Rule 699.

On petition for dissolution of marriage an order was made providing for maintenance of petitioner. The respondent being in default, on motion by the petitioner an order was made committing him. The respondent appealed on the ground that the respondent omitted to serve with the notice of motion the affidavits used in support of the motion as required by rule 699. The affidavits so used were in fact served on the respondent some time prior to the service of the notice of motion for use in connection with another proceeding in the same action.

Held, setting aside the order of HARPER, J., that a motion affecting the liberty of the subject is a matter *strictissimi juris*. Rule 699 was designed to ensure that persons whose liberty is threatened have full notice of the grounds upon which the motion for their committal is made. Strict compliance with that rule is required.

APPEAL by respondent from an order of HARPER, J. of the 27th of February, 1945, whereby the said respondent was adjudged guilty of contempt of Court and adjudged to be imprisoned. The sole ground of appeal was that the affidavits intended to be used upon the motion upon which the order was made were not served with the notice of motion.

The appeal was argued at Vancouver on the 29th of March, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Lucas, for appellant: The respondent was committed for contempt for failure to obey an order for maintenance. The ground for appeal is that the affidavits in support of the motion were not served with the notice of motion in compliance with rule 699. It is true that the affidavits were used and served on a previous proceeding in the same case, but that does not relieve them from a strict compliance with the said rule: see *Williams* v. *Williams* (1943), 59 B.C. 359; *Taylor* v. *Roe* (1893), 68 L.T. 213, at p. 214; *Stockton Football Company* v. *Gaston*, [1895] 1 Q.B. 453.

J. A. Grimmett, for respondent: The affidavits were served 14 days previously on another motion. They had full knowledge of the contents of the affidavits. They were not prejudiced in

any way and the irregularity should be dealt with under rule 1037: see *Hampden* v. *Wallis* (1884), 26 Ch. D. 746; *In re An Arbitration between the Chaplain and Poor of Wyggeston Hospital and Stevenson and others* (1885), 33 W.R. 551; *Rendell* v. *Grundy*, [1895] 1 Q.B. 16, at p. 20.

Lucas, in reply: The cases referred to do not apply to this rule.

Cur. adv. vult.

6th April, 1945.

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

ROBERTSON, J.A.: I agree with my brother BIRD.

BIRD, J.A.: This appeal is taken from an order directing committal of the appellant for contempt because of his failure to obey an order of the Supreme Court of British Columbia. The sole ground of appeal is the respondent's omission to serve with the notice of motion copies of certain affidavits intended to be used thereon as required by rule 699.

Here the appellant, a layman, was served with a notice of motion which contained, *inter alia*, notice of the respondent's intention to use thereon certain affidavits described by the name of the deponent and the date of attestation. The affidavits so described had in fact been served upon the appellant some time prior to the service of the notice of motion, presumably for use in connection with some other proceeding in the same action.

A motion which affects the liberty of the subject is a matter *strictissimi juris*. I have no doubt that rule 699 was designed to ensure that persons whose liberty is threatened have full notice of the grounds upon which the motion for their committal is made. Strict compliance with that rule is required. *Williams* v. *Williams* (1943), 59 B.C. 359; *Taylor* v. *Roe* (1893), 68 L.T. 213.

Assuming, without deciding, that in the circumstances recited the failure to serve the affidavits along with or subsequent to service of the notice of motion was a mere irregularity as contended by counsel for the respondent, it was not, I think, such an

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irregularity as permits of the exercise of the discretion to condone it given by rule 1037. *Taylor* v. *Roe, supra.*

I am of opinion that irregularities in compliance with the rule should not be condoned under rule 1037 unless it be shown that the party affected has had reasonable notice of the grounds of the application and of the material to be used in support thereof, which was held to be the case in the motions under consideration in *Hampden* v. *Wallis* (1884), 26 Ch. D. 746 and *Rendell* v. *Grundy,* [1895] 1 Q.B. 16.

I am not disposed to hold where the liberty of the subject is involved and in the circumstances recited, that sufficient notice was given to the appellant, a layman, not only of the fact that the particular affidavits would be used in support of the motion, but also that he was thereby given an opportunity to answer the matters alleged in those affidavits.

If, as was stated by counsel for the respondent, the learned Chamber judge did invoke rule 1037 to condone the respondent's failure strictly to comply with rule 699, then, with respect, I consider that the discretion was wrongly exercised—*Charles Osenton and Co.* v. *Johnston* (1941), 57 T.L.R. 515.

I would therefore allow the appeal and dismiss the motion, with costs here and below.

Appeal allowed.

Solicitor for appellant: *E. A. Lucas.*
Solicitor for respondent: *J. A. Grimmett.*

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that under authority of the "Court Rules of Practice Act," chapter 249 of the "Revised Statutes of British Columbia, 1936," Rule 63 of the "Probate Rules, 1943," be repealed, and the following rule be substituted therefor:—

"63. In cases where the value of the estate does not exceed the sum of $400, the cost of obtaining probate or letters of administration, including the cost of preparation and filing of affidavits and copies required for the purposes of succession duties, but exclusive of all necessary disbursements, shall not exceed the sum of $30."

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., September 17th, 1945.

JACKSON v. JACKSON.

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Feb. 13, 14.

Divorce—Action by wife for judicial separation—Non-compliance by husband with orders to pay costs and alimony—Contempt of Court—Application by husband to dismiss action for want of prosecution—Refused—Costs.

The wife having petitioned for judicial separation, an order was made by COADY, J. on the 24th of August, 1944, for payment of the wife's costs by the respondent in the sum of $130. Counsel for the petitioner was then to set the cause down for hearing in October, 1944, subject to the payment of these costs, but nothing was paid by the respondent under this order. On August 10th, 1944, another order was made by COADY, J. for payment of alimony *pendente lite* of $40 a month to be computed from June 10th, 1944, under which $320 would have accrued due. Of this $90 was paid. The respondent now applies for dismissal of the petition for want of prosecution.

Held, that the husband is in contempt and in the circumstances is not entitled to the order applied for. The application is dismissed with costs payable forthwith.

APPLICATION by the husband to dismiss for want of prosecution an action for judicial separation brought by the wife. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. in Chambers at Victoria on the 13th of February, 1945.

Clearihue, K.C., for the application.
Sinclair Elliott, contra.

Cur. adv. vult.

14th February, 1945.

MACFARLANE, J.: This is an application to dismiss for want of prosecution a suit for judicial separation brought by the wife against the husband. On August 24th, 1944, COADY, J. made an order for payment of the wife's costs up to the setting down of the cause in the sum of $130. The wife was to set the cause down for hearing in October last. Counsel for the respondent swears that counsel for the petitioner undertook to set the cause down for hearing although he had advised the learned judge that the respondent, the husband was without funds to pay the costs. This is denied by counsel for the petitioner. The purpose of making an order for payment of the wife's costs up to the setting

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down of the cause is to provide her with the means to carry on the litigation and I think counsel for the respondent, the applicant now, must have made an incorrect assumption and that what counsel for the petitioner (the wife) was prepared to do was to set the cause down for hearing within the time suggested subject to payment of these costs.

Nothing has been paid under the order of the 24th of August, last. On August 10th, 1944, COADY, J. made another order for payment of alimony *pendente lite* of $40 a month to be computed from the 10th of June, 1944. Under this order $320 would have accrued due. Of this $90 has been paid.

The respondent is therefore in contempt. The Court of Appeal in *Wessels* v. *Wessels* (1940), 55 B.C. 476, at p. 479 adopted what was said by Hill, J. in *Leavis* v. *Leavis* (1921), 37 T.L.R. 578, part of which was as follows:

> I have come to the conclusion that it is a matter of discretion for the Court to determine upon all the circumstances of the case whether the respondent, so in contempt, should be heard; and that it is a matter material to the exercise of that discretion to consider whether non-compliance with the orders is due to the fault or to the misfortune of the respondent.

In that case the respondent had supplied some information as to his inability to pay on which, however, the learned judge came to the conclusion that it was

> an unfounded contention that he cannot comply with the orders that have been made.

Here the respondent has supplied no adequate information; in fact I might say no information at all.

In the case cited, Hill, J. said that:

> If the respondent made an offer to return to his wife, and I was satisfied that the offer was *bona fide*, I should, on the analogy of *Cooper* v. *Cooper*, [(1864)] (3 Sw. and Tr. 392), only make an order staying the proceedings subject to payment of the wife's costs to the date of the return to cohabitation; and alimony *pendente lite* seems to me to be within the same principle.

In *Cooper* v. *Cooper, supra,* the wife returned to cohabitation and the husband applied to have the petition dismissed. There had been no order for costs but the payment of them was made a condition of the dismissal of the petition.

Here the costs have already been reduced to a minimum by the order of COADY, J. and nothing has been paid on them. In these circumstances in my opinion the husband is not entitled to an order dismissing the petition. I would dismiss this application

and in the circumstances, I do not think the payment of costs of this application should be deferred and I think they should be payable forthwith after taxation.

Application dismissed.

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SWANSON v. SMITH.

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Trust—Father and son—Wages while under age paid to father—To be repaid on father's death—Transfer of moneys by father to daughter—Father's estate left to daughter by will—Death of father—Action by son against daughter—Creation of trust.

The plaintiff's father James A. Swanson had four children. The plaintiff was his second son and the defendant was his only daughter. In 1919, when the plaintiff was 13 years old, his father took him from school and found employment for him. From that time until he reached the age of 21 years in October, 1926, the plaintiff turned over all his earnings to his father. The terms upon which he did this were that the father would hold the earnings for the plaintiff and they would be repaid to the plaintiff upon the father's death. On the 29th of December, 1942, the father paid to the defendant the sum of $12,000 and on January 9th, 1943, conveyed certain lands to her. On January 5th, 1943, the father made a will appointing the defendant and another his executors and leaving his entire estate to her. The father died on the 9th of February, 1943. On April 2nd, 1943, the plaintiff brought this action claiming a declaration that the father received from him to hold in trust for him the sum of $8,175.20 and that the defendant as executrix and in her personal capacity was liable to account for and to pay the same to him. It was held on the trial that the evidence of the plaintiff and his witnesses was accepted and there was ample corroboration as required by the authorities. The deceased constituted himself a trustee for the plaintiff of all moneys earned by him up to the age of 21 years repayable on the father's death out of his estate and the plaintiff was entitled to judgment for the amount claimed.

Held, on appeal, affirming the decision of SIDNEY SMITH, J., that the defendant, having come into possession of the plaintiff's earnings so held in trust by the father as a volunteer, *i.e.*, in part by gift shortly before the father's death and in part by bequest under deceased's will, must be held to have acquired the property burdened with the trust regardless of whether she had or had not knowledge of the trust. Here there was evidence accepted below that she had such knowledge.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 15th of February, 1944, in an action for a declaration

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that the plaintiff's father received from him to hold in trust for him the sum of $8,175.20 and that the defendant (the plaintiff's sister) as executrix and in her personal capacity was liable to account for and to pay the same to the plaintiff. J. A. Swanson (plaintiff's father) lived at East Wellington on Vancouver Island. He had four children. The plaintiff is the second son and was born in October, 1905. The defendant is the only daughter. In 1919, when the plaintiff was 13 years old, his father took him out of school and found employment for him. From that time until he reached the age of 21 years in October, 1926, the plaintiff turned over all his earnings to the father. The plaintiff alleges that the terms upon which he did this were that the father would hold the earnings for the plaintiff and that they would be repaid to the plaintiff upon the father's death. On the 29th of December, 1942, the father paid to the defendant a sum of $12,000 and on January 9th, 1943, conveyed certain lands to her. On January 5th, 1943, the father made a will appointing the defendant and another his executors and leaving his entire estate to the defendant. The father died on the 9th of February, 1943. The defendant proved the will. It was held on the trial that the father had received the earnings from the plaintiff to hold in trust for him.

The appeal was argued at Vancouver on the 27th to the 30th of November, 1944, before SLOAN, C.J.B.C., O'HALLORAN and BIRD, JJ.A.

Cunliffe, for appellant: The plaintiff's evidence and that of his witnesses was not accepted on their demeanour or personality and the appellate Court can review the findings unhampered by the general rule: see *Powell* v. *Streatham Manor Nursing Home* (1935), 104 L.J.K.B. 304, at pp. 316-17; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.* (1935), *ib.* 576, at p. 582; *Re Fowler*, [1937] O.W.N. 417; *McCann* v. *Behnke*, [1940] 4 D.L.R. 272; *Friel* v. *White Central Cab Co.* (1939), 14 M.P.R. 312. There is evidence of the deceased father's integrity and acceptance of the plaintiff's evidence brands the father as a criminal. The plaintiff's "scribbler" purported to contain a copy of deceased's entries in a document not accounted for, is not admissible in evidence and should not have been allowed in. The original

entries are not properly accounted for. The learned judge's findings, being based on the scribbler, should be set aside: see *Posho Ltd.* v. *Gillie,* [1939] 3 W.W.R. 98. Claims against an estate must be examined with jealous suspicion: *Ledingham* v. *Skinner* (1915), 21 B.C. 41, at p. 45. There is no corroboration as required by R.S.B.C. 1936, Cap. 90, Sec. 11. Where infant children live with and are maintained by the father he is entitled to the earnings of their labour: see Halsbury's Laws of England, 2nd Ed., Vol. 17, p. 676, par. 1401; *Ex parte Macklin* (1755), 2 Ves. Sen. 675; Eversley on Domestic Relations, 5th Ed., 537. Statements made by deceased cannot be put on a higher ground than a representation of future intention and is not sufficient; there must be a contract: see *In re Fickus* (1899), 69 L.J. Ch. 161, at p. 163; *Jorden* v. *Money* (1854), 23 L.J. Ch. 865; *Maddison* v. *Alderson* (1883), 52 L.J.Q.B. 737, at p. 741. Whether deceased constituted himself a trustee, it was a voluntary trust that required a will or other testamentary deposition to perfect it. The Court will not enforce a voluntary trust if the settlor has merely undertaken to create a trust: see Underhill on Trusts, 5th Ed., 28; *Milroy* v. *Lord* (1862), 31 L.J. Ch. 798, at pp. 802-3; Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 135. If the Court finds there was a contract, it was not performed within a year, and is unenforceable by virtue of the Statute of Frauds: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 109, par. 155; *Reeve* v. *Jennings* (1910), 79 L.J.K.B. 1137, at pp. 1140-1. If the plaintiff claims under a contract it was enforceable when he was 21 years old and he is now barred by the Statute of Limitations.

A. Bruce Robertson, for respondent: They did not deal specifically with any of the allegations in the statement of claim and they must be taken to have been admitted: see *Page* v. *Page* (1915), 22 B.C. 185. It was held the father had constituted himself a trustee for the plaintiff of all moneys earned by the plaintiff up to 21 years of age to be repaid on the father's death. The findings of fact were based on credibility and will not be lightly disturbed: see *In re Harmes Estate. Hinkson v. Harmes et al.,* [1943] S.C.R. 61, at p. 66; *Marshall* v. *Rogers* (1943), 59 B.C. 165, at p. 172. Those who swore affirmatively are accepted in pref-

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erence to those swearing negatively: see *The King* v. *Stewart* (1902), 32 S.C.R. 483, at p. 501; *Burns & Co. Ltd.* v. *Marcus & Dimor. Palmer & Co.* v. *Dimor, Marcus & Dimor* (1931), 43 B.C. 517, at pp. 519-20. Under section 3 of the Equal Guardianship of Infants Act the father would have been deemed to have taken the plaintiff's earnings into his custody "to the use of" the plaintiff. Corroboration on both vital issues, namely, that the plaintiff paid the money to his father and the terms on which the father received the money, goes well beyond what section 11 of the Evidence Act requires: see *Radford* v. *Macdonald* (1891), 18 A.R. 167; *Green* v. *McLeod* (1896), 23 A.R. 676; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, at p. 263. As to the claim that sections 7 and 4 of the Statute of Frauds apply, section 7 only relates to "lands" and does not apply here. The wording of section 4 only relates to agreements or contracts but has no relation to trusts: see Williams on the Statute of Frauds, at pp. 49 and 54-5; Underhill on Trusts, 9th Ed., 87; *Rochefoucauld* v. *Boustead,* [1897] 1 Ch. 196; *Devine* v. *Somerville* (1931), 44 B.C. 502. As to the Statute of Limitations, the money was to be repaid on the death of the father and only then would a cause of action arise. He died in February, 1943. Objection was taken to the admission of the plaintiff's scribbler in evidence. This was copied from the father's books of account. After the father's death these books were lost and the scribbler was properly allowed in as an exhibit, but even if not allowed in, the result would be the same. The plaintiff swore to the sums paid over and he was corroborated by his younger brother. On the question of whether further evidence should be allowed in after the evidence was closed, that is a matter that is in the discretion of the trial judge: see *Clayton* v. *British American Securities Ltd.* (1934), 49 B.C. 28.

Cunliffe, replied.

Cur. adv. vult.

10th January, 1945.

SLOAN, C.J.B.C.: I agree with my brother O'HALLORAN.

O'HALLORAN, J.A.: The learned trial judge found as a fact that the deceased had received the moneys earned by his son

Robert during his minority upon the understanding that he would refund these moneys to Robert out of his estate when he died. The learned judge then concluded that since the deceased had placed himself in this fiduciary position in respect to Robert's earnings a trust arose by operation of law. The factual basis for this conclusion was largely governed by the credibility of the witnesses as the learned judge emphasized. The trial judge expressly accepted the evidence of Robert and his supporting witnesses. After consideration of the submissions by counsel on behalf of the appellant, I am unable to convince myself that sufficient reasons have been advanced to justify interference with the judgment appealed from, *cf. In re Harmes Estate. Hinkson* v. *Harmes et al.*, [1943] S.C.R. 61, at p. 66.

The learned judge also found there was ample corroboration of Robert's claim within the meaning of section 11 of the Evidence Act, Cap. 90, R.S.B.C. 1936. That Robert did in fact pay his earnings to his father was corroborated by his brother Cornelius. The rate of his earnings was corroborated by the witnesses Inkster and Todd. The total amount Robert paid in to the father was corroborated by his brother Dan. Robert's evidence as to the terms upon which his father received his earnings was corroborated by his wife, his brother Cornelius and by the witnesses Planta, Dendoff and Todd. I must conclude that there was corroborative evidence of a material character supporting Robert's claim. The corroborating evidence need not be sufficient in itself to establish the claim, *cf. Thompson* v. *Coulter* (1903), 34 S.C.R. 261, at p. 263 and *Crump* v. *Smith* (1940), 55 B.C. 502.

Two further questions remain, first, the admissibility in evidence of a scribbler (Exhibit 3) which Robert testified contained items he had copied from a book of his father's showing moneys he had paid his father, and secondly, whether the judgment can stand against the appellant personally as well as in her capacity as executrix of the last will of the deceased. The evidential efficacy of the scribbler is complicated by the fact that it was not strictly a copy of what was in his father's book, but was in the nature of an abbreviated summary thereof with some notes made by Robert himself.

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It is to be noted that the learned judge admitted in evidence only the

> pages of the book [scribbler] in which the witness [Robert] has put down the record from the other book [the deceased's book].

However, even if the scribbler were excluded, it seems the result must be the same. It was produced primarily in order to prove the detailed amounts the deceased had received from Robert, and could have been referred to by Robert to refresh his memory and to enable him to testify regarding those amounts with greater particularity. As a matter of fact Robert's brother Dan, a witness for the appellant (defendant) confirmed the correctness of the sum of $8,175.20 as the amount paid in by Robert to the father. In the circumstances I cannot regard the admissibility of the scribbler as a determining factor in the decision of the case, and I fail to see that any prejudice has resulted from its admission as an exhibit for purposes of convenience.

Robert obtained judgment against his appellant sister Patience personally as well as in her capacity as executrix. Patience was the sole beneficiary under the father's will. The father died in February, 1943. But in December, 1942, he had given her $12,000 in cash and in January, 1943, had conveyed certain realty to her. Counsel on her behalf submitted that personal judgment against her ought not to stand, contending there was no evidence Patience had notice of the trust in favour of Robert at the time she received the cash and the realty. When counsel for the respondent objected that issue was not raised in the pleading this Court allowed an amendment to that effect to be incorporated in paragraph 12 of the statement of defence, and argument was heard thereon.

I take the law to be correctly stated in Lewin on Trusts, 14th Ed., 13, that a trust follows the legal estate wherever it goes except when it comes into the hands of a purchaser for value without notice. There is no evidence whatever that Patience was a purchaser for value. But the evidence of Robert, his wife, and his brother Cornelius clearly establishes she had notice of the trust. Nor was the identity of the fund in the hands of the executrix questioned at the trial.

Considerable attention was devoted in argument to the appellant's submission that at common law a boy's earnings during

minority belong to his father at least until the boy has been "emancipated" as it seems to be called in some decisions. However, I do not find it necessary to decide that point, for as I must view this case, once Robert's earnings during his minority became the subject-matter of a trust such as has been found to exist here, it makes no difference in principle whether those earnings could have belonged to the father at common law if the trust had not arisen.

I would dismiss the appeal.

BIRD, J.A.: The plaintiff (respondent) brought this action to recover against the estate of his father, the late James A. Swanson, who died in 1943, and against his sister the executrix and sole beneficiary under the last will of the father, the sum of $8,175.20, alleged by the plaintiff to constitute in the aggregate the plaintiff's personal earnings prior to attaining the age of 21 years paid by him to and thereafter held for him by his father pursuant to an understanding arrived at when the plaintiff first undertook employment at the age of 13 years.

The plaintiff founds his claim in trust and alternatively in contract and alleges breach of the trust or contract by the father in disposing, without regard to moneys of the son then held by him, of his entire estate by gift in his lifetime and by testamentary disposition to the plaintiff's sister Patience Swanson who took with knowledge of the terms of the understanding and of the alleged breach.

The terms of that understanding as appear from the plaintiff's evidence were laid down by the father at the time when the plaintiff entered his first employment and were confirmed or reiterated by the father on many occasions during subsequent years as follows:

> You are too young to know what to do with money. I will look after this money for you. . . . When I die, you will get all the money back that you have paid in. . . . You will have to pay them [*i.e.*, the wages] until you are 21.

The plaintiff acquiesced in this arrangement though it appears from his evidence that as he grew older he continued to deliver his pay cheques to the father with increasing reluctance and largely as a result of appeals by the father that the son must

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trust him, coupled with repeated assurances by the father that he held the accumulating fund in the interest and for the account and benefit of his son.

It appears from the plaintiff's evidence that pursuant to this understanding he had paid to his father in the period of his employment prior to attaining the age of 21 years the aggregate sum of $8,175.20.

The plaintiff's statements as to the terms upon which his wages were paid to and held by the father were confirmed by the evidence of the witnesses Planta, Todd and the plaintiff's brother Cornelius, each of whom gave evidence as to statements made on the subject at various times by the father to himself, and in the case of Cornelius, of conversations between the plaintiff and his father in that witness's presence.

Counsel for the defendant (appellant) stated before us that the appellant did not question the fact that payments were made as stated by the plaintiff nor the total amount thereof, but if confirmation be required of the plaintiff's evidence as to the aggregate amount of those payments, it was furnished by the plaintiff's brother Daniel, called as a witness by the defendant.

There was in addition evidence of the plaintiff's earnings during the period under consideration given by the witnesses Todd and Inkster, each of whom deposed to the rates of wages earned by the plaintiff during that period, and the duration and continuity of his employment, being evidence which served to establish the fact that the plaintiff had earned in the period wages to an amount comparable to the sum claimed by him.

The plaintiff further says that the defendant, Patience Swanson, had knowledge of the terms upon which the money so paid was held by the father and of the payments so made. His evidence in this respect is corroborated by the evidence of Cornelius and of the plaintiff's wife, both called as witnesses by the plaintiff.

Counsel for appellant questioned the admission in evidence at the trial of certain memoranda made by the plaintiff in a scribbler from records kept by the father, which were proven to have been lost or destroyed about the time of the father's last illness. The contents of the scribbler consisted of notes made by

the plaintiff of entries which he said were made in his father's handwriting and which purported to show amounts and particulars of payments made by the plaintiff to his father. These scribbler notes did not in my opinion come within the rule as to secondary evidence of lost documents—Phipson on Evidence, 8th Ed., 529, and, with deference, consequently were inadmissible at least on the form of notes so made.

It was urged before us that this evidence was a determining factor in influencing the mind of the trial judge in relation to all of the evidence and on the question of creditability of the witnesses. I find no support for this submission in the comments of the trial judge or in his reasons. Moreover, the amount paid by the plaintiff was sufficiently proved by other evidence. In these circumstances I do not consider that the defendant was in any way prejudiced by the admission of the notes.

The learned trial judge has said in his reasons for judgment that he accepted the evidence of the plaintiff and the plaintiff's witnesses, and has held that there was ample evidence of corroboration. These findings were made upon contradictory evidence and I conclude, after careful consideration of all of the evidence, were based upon credibility. Such findings should not lightly be disturbed. (*In re Harmes Estate. Hinkson* v. *Harmes et al.*, [1943] S.C.R. 61, at p. 66).

Reference has been made above to evidence in support of the case made out upon the plaintiff's testimony. The trial judge has held, and I agree, that that evidence provides sufficient corroboration of facts essential to the success of the plaintiff's case within the Evidence Act, R.S.B.C. 1936, Cap. 90, Sec. 11. *Crump* v. *Smith* (1940), 55 B.C. 502.

The argument before us was devoted in large part to discussion of the submission strongly pressed on behalf of the appellant that at common law a parent is entitled as of right to the earnings of his child during minority so long as the child lives with and is maintained by him.

It does not appear to me that there is here any factual basis upon which this submission can be founded. The understanding between the appellant and his father as found by the trial judge does not suggest that the father at any time asserted a right in

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himself to these earnings. On the contrary, the father's reported statements to the plaintiff as well as to Planta show that the father received and held the son's earnings, not as moneys to which he was entitled as a parent, but as moneys of the son which the father insisted that the son should deliver to him, and which he declared that he would hold for the son's benefit, to be returned to the son upon the father's death. Consequently I do not find it necessary further to deal with counsel's submission as to a parent's right to his child's earnings.

The learned trial judge upon the findings of fact recited, held that the deceased had constituted himself a trustee for the plaintiff and with that conclusion I respectfully agree. I am of opinion that the earnings of the plaintiff when handed to the father were impressed with a trust for the son declared by the father when the son first entered upon gainful employment and repeated on many subsequent occasions. That the arrangement was so understood and acted upon by the son, appears not only from the plaintiff's evidence, but also from the fact that he continued until the age of 21 years to pay his wages to the father.

To create an express trust no technical expressions are needed. Any expression will suffice, from which it is clear that the party using it considers himself a trustee and adopts that character. *Dipple* v. *Corles* (1853), 11 Hare 183. A declaration by parol is sufficient to create a trust of personal property. *Milroy* v. *Lord* (1862), 31 L.J. Ch. 798, at p. 803.

The defendant Patience Swanson, having come into possession of the plaintiff's earnings so held in trust by the father as a volunteer, *i.e.*, in part by gift shortly before the father's death and in part by bequest under the last will of the deceased, must be held to have acquired the property burdened with the trust, regardless of whether she had or had not knowledge of the trust: Underhill on Trusts, 9th Ed., 563. Here there was evidence accepted by the trial judge that she had such knowledge.

For the reasons given I would dismiss the appeal with costs.

Appeal dismissed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *V. B. Harrison.*

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Nov. 22.

Practice—Motion—Extending time for filing appeal books—Jurisdiction.

Upon the application of the respondent on the 12th of September, 1944, to dismiss the appeal for want of prosecution, the Chief Justice then stated: "We would refuse to accede to the motion to dismiss for want of prosecution, but we would impose terms upon Mr. *Murphy*" (appellant's counsel). The registrar's note on the Court of Appeal record book of September 12th, 1944, was "Security for costs to be deposited forthwith. Appeal books to be filed by Monday next. Appeal to be placed at the foot of the list. Motion dismissed with costs to respondent." The note in the Bench book of the Chief Justice read "Security to be paid into Court forthwith. Books to be filed by Monday. Case to be placed on the list for hearing at this session. Motion is dismissed with costs to Mr. *Haldane*." The notes of the other judges were substantially the same as those of the Chief Justice. The formal order taken out after reciting the terms just referred to added this clause, that unless those terms were carried out "this appeal be and the same is hereby dismissed without further order." The appellant, not having complied with the terms imposed on September 12th, now applies for leave extending the time for filing his appeal books. On the question as to whether the Court has jurisdiction to hear the motion:—

Held, that where there has been error in expressing the manifest intention of the Court, there is power to amend a judgment which has been drawn up and entered. The formal order of September 12th, 1944, does not carry out the intention of the Court in adding the words "the appeal be and the same is hereby dismissed without further order." It is ordered that the words be struck out of the said order and the objection to the jurisdiction of the Court to entertain this motion is overruled. The motion will be heard on the merits.

MOTION to extend the time for filing the appeal books and factums in the appeal. The Court heard arguments only on whether they had jurisdiction to consider the merits of the motion on the facts of the case. Heard by SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A. at Vancouver on the 21st of November, 1944.

Denis Murphy, Jr., for the motion.
Tysoe, contra.

The judgment of the Court was delivered by

SLOAN, C.J.B.C.: In this matter we were to deliver our judgment on the jurisdictional issue as to whether or not we had any

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right to consider the merits of the present motion on the facts of this case. In order to explain the decision to which we have come, it is necessary to review, shortly, the relevant facts. In Victoria, on September 12th last there was an application launched by counsel for the respondent to dismiss the appeal, for want of prosecution, and upon that application, according to the transcript which I obtained from Victoria, this appears: I said we made the following order: that is to say, we would refuse to accede to the motion to dismiss for want of prosecution, but we would impose terms upon Mr. *Murphy,* and these are the terms we imposed: Mr. *Haldane* was suggesting that the case be traversed to the Vancouver sittings, if we did approve the terms suggested, and I said, speaking on behalf of the Court:

> There are 30 cases on this list, several of them murder cases, and I think it will take some time. If the security is deposited forthwith and the books by Monday next, the case will be set to the foot of the list, to be heard at this sittings unless circumstances change in the interim. This motion must be dismissed with costs to Mr. *Haldane.*

The registrar's note of the order which was made at that time is as follows, according to a certified copy hereof, which I directed to be extracted from the Court of Appeal record book, September 12th, 1944:

> Security for costs to be deposited forthwith. Appeal books to be filed by Monday next. Appeal to be placed at the foot of the list. Motion dismissed with costs to the respondent.

That is carrying out the terms of the directions contained in the transcript. Upon consulting our Bench books in the matter, we find that our notes record the direction as it appears in the transcript, and in the Court of Appeal record book. My note I made at the time reads as follows:

> Security to be paid into Court forthwith. Books to be filed by Monday. Case to be placed on the list for hearing, at this session. Motion is dismissed with costs to Mr. *Haldane.*

My brothers inform me their notes are exactly or substantially the same as mine are.

However, the formal order which was taken out after reciting the terms to which I have just referred had as an added clause that unless those terms were carried out,

> this appeal be and the same is hereby dismissed, without further order.

The position we are in today is that counsel for the appellant, not having complied with the terms we imposed on September 12th

last, applies now to have leave extending the time for filing his appeal books. Counsel for the respondent takes the position that because of this paragraph in the order which I have just read, that in the case of default in complying with the terms fixed on September 12th that the appeal be dismissed without further order, we have no jurisdiction to entertain the motion, and that the appeal, pursuant to the terms of the order taken out, should be considered dismissed. The relevant law on the subject, I think, is stated concisely enough for the purposes of this motion in *B. Wood & Son* v. *Sherman* (1917), 24 B.C. 376, and the late Chief Justice MACDONALD, at pp. 379-80, said this:

> The power which judges of Courts of Law and Equity formerly enjoyed of reviewing their own judgments or orders, after they were drawn up and entered, was taken away by the Judicature Act. There remained, however, an inherent jurisdiction to correct errors in judgments or orders which, because of such error, did not truly express the intention of the Court, or errors of ministerial officers and mistakes in records.

The Supreme Court of Canada has enunciated the same principle in *Paper Machinery Ltd. et al.* v. *J. O. Ross Engineering Corporation et al.*, [1934] S.C.R. 186, and the judgment of the Court delivered by Rinfret, J. at p. 188, says this:

> The question really is therefore whether there is power in the Court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think,—and we see no reason why it should not also be the rule followed by this Court—that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court.

Counsel for the appellant invokes the second branch of that principle, and takes the position that the order as drawn up containing that clause dismissing the appeal without further order, does not truly express the intention of the Court. That appears to be so. Both the stenographic record, and the record of what our order was, entered in the Court of Appeal record book in Victoria, and our own Bench notes, bear this out. Therefore, according to the authorities, we declare this order does not carry out our intention, in that the Court did not make the order that if default occurred

> the appeal be and the same is hereby dismissed without further order.

As a matter of fact, the language indicated rather a contrary intention, because I said this at the time:

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If the security is deposited forthwith and the books by Monday next, the case will be set to the foot of the list, to be heard at this sittings unless circumstances change in the interim.

In order that the record, therefore, might be in keeping with our expressed intention, we direct that clause in the order of September 12th, dismissing the appeal in the event of default of the terms imposed be struck out of that order, and that means that we overrule the objection to our jurisdiction to entertain this motion, and we will hear the motion on the merits.

Objection overruled.

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Jan. 9.

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Negligence—Damages—Motor-vehicles—Collision at an intersection—Right of way—R.S.B.C. 1936, Cap. 116, Sec. 21.

Blenheim Street, running north and south, intersects 31st Avenue, running east and west in the city of Vancouver, Blenheim being the principal thoroughfare. There is a sharp down grade from west to east just west of the intersection averaging 10 per cent. and a grade of 4.7 per cent. from south to north just south of the intersection on Blenheim Street. 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 about 15 miles per hour and the defendant was proceeding north on Blenheim Street driving a Studebaker at about 25 miles per 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 the defendant's car came in contact with the rear right wheel of the 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. It was held that the two cars entered the intersection almost simultaneously, the plaintiff failed to give the right of way to the defendant as was his duty and his failure to do so was the sole cause of the accident.

Held, on appeal, varying the decision of BIRD, J. (SLOAN, C.J.B.C. dissenting), that the respondent was guilty of negligence contributing to the collision when he drove his car into the dangerous Blenheim Street intersection at a speed which rendered him unable to avoid a collision with a motor-car on his left which he failed to see until he arrived at the intersection. Both parties being at fault, the appellant is fixed with two-thirds of the blame and the respondent one-third.

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APPEAL by plaintiff from the decision of BIRD, J. of the 7th of March, 1944 (reported, 60 B.C. 157), in an action for damages resulting from a collision between the plaintiff's and defendant's cars at the intersection of Blenheim Street and 31st Avenue in the city of Vancouver. The facts are sufficiently set out in the head-note and reasons for judgment of O'HALLORAN, J.A.

The appeal was argued at Vancouver on the 18th and 19th of December, 1944, before SLOAN, C.J.B.C., O'HALLORAN and SIDNEY SMITH, JJ.A.

Denis Murphy, Jr., for appellant: Blenheim Street is an asphalt road but 31st Avenue is a dirt road. The defendant was going north on Blenheim and the plaintiff was going east on 31st Avenue. There was a down-hill grade from the west on 31st Avenue, also a down-hill grade from the south on Blenheim. The area at the south-west corner of the intersection was considerably above the streets so as to obstruct the view on the west side of Blenheim and the south side of 31st Avenue. We claim we had substantial prior entry into the intersection. The learned trial judge found our car was going at 15 miles an hour and the respondent's at 25 miles per hour. The respondent's car struck the rear right wheel of our car showing we had substantial prior entry in the intersection and we nearly cleared his car: see *Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244; *Reed* v. *Lawson* (1934), 48 B.C. 103; *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512.

Tysoe, for respondent: The *Fewster* case is distinguishable from this one. In this case the two cars entered the intersection at the same time and it was so found by the trial judge. The facts show the plaintiff was going faster than 15 miles an hour: see *Swartz* v. *Wills*, [1935] S.C.R. 628; *Carter* v. *Wilson*, [1937] 3 D.L.R. 92; *Thompson* v. *McCaig*, [1938] 3 D.L.R. 487; *Robt. Simpson Western Ltd.* v. *Goldman*, [1936] 3 W.W.R. 429. Twenty-five miles an hour is not an excessive speed. He could stop in a car length with good brakes.

Murphy, replied.

Cur. adv. vult.

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9th January, 1945.

SLOAN, C.J.B.C.: The learned trial judge reached a conclusion of fact which is, in my opinion, supported by the evidence. It may be that from such evidence other and different findings might have been reasonably made, but I am unable to say that his determination of the relevant issues was clearly erroneous.

In consequence I would dismiss the appeal.

O'HALLORAN, J.A.: The learned trial judge found that the two motor-cars entered the intersection of Blenheim Street and 31st Avenue in Vancouver at nearly the same time. I am unable to say that finding is not supported by evidence. Hence the submission of counsel for the appellant cannot prevail that the respondent's right of way was displaced as it was in *Fewster* v. *Milholm and Vallieres and McAndless* (1943), 59 B.C. 244, by a reasonable prior and substantial entry into the property line intersection by the appellant.

The appellant was travelling east on 31st Avenue while the respondent was proceeding north on Blenheim. I have no doubt the appellant was negligent in failing to give the respondent the right of way. But we must also decide whether the respondent was guilty of contributory negligence. Even though a driver's right of way is not displaced, that does not give him the right to run down another with impunity if he can reasonably avoid doing so. In this case, the learned judge found that the respondent applied his brakes at or near the intersection, and held that in the circumstances he could not reasonably have done more to avoid the collision. With respect the evidence and the guiding authorities prevent me accepting that conclusion.

The respondent testified he did not see the appellant until they had both arrived approximately at the intersection. But it appears from the evidence of the respondent's surveyor Roberts and accepted by the learned judge, that if the respondent had looked when he ought, or had seen what was visible, he would have seen the appellant's car some time before that. He testified he had looked to his left 40 to 50 feet away from the intersection and saw nothing. But the effect of the surveyor's testimony is that a person on 31st Avenue 60 feet west of the point of impact could be seen by a person on Blenheim Street some 150 feet

south of the point of impact. It follows that the closer to the point of impact the person on Blenheim travelled, the further west he could see on 31st Avenue.

Add this factor to the respondent's greater speed (25 miles per hour as against the appellant's 15 miles per hour) and also to the fact they reached the intersection at about the same time, and it seems unanswerable, that at 70 to 80 feet from the point of impact when the respondent says he looked the appellant must have been clearly visible but the respondent failed to see him. Where the view is unobstructed it is negligence not to see what is clearly visible as was said in *Swartz* v. *Wills,* [1935] S.C.R. 628, at p. 634. The respondent's testimony that he did not see the appellant until the latter reached the intersection cannot be interpreted in any other way in the circumstances than as a failure to see what was clearly visible some appreciable time before that. He seems to have approached the Blenheim Street intersection—which the learned judge described as an unusually bad corner—as if it did not exist.

In *The Royal Trust Company* v. *Toronto Transportion Commission,* [1935] S.C.R. 671, the street-car had a statutory right of way and approached the intersection at 22 miles per hour, while the motor-car was going 35 miles per hour but showing no intention of slackening speed until the accident was inevitable. Both parties were held equally at fault. Crocket, J. (with whom Duff, C.J. concurred) held it was the duty of the motorman in approaching the street intersection to have his car under such control as to enable him to stop in order to avoid hitting any person venturing across Bay Street in his path, as it was also the duty of the driver of the motor-car to have his car under similar control. While the opinion of the remainder of the Court given by Davis, J. is not couched in such definite language, it seems that the street railway was found equally at fault, because notwithstanding his right of way, if the motorman had looked when he ought, he would have seen the likelihood of a collision if he did not slacken his speed to enable him to stop in time. That seems to me to be the case here, and *cf. Carter* v. *Wilson,* [1937] 3 D.L.R. 92.

As Lord Ellenborough, C.J. said in the leading case of *Butter-*

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O'Halloran, J.A.

field v. *Forrester* (1809), 11 East 60, at p. 61; 103 E.R. 926, a man cannot avail himself of the fault of another "if he do not himself use common and ordinary caution to be in the right." In this case, I am of opinion that the respondent was guilty of negligence contributing to the collision, when he drove his motor-car into the dangerous Blenheim Street intersection at a speed which rendered him unable to avoid a collision with a motor-car on his left which he failed to see until he arrived at the intersection. Because a driver has the right of way it does not mean he owns the road. What constitutes lack of common and ordinary caution which amounts to a contributing cause, while a question of fact, is not a matter of uniform standard. As Lord Wright observed in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, at p. 176:

> It may vary according to the circumstances from man to man, from place to place, from time to time. [And] may vary ever in . . . the same man.

Both parties being at fault their proportion of blame must be determined. I cannot feel they are equally to blame in the circumstances of this case. For the respondent did have the right of way, and the appellant ought to have exercised correspondingly greater caution. I would fix the appellant with two thirds and the respondent with one third of the blame, and allow the appeal to that extent.

SIDNEY SMITH, J.A.: I have had the advantage of reading the judgment of my brother O'HALLORAN and agree with his conclusions. I think both drivers erred in failure to keep a proper look-out in the circumstances and that this was the primary cause of the collision.

Appeal allowed in part, Sloan, C.J.B.C. dissenting.

Solicitor for appellant: *Denis Murphy, Jr.*
Solicitor for respondent: *Charles W. Tysoe.*

REX v. GOVERLUK.

C. A.
In Chambers
1945
Mar. 12, 20.

Criminal law—Bail—Application for, pending appeal from conviction.

Appellant was found guilty of being in possession of housebreaking instruments by night without lawful excuse and sentenced to two years' imprisonment. He gave notice of appeal on questions of law alone and filed notice of motion for leave to appeal on questions of fact or of mixed law and fact. On application under section 1019 of the Criminal Code for bail pending the determination of his appeal:—

Held, that bail after conviction is governed by entirely different principles from an application before conviction. There is no jurisdiction to entertain applications for bail from convicted persons who have filed a notice of motion for leave to appeal on a question of fact or of mixed law and fact, but have not yet been granted leave to appeal. This does not, however, apply to appeals on questions of law alone which may be brought without leave. Bail will not be granted after conviction unless there are exceptional or unusual circumstances to warrant it. The known previous character of the applicant is one of the essentials and there ought to be present something more than a mere chance of success on appeal. No special or unusual circumstances have been shown in this case and the application must therefore be dismissed.

APPLICATION for bail heard by O'HALLORAN, J.A. in Chambers at Vancouver on the 12th of March, 1945.

Castillou, K.C., for the application.
Remnant, for the Crown.

Cur. adv. vult.

20th March, 1945.

O'HALLORAN, J.A.: The appellant was found guilty by LENNOX, Co. J. on the 6th of this month of having possession of housebreaking instruments by night without lawful excuse contrary to Code section 464 (*a*) (as amended by 1936, Cap. 29, Sec. 10) and sentenced to two years' imprisonment. He has given notice of appeal to the present sittings of the Court of Appeal on questions of law alone, and has also filed notice of motion for leave to appeal on questions of fact or of mixed law and fact. The appellant applies now under Code section 1019 for bail pending the determination of his appeal. The application is opposed by counsel for the Attorney-General.

A review of the question of granting bail pending appeal from

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conviction is necessitated by the increasing number of criminal appeals and motions for leave to appeal, a large percentage whereof being brought by convicted persons with criminal records, some of whom may be classed as habitual criminals. Before discussing the present application, I ought, without attempting to be exhaustive, to refer to certain primary considerations which it is unsafe to allow to become obscured. The first of these is that bail after conviction is quite a different thing to bail before conviction, and is governed by entirely different principles. Until a man is convicted he is presumed to be innocent. But naturally there can be no such presumption after he has been found guilty by a competent Court. There is no basis whatever in our law for treating his guilt as if it were in a state of suspension until his conviction has been confirmed by a Court of Appeal.

A second consideration is that there is no jurisdiction to entertain applications for bail from convicted persons who have filed a motion for leave to appeal on a question of fact or of mixed law and fact, but have not yet been granted leave to appeal. A single judge of the Court of Appeal has no jurisdiction to grant such leave to appeal (which may be granted only by the Court of Appeal—see Code section 1013 (*b*)). But the Court of Appeal has no jurisdiction as a Court to grant bail. See *Rex* v. *Blanchard* (1941), 56 B.C. 378. Until leave to appeal has been obtained from the Court of Appeal, no appeal can exist and hence none can be "pending" as Code section 1019 requires before the power to grant bail may be exercised, and see *Rex* v. *Guinness* (1939), 54 B.C. 12; and *Rex* v. *Cavasin* (1944), 60 B.C. 497. This does not apply, of course, to appeals on questions of law alone which may be brought without leave.

A third consideration is that bail will not be granted after conviction unless there are exceptional or unusual circumstances to warrant it. See *Rex* v. *Fitzgerald* (1923), 17 Cr. App. R. 147, at p. 148 (obtaining credit without disclosing he was an undischarged bankrupt); *Morin* v. *Regem* (1926), 41 Que. K.B. 322 (manslaughter); *Rex* v. *Davidson* (1927), 20 Cr. App. R. 66 (fraudulent conversion and forgery); *Rex* v. *Starkie* (1932), 24 Cr. App. R. 1 (procuring miscarriage); *Rex* v. *Verigin (No. 1)*, [1932] 2 W.W.R. 489 (perjury); and *Rex* v. *Henry*,

73 Can. C.C. 347, [1940] 3 D.L.R. 270 (Nova Scotia) (theft of a motor-car) and see also *Rex* v. *Cavasin, supra,* at p. 224. No doubt this rule has been prompted largely by the fact that the applicant has been found guilty and is no longer presumed to be innocent. It may be said also that public confidence in the Courts may easily be weakened by the spectacle of convicted persons remaining at large for weeks and sometimes months after they have been convicted of prevalent crime, particularly so if they have had bad records. If bail is easily obtainable or is regarded as a matter of course, it may be an incentive to hardened offenders to appeal even when there is little if any merit in the questions of law which are raised on their behalf, for it postpones their return to prison in which they have spent many years.

The applicant in this case has a bad record over a period of 18 years. His police record shows in that period he has been known as John Durant and David Ashwell as well as by several variations of his present name such as Gowreluk, Gaureluk, Gauryluk, and Gawrieluk. His convictions record shopbreaking and theft in Regina in 1927; theft in Saskatoon in 1928; theft of a motor-car in Regina in 1929 (15 months' imprisonment); theft in Winnipeg in 1929 (four months); fraud in Winnipeg in 1931 (two months); theft and breaking and entering in Regina in 1932 (two years and three months). Six convictions for vagrancy also occurred between 1928 and 1932. In 1934 he was convicted of theft in Kamloops (30 days) and then follow, 1934 carrying revolver in Regina ($100 fine); 1935 breaking and entering and theft, Regina—two charges (12 months concurrent); 1936 breaking, entering and theft, Regina, for which he was sentenced to eight years' imprisonment, which was reduced to five years by the Saskatchewan Court of Appeal. In 1938 at Prince Albert for escaping from lawful custody and for breaking and entering and theft he received one year and ten months (concurrent). In 1942 he was convicted of shoplifting in Winnipeg on two charges and received six months consecutively on each charge.

In deciding if exceptional or unusual circumstances exist, the known previous character of the applicant is one of the essentials for consideration. See *Morin* v. *Regem, supra; Rex* v. *Clarence*

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F. Smith (1924), 56 O.L.R. 244, and *Rex* v. *Starkie, supra.* That is not to say, however, that a man of previous bad character ought not to be granted bail if it appears he was denied a fair hearing below or that he was convicted without jurisdiction. For in such circumstances he has not legally been tried at all. Such unusual or exceptional circumstances would naturally override any consideration of character. But that is not the case where the ground of appeal, as here, is based on an alleged error in the application of the law during a trial held by a Court with jurisdiction which has exercised its jurisdiction competently. That an appellant may possibly succeed on his appeal is not sufficient in itself to constitute a special circumstance justifying grant of bail. See *Rex* v. *Davidson, supra.* The possibility of success is present in many criminal appeals which are ably argued, although of course, a great many of such appeals are not successful.

I must conclude there ought to be present something more than a mere chance of success on appeal. There is no occasion at this time to define or describe generally what may constitute exceptional or unusual circumstances, although it may be said that Sir Joseph Chisholm offered some helpful observations in *Rex* v. *Henry, supra.* A great deal depends on the circumstances of the particular case. In this case counsel for the appellant submits two grounds as special circumstances: (1) That the learned trial judge erred in rejecting the "explanation" of the appellant's possession of the housebreaking instruments which is alleged to appear in the evidence of the witness Amy Margaret Bennett; and (2) that the learned judge refused to allow the appellant until the date of his trial within which to make up his mind how he should plead.

On the first ground, I have before me the evidence of the witness Mrs. Bennett. I have not the transcript of all the evidence and I am informed that the learned judge gave no reasons for judgment. I must assume the learned judge did not believe the evidence of the witness Mrs. Bennett, or that he did not regard her evidence as sufficient to set up a lawful excuse in the appellant for possession of the housebreaking instruments at the time and place. See *Rex* v. *Mitchell and McLean,* [1932] 1 W.W.R. 657. I cannot conclude the learned judge did not direct

himself properly within *Rex* v. *Ward,* [1915] 3 K.B. 696; 85 L.J.K.B. 433, and see also *Rex* v. *Bush* (1938), 53 B.C. 252, as applied in our recent decision of *Rex* v. *James* [*ante,* p. 161]. It is not disclosed that the appellant himself at any time gave any explanation of his possession of the housebreaking instruments at the time and place. Nothing has been advanced to convince me that the appeal ought to succeed on the first ground. That is not to say it may not be successful. See *Rex* v. *Davidson, supra.*

The second ground as presented is not raised in the notice of appeal. From the Court record produced (Form No. 61, Code section 833) and from the transcript of the proceedings, it appears that on January 5th the appellant consented to be tried before a judge alone and the trial was then fixed for January 25th. It also appears the appellant appeared on January 25th represented by counsel, but asked for an adjournment because of the illness of a material witness and objected to be arraigned. The learned judge then directed the appellant to be arraigned, whereupon he refused to plead thereto on the ground he was not ready to plead. The learned judge then ordered a plea of "not guilty" to be entered on his behalf (Code section 900, subsection 2) and the trial was adjourned until March 2nd, the date requested by appellant's counsel. The trial took place on the latter date and the appellant represented by counsel was convicted. On the hearing of the appeal, counsel my possibly be able to show that something which then occurred amounted to an abuse of jurisdiction or a denial of a fair trial, but at present I am apprised of nothing which enables me to accept that view.

I may add that, so far as the Court of Appeal is concerned, no delay need be encountered in hearing the appeal. The Court will be sitting here in Vancouver until at least the end of this month of March, and the Court will sit again in Victoria next month, commencing on Tuesday, April 10th.

I must conclude that no special or unusual circumstances have been shown and therefore dismiss the application. I may add that the foregoing reasoning and conclusions have received the general concurrence of all members of the Court.

Application refused.

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March 20, 21, 22; *April* 13.

REX v. DUNCAN.

Criminal law—Theft—Fraudulently taking of goods—Colour of right—Benefit of the doubt—Finding of trial judge—Criminal Code, Sec. 347.

Accused was sales manager of Electric Panel Manufacturing Limited. The company manufactured panel boxes and switches. One J. S. Don was general manager and principal owner. Prior to August 1st, 1944, the company operated under a sales policy allowing a discount of 18 per cent. off list prices on sales to jobbers, wholesalers and contractors, but owing to pressure by jobbers, on August 1st, it was decided to sell only to jobbers and wholesalers and eliminate sales to contractors. On September 1st, 1944, J. S. Don left for a month's holiday, leaving Duncan in complete charge of sales policy. On the return of J. S. Don on September 27th, accused was charged with unlawfully stealing a number of panel boxes and switches between the 12th and 29th of September and convicted. The Crown established that from time to time during Don's absence the accused took from the stock-room panel boxes and switches, a considerable number of which were delivered by accused to Domino Electric Co., contractors who were old customers of the company. He did not invoice any of these goods, nor did he furnish to the company's accounting department particulars of these transactions or anyone else in the company. Accused in his evidence admitted taking the panel boxes and switches, but delivered them to Domino Electric Co., an old customer, under special circumstances. He found contractors were not taking kindly to increased prices and feared that such increases in respect to some of the older contractors' accounts might be an infraction of the Wartime Prices and Trade Board regulations. He was particularly concerned with Domino Electric as it had on hand considerable work that meant substantial demand for electric panels if prices were right and it was familiar with the effect of Wartime Prices and Trade Board regulations. He found himself in a dilemma and in the circumstances he took full responsibility as sales manager during Don's absence and delivered the goods to the Domino Electric Co. without making out any sales invoices, leaving the whole matter of prices to be paid to await Don's decision on his return. He kept a memorandum of all deliveries he made to the Domino Electric Co., which the Domino Electric Co. initialled each time a delivery was made. On September 15th, he wrote Don telling him of the danger of their sales policy conflicting with the Wartime Prices and Trade Board regulations. There was no evidence that he received any money from the Domino Electric Co. or that he had profited personally in any way. On appeal on the ground that accused should have received the benefit of the doubt:—

Held, affirming the decision of police magistrate Wood (O'HALLORAN, J.A. dissenting), that it was open to the learned magistrate upon the evidence to disbelieve the explanation of the accused and to find that the taking of the goods was fraudulent.

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APPEAL by accused from his conviction and sentence by H. S. Wood, Esquire, police magistrate for the city of Vancouver on the charge that at the city of Vancouver between the 11th and 29th of September, 1944, he did unlawfully steal a number of panel boxes and switches of the total value of over twenty-five dollars, the property of Electric Panel Manufacturing Limited. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Vancouver on the 20th, 21st and 22nd of March, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

D. J. McAlpine, for appellant: Duncan was sales manager of Electric Panel Manufacturing Limited. J. S. Don was general manager and principal owner of the business. The company sold panel boxes and switches to jobbers and contractors at a discount. When Don was away in September, 1944, Duncan was in charge. At this time the policy of the company in relation to sales was changed owing to the pressure of jobbers wanting exclusive right of sales at a discount. One of the chief customers of the company was the Domino Electric Co. to whom Duncan made sales during Don's absence and no sales invoices were made out showing the transactions. Owing to the change of policy, customers objected to the increased prices owing to the exclusive sale to jobbers. The policy was further affected by the Wartime Price and Trade Board regulations and Duncan claimed it was owing to this that invoices were not made out. He made nothing out of the transactions with the Domino Electric Co. The learned trial judge failed to give him the benefit of the doubt: see *Rex* v. *Clark* (1901), 3 O.L.R. 176. On cross-examination of accused tending to commission of other crimes see *Brunet* v. *Regem* (1918), 57 S.C.R. 83; *Paradis* v. *Regem* (1933), 61 Can. C.C. 184; *Rex* v. *Johnson* (1904), 7 O.L.R. 525, at p. 530.

Dickie, for the Crown: The taking of stock shows a large shortage during the time in question. The goods were taken without authority and the learned magistrate rightly found the accused guilty as charged.

McAlpine, replied.

Cur. adv. vult.

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13th April, 1945.

O'HALLORAN, J.A.: The appellant Duncan was sales manager and sole salesman of Electric Panel Manufacturing Limited of Vancouver which manufactures panel boxes and switches. He had held that position for some five years and had charge of sales policy subject to the approval of J. S. Don, the principal owner who concentrated on production and general management. Duncan was convicted by magistrate Wood on 6th November, 1944, under Code section 347 of unlawfully stealing a number of panel boxes and switches between 12th and 29th September and was sentenced to one year's imprisonment. No reasons for conviction were given beyond the learned magistrate's pronouncement that he had no doubt of Duncan's guilt. The appeal is grounded upon the submission that there was insufficient evidence to convict and that Duncan was denied the benefit of a reasonable doubt.

The appellant gave evidence in his own defence. He readily admitted taking the panel boxes and switches, but said he had delivered them to the Domino Electric Company, a contractor, which was an old customer of the Electric Panel Limited, under special circumstances which will be elaborated in a moment. That he did so does not seem to be seriously questioned. It was largely confirmed by the evidence of the investigator Acheson, and moreover a substantial quantity of panel boxes and switches manufactured by the Electric Panel Limited were found on the premises of the Domino Electric Co. when its premises were searched on the day of Duncan's arrest. It was not established that Duncan received any money from the Domino Electric Co., or that he had profited personally in any way. It was proven that he had delivered panel boxes and switches to an old customer without the sales invoices required to show the transactions on the books of the Electric Panel Limited.

J. S. Don did not deny Duncan's authority as sales manager to sell and deliver the firm's products to the Domino Electric Co., but said he had no authority to do so without making out sales invoices which would show the transactions in the office records. Duncan gave an explanation of the lack of sales invoices. It involved problems he had to face as sales manager. On 1st

August, 1944, the Electric Panel Limited at the instance of the Vancouver jobbers decided to sell only to jobbers and eliminate sales direct to contractors. This meant a substantial price increase to contractors who would thus be forced to absorb the jobber's charge and profit. On 1st September, J. S. Don left for a month's holiday leaving Duncan in complete charge of sales policy. Duncan's explanation relates to what happened when he was away.

Within the first week or so of September after Don had left, Duncan found that some of the contractors were not taking kindly to the increased prices. He also began to fear that such increases in respect to some of the older contractor accounts might be an infraction of the Wartime Prices and Trade Board regulations. Those fears were definitely confirmed later in the month of September. He was particularly concerned with the Domino Electric Co., because he knew that firm had considerable work on hand in September, which would mean a substantial demand for Electric Panel's products if its prices were right. He also had reason to believe that the Domino Electric Co. was familiar with the effect of the Wartime Prices and Trade Board regulations. He found himself in a quandary, for if he attempted to sell to the Domino Electric Co. through a jobber the increased prices might drive the Domino Electric Co. to a competitor and might also render his firm liable to prosecution for a breach of the Wartime Prices and Trade Board regulations. On the other hand, if he sold the Domino Electric Co. direct, eliminating the jobber, he would incur the ill will of the jobbers by breaking the arrangement which Don and he had made with them on 1st August.

In these circumstances the course he took with full responsibility and authority as sales manager during Don's absence, was to deliver the goods to the Domino Electric Co., but without making out any sales invoices, leaving the whole matter of the prices to be paid to await Don's decision on the latter's return on or about the 1st of October. In the meantime he kept a memorandum of all deliveries he made to the Domino Electric Co., which the Domino Electric Co. initialled each time a delivery was made. That memorandum was introduced in evidence at the trial as Exhibit 8, with supplementary Exhibit 9. Exhibit 8

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is headed "Memorandum of Shipments. Billing to be decided." On 15th September he wrote Don, who was at some small place near Kamloops giving him general office news and telling him of the danger of their sales policy (selling only to jobbers) conflicting with the Wartime Prices and Trade Board regulations.

After describing the situation as delicate he added:

> My present suggestion is to allow such contractors as are now putting their business without protest through jobbers to continue to do so, but if we sense any antagonism from any other of the contractors then we will, with good grace, continue to serve them. When we get the ruling from the chief administrator, and if it should be in the negative, then it will be up to the jobbers to suggest a solution, as we certainly have proven to them our desire to co-operate with them.

That letter (Exhibit 10) and memorandum (Exhibit 8) bear out Duncan's explanation. If the letter does not mention the Domino Electric Co. by name, the words

> if we sense any antagonism from any other of the contractors then we will, with good grace, continue to serve them

must reasonably have included them in Don's mind when he read the letter. It would have been better for the purposes of his trial if Duncan in this letter had specifically mentioned the Domino Electric Co. situation and the deliveries he was then making. But I cannot see how fraudulent intent can be inferred from his failure to do so, unless Exhibit 8 is dismissed entirely from consideration.

Unfortunately for Duncan he never had the opportunity of placing the matter before Don on the latter's return. For he was arrested on 29th September before Don returned to the office. The book-keeper and factory foreman of the Electric Panel Limited who admittedly knew nothing of the firm's sales policy or the delicate business situation with which Duncan was faced, became suspicious of him and put an investigator on his trail, and he reported the deliveries to the Domino Electric Co. Don was informed of this as soon as he returned to the city but before he came to the office and Duncan had a chance to see him. Don then laid this charge of theft against Duncan and he was arrested.

The essence of the offence of theft under section 347 is whether Duncan took the articles "fraudulently and without colour of right," *cf. Rex* v. *Lakusta* (1944), 60 B.C. 241. In 2 East, P.C. 659, it is said:

. . . if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal; . . .

That was applied by the Court of Criminal Appeal in *Rex* v. *Bernhard* (1938), 26 Cr. App. R. 137, at p. 145, and see also Kenny's Outlines of Criminal Law, 14th Ed., 206-7. Duncan may have been unwise in what he did, and his conduct may have aroused suspicion but he was acting as sales manager with a wide business discretion and was responsible to no one but J. S. Don. The latter seems to have come hastily to a conclusion that Duncan was stealing the firm's property for without waiting to hear the latter's side of the case and although Duncan had been a trusted and respected official of the company for five years he had him arrested immediately. In my judgment a properly-instructed jury could not have convicted Duncan in the circumstances of this case without depriving him of the benefit of the reasonable doubt created by the explanation he gave for the absence of sales invoices.

Moreover, if Duncan honestly thought that he was entitled to do what he did, he was entitled to be acquitted even though he was wrong in so thinking and see *Rex* v. *Bernhard, supra,* at p. 146, and *cf.* also by analogy *Rex* v. *Johnson* (1904), 7 O.L.R. 525, at pp. 530-1. When he was arrested, the detective testified he exclaimed "I can't understand it." After he was arrested, and saw Don for the first time since the latter's return to the city he said to Don "Well, I am surprised!" To Don's reply "I don't see why you should be," he answered "I am still surprised." These are the kind of remarks to be expected from a man who honestly and reasonably thought he was not doing anything wrong. That Duncan was a man of the highest business reputation, who was worthy of credence and was thought very well of in the electrical industry appears from the character evidence given by several leading men engaged in the electrical industry in Vancouver who had known him well in business for not less than five years.

I can find in the testimony no evidence that Duncan intended to injure the Electric Panel Limited, or that he had profited in any way personally. While absence of personal profit is not in itself an answer to theft, it is undeniably an element to be considered in gauging the existence or non-existence of a fraudulent

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intent. The Domino Electric Co. received the goods, and there is no evidence that the Electric Panel Limited have not been paid for them in full as the Domino Electric Co. agreed with Duncan they would be, which is evidenced by the memorandum Exhibit 8 above referred to. Duncan's authority, exercised as it was in the business situation which confronted him, gave him a colour of right which raises the gravest doubt that he had a thievish intent. The testimony is certainly consistent with the view that what he did was animated not by a fraudulent intent, but by an excess of zeal in the promotion of his company's sales. He went to considerable lengths to hold a customer's business. I must conclude that no inference of an intent to steal is deducible from his acts and conduct.

Some suspicion was attached to Duncan by what the investigator Acheson seems to imply was a certain furtiveness in his movements. That Duncan took the articles from the office shortly after it closed at 5 p.m. was stressed as pointing to fraudulent intent. The implication of furtiveness is too indefinite in my view to support fraudulent intent when related to all the other circumstances of this case. Regarding delivery after office hours, Duncan said that it was the most convenient time for him to make the deliveries on his way home from the office. In judging Duncan's actions and drawing inferences therefrom it is a factor for consideration that they are not to be measured by a standard applicable to a junior employee, for he was the sales manager then in complete charge of sales and deliveries during Don's absence.

Some stress was laid upon the fact that the defence did not call either of the Nemetz brothers who operated the Domino Electric Co., to prove the deliveries and the terms thereof in support of Duncan's explanation. This overlooks Duncan's memorandum of deliveries to the Domino Electric Co. (Exhibits 8 and 9) which contains written acknowledgment of the deliveries by the initials of one of the Nemetz brothers on Domino Electric Co. note-paper, and that Exhibit 8 is headed "Memorandum of Shipments. Billing to be decided." That memorandum confirmed Duncan's explanation. His explanation did not have to go further than the balance of probability in his favour such

as suffices in a civil case. It did not have to be established beyond reasonable doubt, *cf. Rex* v. *Carr-Braint,* [1943] 2 All E.R. 156; *Rex* v. *Lawson* (1944), 59 B.C. 536, at pp. 545-6, and *Rex* v. *Findlay* (1944), 60 B.C. 481, at p. 486.

In *Rex* v. *Clark* (1901), 3 O.L.R. 176, the Ontario Court of Appeal was confined to the question of law raised on the case stated, as leave had not been obtained to apply for a new trial on the ground that the verdict was against the weight of the evidence, which is a ground set out in the notice of appeal in this case. The distinguishing facts in the *Clark* case were capable of supporting inferences which in my judgment cannot be properly drawn from the facts in this case. It is noted in the report of the argument that Clark had been "previously suspected and specially warned to keep the rules of his employers."

For the foregoing reasons I would allow the appeal and direct a verdict of acquittal to be entered.

SIDNEY SMITH, J.A.: I think the learned magistrate came to the right conclusion and I would dismiss the appeal.

BIRD, J.A.: The appellant who was convicted of the theft from his employer, Electric Panel Manufacturing Limited, of certain panel boxes and switches of a value in excess of $25, appeals the conviction upon two grounds—First, that the accused was not given the benefit of the doubt raised by his explanation as to the nature of the taking of the goods and, alternatively, that there was no evidence to support the conviction. Secondly, the improper admission of certain evidence adduced on the cross-examination of the accused.

The accused was employed as sales manager of the company, which was engaged in the manufacture of electrical equipment. Prior to September 1st, 1944, the company had operated under a sales policy which permitted the allowance of a discount of 18 per cent. off the list price of its products on sales to jobbers, wholesalers as well as to certain selected contractors. Effective from September 1st, 1944, a new sales policy was adopted by the company whereby the discount was restricted to jobbers and wholesalers. About September 1st, 1944, the manager of the company James S. Don, left the city on a vacation and did not return

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until September 27th, 1944. During his absence it was the responsibility of the accused to carry out the new sales policy. The alleged thefts took place in the interval between September 11th and 27th, 1944.

The Crown established that during the period from the 11th to the 27th of September, 1944, the accused took from the company's stock-room from time to time panel boxes and switches, a considerable number of which were delivered by the accused to the Domino Electric Company, a firm of electrical contractors, which had been a customer of the company for several years. It was further established that the accused did not invoice any of the goods so delivered to the Domino Company, nor did he furnish to the company's accounting department any particulars of those transactions, as was the recognized practice of the company. No more did the accused furnish to any other person in the employ of the company any information relative to those transactions.

James S. Don, the manager of the company, on his return to Vancouver on September 27th, 1944, without having had communication of any kind with the accused, laid the charge upon which the accused was subsequently convicted. The accused gave evidence in his own defence. He acknowledged having taken certain panel boxes and switches, all of which he said he delivered to the Domino Company on behalf of the company and in the course of his duty. He produced a list of the goods so delivered, upon which was endorsed the initials of one Nemetz, a representative of the Domino Company, as an acknowledgment of receipt of the goods. That list showed deliveries of panel boxes and switches on the 6th, 7th, 11th, 13th and 14th days of September, in addition to deliveries of a comparatively equal quantity on dates subsequent to September 15th, 1944. The accused explained the manner of his handling these transactions with the Domino Company and particularly the omission to invoice those goods as a procedure which, in the absence of James S. Don, he was compelled to adopt due to the fact that subsequent to the departure of the manager from the city accused discovered the new sales policy involved contravention of the orders or regulations of the Wartime Prices and Trade Board, in that,

under those regulations the company was not permitted to change the price at which its goods were sold to particular customers without the permission of the Wartime Prices and Trade Board. He said further that the Domino Company, prior to the introduction of the Wartime Prices and Trade Board regulation, had enjoyed the discount and was aware of its right under this regulation to continue to buy from the company at the discount price. Consequently accused was fearful that the Domino Company would report the situation to the Wartime Prices and Trade Board if he applied the new sales policy to them, which he believed would result in prosecution of the company for breach of the Board's price regulations. He said that in consequence he made an arrangement with the Domino Company to sell to them at an undetermined price, the same to depend upon whatever ruling was finally made by the Wartime Prices and Trade Board as to the price payable by the Domino Company. This course was adopted by him for the protection of his employer since he was unable to discuss the problem with the manager. Thereafter he made the deliveries, the subject of the charge, to the Domino Company. He refrained from informing anyone in regard thereto since he was in charge of sales and under no obligation to report the transaction to anyone other than James S. Don.

The defence put in evidence the before-mentioned list of goods covering deliveries to the Domino Company and a letter written by the accused to James S. Don, dated September 15th, 1944. In that letter the accused discussed the difficulties arising from efforts to carry out the new sales policy and said

> my present suggestion is to allow such contractors as are now putting their business without protest through jobbers to continue to do so, but if we sense any antagonism from any other of the contractors then we will with good grace continue to serve them.

In that letter he reported an arrangement he had made with one contractor "to continue to serve him as in the past." But he failed to mention the arrangement made with the Domino Company to which he had made deliveries without invoices on five of the preceding nine days. He explained this difference in the treatment of the Domino and other contractors on the footing that direct sales had been made to those other contractors for some

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time immediately before the new sales policy was initiated but that this had not been done with the Domino Company for some years although that firm was also entitled to the discount, having enjoyed it in the base period fixed by the Wartime Prices and Trade Board regulations.

The learned magistrate upon that evidence found the accused guilty of theft. He gave no reasons other than to say

I haven't any doubt about this case at all. I find you guilty.

The conviction, if it is to be sustained, necessarily presupposes a finding against the accused upon three essential elements of the offence as defined by Code section 347, *viz.*, (1) Taking of the goods by the accused. (2) Fraudulently and without colour of right. (3) With intent to deprive the owner thereof.

On this appeal the attack upon the conviction is directed primarily to the finding upon the second element.

Counsel for appellant submits that the accused conducted this business with the Domino Company in the interest of his employer. He urges that the explanation made by the accused was a reasonable one and should have been accepted by the learned magistrate; that although not accepted by him nevertheless the explanation raised a reasonable doubt as to whether the goods were taken fraudulently, the benefit of which was not given to the accused by the magistrate. Apart from consideration of the defence, later discussed, I think there was ample evidence before the magistrate to support the conviction. The defence advanced by the accused set up a claim of right in so taking and delivering the goods to the Domino Company. I take the law to be well settled that the question whether a defence of a claim of right is negatived is a question of fact for the jury—*The Queen* v. *Farnborough,* [1895] 2 Q.B. 484—but that if any reasonable doubt is raised as to the fraudulent taking by the facts put forward in support of that claim then the benefit of the doubt must be given to the accused—2 East, P.C. 659.

An explanation was made before the magistrate which, if accepted, would have been sufficient not only to negative fraudulent intent, but more than that to show that in so acting the accused was serving the best interest of his employer. But there was also before the magistrate in the evidence adduced on the

cross-examination of the accused proof that he wrote to the manager of the company on September 15th, 1944, *i.e.*, at a time when he had been for some days and still was engaged in making almost daily deliveries to the Domino Company yet omitted to make therein any reference to those transactions, though he discussed the difficulties arising from efforts to carry out the new sales policy and reported certain specific instances wherein he had disregarded the new policy. The magistrate therefore had before him evidence as to the nature of the taking and delivery of the goods which was open to two constructions: one which supported the Crown's contention, the other which supported that of the defence. It was for him to determine upon consideration of all of the evidence whether the Crown had proved beyond a reasonable doubt that the goods had been taken fraudulently or whether the explanation made by the accused, either raised a doubt, or should be accepted as sufficient proof, that in so taking and delivering the goods the accused believed that he was exercising his lawful right so to dispose of them even though such belief was unfounded both in law and in fact. *Rex* v. *Bernhard* (1938), 26 Cr. App. R. 137, at p. 145.

In my opinion it was open to the learned magistrate upon that evidence to disbelieve the explanation of the accused and to find that the taking of the goods was fraudulent—*Rex* v. *Clark* (1901), 3 O.L.R. 176, at p. 181. In these circumstances I think the conviction must be taken to include such a finding.

Then dealing with the second ground of appeal, I am of opinion that the objection taken to the admission of certain evidence on the cross-examination of the accused which it is submitted tends to show the commission of other crimes by him, cannot be sustained. The evidence sought to be adduced I think was relevant to the issue of intent and was therefore admissible—*Brunet* v. *Regem* (1918), 57 S.C.R. 83, at p. 107. The mere fact that such evidence might tend to show the commission of other crimes by the accused does not render it inadmissible if that evidence is relevant to an issue before the Court—*Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57. Consequently I would dismiss the appeal from conviction.

As to the appeal from the sentence of one year from the date

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of the accused's conviction, it appears that the accused occupied a position of trust, a position which, in the absence of his employer, he has abused. I consider that in fixing the sentence the magistrate has taken into account the previous good record of the accused.

I would therefore dismiss the appeal from sentence.

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

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Feb. 8;
March 6.

REX v. KEARNS.

Criminal law—Possession of stolen goods—Evidence of other criminal acts—Secondary evidence—When permitted—Criminal Code, Sec. 399.

The appellant was convicted for unlawfully retaining stolen goods knowing them to have been stolen. The Cascade Machinery Limited displayed spray-guns and electric saws in the window of its showroom. An employee of the firm made a list of the serial numbers of the articles in the window and after some of the spray-guns and saws were stolen, he gave a police officer the list containing the serial numbers, but did not keep a copy of the list. The police officer made a typewritten copy within five minutes after receiving it from the employee, but did not keep the employee's list, which was either lost or destroyed. At the trial the police officer had the typewritten copy when giving evidence. Crown counsel asked him to refer to it to refresh his memory which he did and gave in evidence the serial numbers of the articles stolen, one of which was that of a spray-gun which was found in the appellant's car. Crown counsel did not tender the officer's typewritten memorandum in evidence, but on defence counsel insisting that it should go in as an exhibit, the learned judge directed that it be admitted. The defence submitted that this was the same as if the officer had sought to repeat a conversation with the employee wherein the latter had told him that a spray-gun and electric saw with specified serial numbers had been stolen and therefore hearsay evidence.

Held, on appeal, affirming the conviction by BOYD, Co. J., that the defence failed to recognize the distinction between secondary evidence and hearsay evidence. Secondary evidence is permitted in the absence of primary evidence when a proper explanation of the absence of the latter has been given and the appeal is dismissed.

APPEAL by accused from his conviction by BOYD, Co. J. at Vancouver on the 16th of October, 1944, for unlawfully retain-

ing stolen goods. The facts are set out in the reasons for judgment.

The appeal was argued at Victoria on the 8th of February, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Wismer, K.C., for appellant: The Cascade Machinery Limited had some spray-guns and electric saws stolen from its front window. A spray-gun was found in the accused's car. They endeavour to show this was one of the stolen spray-guns by a serial number. An employee made a list of serial numbers and handed it to the detective who made a copy of it and then lost the original list. The copy can only be used to refresh his memory. His list is hearsay and cannot be used in evidence. An electric saw was found in a bin in the cellar in the apartment-house where he lived. There is no evidence whatever to connect him with the saw: see *Rex v. Voisin* (1918), 13 Cr. App. R. 89, at p. 96; Tremeear's Criminal Code, 5th Ed., 752. There was no proper warning before statements were made by accused: *Gach* v. *Regem* (1943), 79 Can. C.C. 221; *Trepanier* v. *Regem* (1911), 19 Can. C.C. 290; *Rex* v. *Cummings* (1912), *ib.* 358. The learned judge based his judgment on evidence of accused's drunkenness when found with the spray-gun: see *Koufis* v. *Regem*, [1941] S.C.R. 481. He was introducing evidence that he was guilty of other crimes.

Remnant, for the Crown: The defendant first gave evidence as to another breaking and entering and was then cross-examined as to the incident: see Phipson on Evidence, 8th Ed., 175; *Rex* v. *Green* (1943), 59 B.C. 16, at p. 20; *Rex* v. *Bush* (1938), 53 B.C. 252. He gave evidence that he found the spray-gun in a vacant lot and the confession is admissible: see *Rex* v. *Hurd* (1913), 21 Can. C.C. 98. The test of a voluntary statement is its truth: see *Rex* v. *Hammond*, [1941] 3 All E.R. 318. Statements given free and voluntarily are admissible: see *Rex* v. *Rodney* (1918), 30 Can. C.C. 259; *Bigaouette* v. *Regem* (1926), 46 Can. C.C. 311. Evidence of where the electric saw was found links with that of the spray-gun. The memorandum in the detective's hands is secondary evidence: see Phipson on Evidence, 8th Ed., 537; *Lloyd* v. *Powell Duffryn Steam Coal Company, Limited*, [1914] A.C. 733; *The Queen* v. *Gandfield and*

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Another (1846), 2 Cox, C.C. 43; *Reg.* v. *Edwards* (1872), 12 Cox, C.C. 230; *Reg.* v. *James Buckley* (1873), 13 Cox, C.C. 293; *Rex* v. *Foster* (1834), 6 Car. & P. 325. The finding of the trial judge should not be disturbed: see *Rex* v. *Murphy, Kitchen and Sleen* (1931), 4 M.P.R. 158.

Wismer, replied.

Cur. adv. vult.

6th March, 1945.

O'HALLORAN, J.A.: The conviction of the appellant under Code section 399 for unlawfully retaining stolen goods must be upheld. It is felt, however, reference ought to be made to two of the grounds upon which his counsel urged that the conviction should be set aside.

The first relates to the introduction of evidence of other criminal acts, *viz.*, drunkenness and breaking a window of the Main Machinery Limited showroom. But the record makes it plain that these matters were first brought out in cross-examination by appellant's own counsel, and that the subsequent examination and cross-examination thereon by Crown counsel was directed to show the appellant was not arrested for drunkenness, as his counsel sought to establish. In these circumstances the objection must be overruled and *cf. Rex* v. *Green* (1943), 59 B.C. 16.

The second ground raises the question of what is hearsay evidence. Shortly after the paint spray-gun and electric saw were stolen from the owner's showroom window, an employee, Spring, gave to a police officer a written list containing their serial numbers, which he had made at the time they were placed in the show-window. Spring did not keep a copy of the list, and at the trial, could not remember the serial numbers. The police officer made a typewritten copy within five minutes of receiving the list from Spring, but did not keep Spring's list. At the trial the police officer had this typewritten copy with him when giving evidence. Crown counsel asked him to refer to it to refresh his memory, which he did, and gave in evidence the serial numbers of the articles which Spring's list showed were stolen.

Crown counsel did not tender the officer's typewritten memorandum in evidence, but on defence counsel insisting that it should go in as an exhibit, the learned judge directed that it be

admitted. Defence counsel did not cross-examine thereon. In this Court, counsel for the appellant submitted that this was just the same as if the officer had sought to repeat a conversation with Spring wherein the latter had told him that a spray-gun and electric saw with specified serial numbers had been stolen. This submission fails to recognize the distinction between secondary evidence and hearsay evidence. Secondary evidence is permitted in the absence of primary evidence when a proper explanation of the absence of the latter has been given—*per* Lord Esher, M.R. in *Lucas* v. *Williams & Son,* [1892] 2 Q.B. 113, at p. 116.

In this case the police officer's memorandum was put in evidence by defence counsel. Moreover, even if the memorandum had not been put in evidence the result would be the same. For paraphrasing what was said in our recent decision in *Swanson* v. *Smith* [*ante,* p. 243], the memorandum was produced primarily in order to prove the serial numbers of the stolen articles, and could properly be referred to by the police officer to refresh his memory, and to enable him to testify with greater particularity concerning the description of the stolen goods contained in Spring's list which he had lost or destroyed.

The appeal is dismissed.

SIDNEY SMITH, J.A.: I would dismiss the appeal.

BIRD, J.A.: I would dismiss this appeal for the reasons given by my brother O'HALLORAN, with which I agree.

Appeal dismissed.

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Feb. 12, 16.

IN RE EDWARD CHAN QUONG.

Infant—Illegitimate child—Custody—Welfare of the child—Consent of mother only—Adoption Act, R.S.B.C. 1936, Cap. 6, Sec. 7, Subsec. (1) (c).

John Quong, a Chinese farmer 30 years old was married in China when 16 years old where his wife presumably still resides. He resides at Vernon and has been living with a young white girl in a cabin there. To this couple was born a male child on November 5th, 1944. In December, 1944, without the knowledge of Quong, the girl left with the child for Vancouver. On arrival she sent a telegram to Quong to come and get the baby as she was going to work and was unable to look after it. On January 23rd, 1945, the mother deeded the child to one Ming Dock Thong. When Quong arrived at Vancouver he found the child was in possession of Ming Dock Thong and his wife. On motion on the return of a writ of *habeas corpus* the Court was not favourably impressed with Quong's demeanour in the witness box, nor convinced that he had the means to properly nurture and care for the infant. On the other hand, the Court was favourably impressed with Ming Dock Thong and his wife. He was a grocer carrying on business in Vancouver. He and his wife had no children, were anxious to adopt a child and were proceeding with an application for adoption of this infant.

Held, that by implication at least, section 7, subsection (1) (*c*) of the Adoption Act requires that before any order of the Court is made for the adoption of an illegitimate child, the written consent "of the mother only" of the child shall be obtained. The consent of the father is not necessary. The cardinal principle on which the Courts should proceed is the benefit of the infant. In the circumstances here, it is in the best interests of the child that it should remain in the custody of Ming Dock Thong and his wife.

MOTION by way of *habeas corpus* proceedings to a Chinese woman (Ah Mee) to produce an infant Edward Chan Quong for committal to the custody of the applicant John Quong. The facts are set out in the reasons for judgment. Heard by HARPER, J. in Chambers at Vancouver on the 12th of February, 1945.

Bray, for the applicant.
Marsden, for Ming Dock Thong.

Cur. adv. vult.

16th February, 1945.

HARPER, J.: This is a motion on the return of a writ of *habeas corpus* directed to a Chinese woman (Ah Mee) to produce an

infant Edward Chan Quong for committal to the custody of the applicant, John Quong, a Chinese farmer residing at Vernon, British Columbia.

The facts briefly stated, are that John Quong is a market gardener who rents certain farm lands in the vicinity of Vernon, B.C., for the production and sale of farm produce. Quong is a man 30 years of age who was married in China at the age of 16 years and whose wife presumably still resides there but has not been heard from for a period of six years past. Quong became sexually intimate with a young white girl, Elva Johnson, 17 years of age, and was living with her in a cabin at Vernon. To this couple was born on the 5th of November, 1944, at Vernon Jubilee Hospital, a male child who was given the name of Edward Chan Quong.

On the 26th of December, 1944, with the money supplied by her sister and without the knowledge of Quong, Elva Johnson left with her infant for Vancouver. Arriving in Vancouver she sent a telegram to Quong to come and get the baby as she was going to work and was unable to look after him. When Quong arrived at Vancouver he found the infant in the possession of Ming Dock Thong and his wife. These parties reside at 799 Keefer Street in the city of Vancouver. Both appeared on this hearing and gave evidence. The material produced before me disclosed that on January 23rd, 1945, the mother of the child had, no doubt, due to the ignorance of all parties to the proper procedure, deeded the child to Ming Dock Thong. The mother of the infant had heard through a friend that Ming and his wife were anxious to adopt a child, and accordingly she gave them the custody of it, and it is now in their care.

Apart from the reprehensible conduct of Quong toward this 17-year-old white girl, I was not favourably impressed with his demeanour in the witness box, nor am I convinced that he has the means to properly nurture and care for this infant. On the other hand Ming Dock Thong is a grocer, carrying on business in the city of Vancouver. He is 36 years old, has been married 12 years and has no children. I was favourably impressed with his demeanour in the witness box and I reached a similar favourable conclusion as regards his wife. In my opinion the child will

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be given a better home and a better upbringing if left in their care, than either of the parents could give it. Ming Dock Thong is now proceeding with an application for the adoption of this infant. His standing in the Chinese community and his ability to provide for and raise the child will be further investigated by the Superintendent of Neglected Children. Under all the circumstances existing here, I am of the opinion that it is in the best interests of the child that it be not removed from their custody. Quong has no home to take it to, and must, if given custody, entrust it to the care of a Chinese woman in Vernon, about whom the Court has no precise information.

The principle laid down as to illegitimate infants in Simpson on Infants, 4th Ed., 100-1 is:

> While the child is within the age of nurture, it seems doubtful whether the father has the right to take it from the custody of anyone with whom it may be. The mother has a natural right to its custody, which will be regarded by the Court.

By implication at least the same principle has been recognized by our Legislature in the enactment of the Adoption Act, Cap. 6, R.S.B.C. 1936. Section 7, subsection (1) *(c)* requires that before any order of the Court is made for the adoption of an illegitimate child the written consent "of the mother only" of the child verified by affidavit, shall be obtained. The consent of the father is not necessary.

Eversley on Domestic Relations, 5th Ed., 511, whilst pointing out that at one time the mother and her illegitimate child were deemed very little more than strangers to one another, yet now subject to the interests and benefit of the child, she has the right to its control and custody. It has been held over and over again that the cardinal principle on which the Courts should proceed is the benefit of the infant.

Under all the circumstances existing here I have no hesitation in finding that it is in the best interests of the child that it should remain in the custody of Ming Dock Thong and his wife.

Order accordingly.

IN RE DESERTED WIVES' MAINTENANCE ACT AND *IN RE* ADA SARAH STEPHANIE.

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Feb. 22, 23.

Husband and wife—Contempt of Court—Mandamus—Deserted Wives' Maintenance Act—Order by magistrate for weekly payments—Not obeyed—Show cause summons—Appeal from order—Adjourned pending disposition of show cause summons—Mandamus refused—R.S.B.C. 1936, Cap. 73, Sec. 10.

A magistrate ordered a husband to pay $15 a week for maintenance of his wife, whom the magistrate held to be a deserted wife within the meaning of the Deserted Wives' Maintenance Act. On the hearing of an appeal by the husband, the wife's counsel objected that the husband had not made any weekly payments as ordered and that a show cause summons had been served on the husband under section 10 of the Act to show cause why the order should not be enforced. The county court judge adjourned the hearing of the appeal, stating in his reasons for judgment that in the event of the magistrate varying the previous order, it would affect his determination of the appeal. On the husband applying for a prerogative writ of *mandamus* directing the judge to hear the appeal:—

Held, after perusal of the proceedings before the magistrate and the reasons for judgment of the county court judge, this is not a proper case for a prerogative writ of *mandamus* to issue and the motion is dismissed.

MOTION for a prerogative writ of *mandamus* addressed to SARGENT, Co. J., directing him to hear an appeal taken by the husband from the judgment of magistrate F. J. Bayfield, Esquire, ordering the husband to pay $15 per week for maintenance of his wife. Heard by HARPER, J., at Vancouver on the 22nd of February, 1945.

J. A. MacInnes, for appellant.
William Savage, for respondent.

Cur. adv. vult.

23rd February, 1945.

HARPER, J.: This is a motion for a prerogative writ of *mandamus* addressed to His Honour Judge R. A. SARGENT directing him to hear an appeal taken by the husband from a judgment of magistrate F. J. Bayfield, ordering the husband to pay $15 a week for maintenance of his wife, whom the magistrate held to be a deserted wife within the meaning of the Deserted Wives' Maintenance Act.

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On the hearing before the learned county court judge an objection was taken by counsel for the wife that the husband had made no weekly payments as ordered by the magistrate, and he was further advised that a show cause summons had been served on the husband pursuant to section 10 of the Deserted Wives' Maintenance Act, to show cause why the order should not be enforced. The county court judge, in the result, adjourned the hearing of the appeal. In his reasons for judgment he stated that, in the event of the magistrate varying the previous order, it would affect his determination of the appeal which was accordingly adjourned until March 5th. While the county court judge has dealt with the question as to whether the husband was guilty of contempt in not obeying the order of the magistrate and quotes several authorities in support of his view, it cannot be overlooked that in his final summing up he clearly and definitely placed on record his opinion that the proceedings in the county court would be affected by the decision of the magistrate on the show cause summons.

Although it may not be necessary to this decision, in view of the fact that, counsel has dealt with the subject of contempt of Court and the right of one, though in contempt, to have the right of questioning the order, it is to be noted that Vaughan Williams, L.J., in *Gordon* v. *Gordon,* [1904] P. 163, at p. 172, qualifies that right by saying,

> if upon looking at the order one can see that that really is the ground of appeal.

Stirling, L.J. in *Gordon* v. *Gordon, supra,* at p. 174 also states:

> And here the question is not merely one of irregularity in the order, but it is one of want of jurisdiction in the Court.

The third member of the Court of Appeal, Cozens-Hardy, L.J. at p. 174 says:

> But I desire expressly to limit my judgment to a case in which the respondent is saying that the order complained of is outside the jurisdiction of the Court, as distinguished from the case of an order which, although it is within the jurisdiction of the Court, ought not, it is said, to have been made.

Again it may be pointed out that the Deserted Wives' Maintenance Act is legislation to ensure that deserted wives may enforce weekly payments from husbands who refuse to carry out their marital obligations. The order of the magistrate is not in

the form of any ordinary judgment whereby one recovers from another any lump sum, but is restricted to weekly payments not exceeding $20, the *quantum* depending on the circumstances and the means of the husband and any means which the wife may have. Jurisdiction is also given to vary or rescind the original order if proof is given that the means or circumstances of the husband or wife or needs of the children have been altered since the making of the original order. The Legislature has put teeth in the Act by altering the general rule of law by making the husband and wife not only competent but compellable witnesses for and against each other, and also competent and compellable to disclose any communication made by either of them to the other during marriage.

It is further expressly provided that where the husband is the appellant, proceedings in the order appealed from shall not be stayed pending the appeal, and he shall pay all costs of the appeal.

A reading of the record of the proceedings before the magistrate discloses that the parties reside in North Vancouver. The wife gave evidence of non-support; the husband, I am informed, was present in Court and was represented by counsel who cross-examined the wife, and then the husband chose not to give evidence.

In view of the very stringent provisions of the Deserted Wives' Maintenance Act, in my opinion the Legislature intended that every protection possible should be given to the wife to ensure her proper maintenance during the pendency of the proceedings taken against her husband. After perusal of the proceedings before the magistrate and also the reasons for judgment of the county court judge I cannot find that this is a proper case for prerogative writ of *mandamus* to issue. Accordingly the motion is dismissed with costs.

Motion dismissed.

C. A.

1945

April 5, 13.

REX v. EIST.

Criminal law—Theft—Accused employed to sell magazines—Commission basis—Collections in Victoria and tried by magistrate in Vancouver—Jurisdiction — Successive collections — Using Courts for collection of debts—Criminal Code, Sec. 347.

Accused was employed to sell magazines and was to receive 60 per cent. on all moneys collected on sales of "Toronto Saturday Night" and 85 per cent. for sales of "Canadian Home Journal." In Victoria he obtained 42 orders for "Toronto Saturday Night" for which he received $260, and 2 orders for "Canadian Home Journal" for which he received $5, there being a balance due his employers of $88.55. In September, 1944, accused handed a letter to his employer setting out the sales and the balance due to the company, but he failed to pay the balance due his employers. After delivery of the letter the company entrusted him with a further order-pad and allowed him to continue in their employ. On October 20th, 1944, an information was laid and warrant issued, but he was not arrested until March 12th, 1945. He was convicted and sentenced to six months' imprisonment.

Held, on appeal, affirming the decision of police magistrate Wood (O'HALLORAN, J.A. dissenting), that although the money was stolen in Victoria, the Vancouver magistrate had jurisdiction as the information was laid while accused was in Vancouver and no objection was taken to the jurisdiction. The submission that the $85.75 was made up of a large number of subscriptions and there should have been a separate charge in respect of each, fails in view of the decision in *Minchin* v. *Regem* (1914), 23 Can. C.C. 414, and the submission that the firm was using the Courts for the purpose of collecting the debt, fails as after receiving the letter from accused in which he said "he was sorry he had spent the company's money and would do everything he could to straighten the matter out," the manager issued to him "one other order-pad" with instructions to report daily and make a small payment on account each day. The manager said he did not see the accused after that until the trial.

APPEAL by accused from his conviction by police magistrate H. S. Wood, Esquire, Vancouver, for stealing $85.75, the property of Consolidated Press Limited, Vancouver, and appeal from sentence. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 5th of April, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Gordon M. Grant, for appellant: The prosecution is in bad faith and an attempt to use the Courts for the collection of a debt:

see *Rex* v. *Thornton* (1926), 37 B.C. 344; *Rex* v. *Leroux* (1928), 50 Can. C.C. 52, at p. 56.

J. H. MacLeod, for the Crown, referred to *Reg.* v. *Hogle* (1896), 5 Can. C.C. 53.

Cur. adv. vult.

13th April, 1945.

O'HALLORAN, J.A.: The appellant was convicted of theft under Code section 347, and sentenced to six months' imprisonment. No reasons for judgment were given. No previous criminal record has been disclosed. It was stated that he was four and a half years overseas in the Canadian Armed Forces. He was engaged in soliciting subscriptions for several periodicals upon a commission of 60 per cent. of all moneys he collected. He received no salary. Towards the end of September last year he wrote a letter from Victoria to his principal (which he handed in at the Vancouver office in person) enclosing 44 orders for periodicals showing $260 collected, of which $90 was expressed to be due from him to the principal.

The correctness of these amounts was not questioned. On 20th October the principal laid the charge of stealing $85.75 upon which the conviction is founded, but subsequently accepted one payment of $5 and also received 30 or 40 dollars' worth of further subscriptions. The appellant was not arrested until early in March. The trial took place on 13th March almost five months after the information had been laid. Counsel for the appellant advanced several grounds of appeal, but the decisive ground in my judgment is that it was not conclusively established there was fraudulent taking or conversion of the money within the meaning of Code section 347.

The fact the appellant withheld the moneys openly in the way he did when reporting to his principal, combined with the delay of nearly five months in arresting the appellant after the information was laid, the intervening disputes regarding the amount owing and the inconclusive nature of the prosecution evidence as to the arrangement between the appellant and his principal, satisfies me there is a grave rational doubt that there was fraudulent taking or conversion of the moneys and *cf. Rex* v. *Curtiss* (1925), 18 Cr. App. R. 174, and Kenny's Outlines of Criminal

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Law, 14th Ed., 206-7. I do not understand Code section 347, subsection 2 to mean that under no circumstances may the open taking of a thing deny lack of fraudulent intent. Theft was a common-law offence and was not created by the Criminal Code, *cf. Smith* v. *Regem*. *Blackman* v. *Regem*, [1931] S.C.R. 578, at p. 581.

The letter the appellant wrote his principal recorded the subscriptions he had obtained and stated correctly the balance due the principal. The latter did not insist on immediate payment of that balance, but continued the appellant as his agent. When the principal prosecution witness was asked if it was not usual for commission agents to retain moneys for payment of their immediate expenses in anticipation of commissions they expect to earn, he said:

> It is unusual. In most cases the company money is reported promptly or on time, either weekly, at the outset two times weekly.

The principal prosecution witness did not say that in all cases company money was "reported" in the several ways he indicated. Furthermore, he did not say the money was payable in the ways he indicated. He said it was "reported." The appellant here did certainly "report" the company's money in the letter to which I have referred. The prosecution witness did not inform the Court of the arrangement he had with the appellant for paying in the net proceeds of cash subscriptions obtained. I am forced to conclude that the evidence pointing to fraudulent taking or conversion within the meaning of Code section 347, lacks that certainty of proof which the criminal law requires. Compare *Rex* v. *Wade* (1869), 11 Cox, C.C. 549 (Blackburn, J.); *Rex* v. *Lakusta* (1944), 60 B.C. 241, and Russell on Crime, 9th Ed., p. 868 *et seq.*

It is observed also that while the information was laid on 20th October the appellant was not arrested until early in March. The delay was not due to inability to find the appellant. It appears that in the interval there were disputes between the appellant and the principal prosecution witness wherein the former denied he owed any money at all in view of certain claims he then set up against the principal. The circumstances to which I have referred when viewed against the background of all the testimony bring me to the conclusion that the appellant did

not receive the benefit of the substantial doubt of his guilt which the evidence creates.

I would allow the appeal and direct a verdict of acquittal to be entered.

ROBERTSON, J.A.: The accused appeals from his conviction for stealing $85.75, the property of the Consolidated Press Limited, 815 W. Hastings Street, Vancouver, B.C. The accused was employed to sell magazines, principally the "Toronto Saturday Night" and the "Canadian Home Journal," in Vancouver. The manager of the Consolidated Company who made the arrangement with the accused, says that he was to get a commission of 60 per cent. of all moneys collected in respect of "Toronto Saturday Night" sales and 85 per cent. in respect of "Canadian Home Journal" sales and he was to work in Vancouver.

The accused agrees with the contract so far; but says that he went to Victoria, to work there, with the approval of his employers and that there was an additional term of the contract, namely, he was to get a further 20 per cent. over and above the commissions above mentioned for certain salesmanship training he was to do. His defence was that his regular commissions, plus the extra 20 per cent. and plus what he had paid after his letter to the Consolidated (to be later mentioned) more than paid the Consolidated that he owed them. The manager of the Consolidated denied that there was any arrangement in regard to the 20 per cent. and that he authorized the accused to go to Victoria. Apparently the magistrate did not accept the accused's version of either of these two things.

In Victoria he obtained 42 orders for "Saturday Night" for which he received $260 and two orders for "Canadian Home Journal" for which he received $5, leaving a balance due to his employers, after deducting his commissions, of $85.75.

About the end of September, 1944, the accused handed a letter to his employer in Vancouver, setting out these sales and the balance due to them. He has failed to account for it.

An information was laid, and a warrant taken out, about the 20th of October, 1944, but for some reason the accused was not arrested till about the 12th of March, 1945.

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The accused says that after the delivery of the letter the Consolidated entrusted him with a further order-book and allowed him to continue in their employ and that he made certain payments to them. Counsel for the accused takes four points: First, that the theft was for money stolen in Victoria and therefore the Vancouver magistrate had no jurisdiction. Apparently the information was laid while the accused was in Vancouver but it is not quite clear that he was apprehended in Vancouver. The accused raised no objection to the jurisdiction.

In *Rex* v. *Rochon* (1923), 42 Can. C.C. 323 the facts were that the accused was indicted at Sherbrooke, Quebec, for offences committed at Montreal, Quebec. The accused was convicted and a case was stated. One question was whether or not the grand jury of the District of St. Francis had jurisdiction to deal with the matter for the offence alleged to have been committed in the District of Montreal. Hall, J. said at p. 325:

> In answer to the second question, I am of the opinion that the Grand Jury of the District of St. Francis had jurisdiction, although the indictment shows nothing more than the venue. As has just been said, in the absence of any objection by the accused on that ground, there is a concise and weighty presumption that, when the accused is brought before the magistrate, he was arrested in the district.

See also *Rex* v. *McKeown* (1912), 20 Can. C.C. 492 and section 577 of the Code.

The second submission is that as the $85.75 was made up of a large number of subscriptions there should have been a separate charge in respect of each. This objection fails in view of the decision of the Supreme Court of Canada in *Minchin* v. *Regem* (1914), 23 Can. C.C. 414.

The third objection is that the evidence does not prove theft. Upon the evidence it is clear that the accused collected $85.75 which belonged to his employers. His act in converting this money to his own use was fraudulent and without colour of right. It was suggested that as he told the Consolidated exactly what he had done he could not be guilty of "fraudulently and without colour of right taking"; but subsection 3 of section 347 of the Code provides that the taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

It was argued that the following evidence of the manager of Consolidated, in cross-examination, showed the accused was

entitled to spend the money which he collected and make it up afterwards:

> At that time—it is not unusual, is it for salesmen to anticipate the commissions that they will receive and spend the money to make it up afterwards? That seems to be a common belief. It is unusual. In most cases the company money is reported promptly or on time, either weekly, at the outside two times weekly.

I take this to mean that the manager was not speaking of the terms of the instant contract, but of other contracts which were sometimes made. The accused in his evidence did not suggest any such term of the contract.

The only remaining point for consideration is the suggestion by counsel for the accused that the Consolidated were using the Courts for the purpose of collecting the debt. After the receipt of the letter above mentioned the accused said to the manager:

> He was sorry that he had spent the company's money in this way, that he would do everything he could to straighten it out, if I would just give him one more chance.

The manager issued to him "one other order-pad" with instructions that he report daily and make a small payment on the account each day. The manager says he did not see the accused after this until the trial day.

The accused made one payment of $5. There is no suggestion in the evidence that at this time or at any other time prior to the 20th of October, 1944, the accused was threatened with prosecution if he did not pay. On the 20th of October, 1944, the information against the accused was sworn and presumably the warrant issued on that date. The warrant was not executed until March, 1945. There is no explanation of why the police did not execute it. Consolidated's manager says

> he did not at any time ask anybody in connection with the police to withdraw that or hold it or interfere with the information in any way.

In my opinion this defence also fails.

Finally the accused's counsel says that the cross-examination of the accused as to his failure to account for moneys to other previous employers was improper and prejudicial to the accused. In my opinion it is not necessary to decide this point as the accused was plainly guilty as charged and I am satisfied no substantial wrong or miscarriage of justice has occurred in the conduct of the trial. *Rex* v. *Dillabough* (1944), 60 B.C. 534 and

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Rex v. *Haddy* (1944), 29 Cr. App. R. 182 referred to at p. 536. The *Haddy* case was approved of by the House of Lords in *Stirland* v. *Director of Public Prosecutions* (1944), 60 T.L.R. 461, at p. 462.

The appeal from conviction must be dismissed.

The accused also appeals from the sentence of six months imposed on March 14th, 1945. He has not been previously convicted. The accused's counsel put to the learned magistrate the same arguments as he submitted to us in asking for a reduction of the sentence, so that the magistrate did not leave "out of consideration any substantial elements." Applying *Rex* v. *Zimmerman* (1925), 37 B.C. 277, I see no reason why the sentence should be interfered with.

The appeal against sentence is also dismissed.

BIRD, J.A.: I would dismiss the appeal from conviction. I have had the privilege of perusing the opinion of my brother ROBERTSON and agree with his reasons for dismissal of the appeal.

As to the appeal from sentence, no good ground has been advanced before us, in my opinion, for reduction of the sentence of six months' imprisonment imposed by the learned magistrate. I would therefore also dismiss the appeal from sentence.

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

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Feb. 6, 14.

DAVIS v. BANK OF MONTREAL.

Banks and banking—Cheque payable to "Labor Day Sports Program"—Plaintiff's authority to endorse—Deposit in bank—Refusal of bank to honour cheque—Action for damages.

Plaintiff deposited $5 in the defendant bank upon opening an account. Shortly after he deposited two cheques made payable to Labor Day Sports Program and endorsed "Labor Day Sports Program *per* J. C. Davis," in all $15. The cheques were accepted and went through the clearing-house. Later he submitted for deposit eight more cheques so endorsed and was told by the accountant that the deposit could not be accepted unless he agreed to have a form signed showing his authority

to endorse. He promised to have the form signed and returned and was allowed to deposit the eight cheques, in all $50, but was told that he could not operate this account until the completed form was returned. Without any intention of having the form signed, the plaintiff endorsed more such cheques to one M. who deposited them in his account in the same bank, but the bank charged them back to M.'s account and returned them to him. The plaintiff, knowing all this, issued the cheque in question herein for $16.70 in favour of M. who tried unsuccessfully to have it cashed by the defendant. Exclusive of the $50 deposit there was enough in the plaintiff's account to meet the cheque. In an action for damages for failure to honour the cheque:—

Held, that as there was a sufficient amount on hand in the account exclusive of the $50 deposit made on August 16th, 1944, to make payment of the cheque and as the bank has not discharged the burden of establishing that the condition imposed by it was accepted by the plaintiff as applying to the deposits made prior to August 16th and as the bank had, after discovering the invalidity of the endorsement on the two cheques of August 15th, permitted these cheques to go through the clearing-house, the bank had no right to refuse payment of the cheque for $16.70. The cheque for $16.70 was issued by the plaintiff for the purpose of testing the legal position by the bank and under the circumstances he is only entitled to nominal damages.

ACTION for damages for the defendant's failure to honour a cheque drawn by the plaintiff on his account in the defendant bank for the sum of $16.70. The facts are set out in the headnote and reasons for judgment. Tried by COADY, J. at Vancouver on the 6th of February, 1945.

Fleishman, for plaintiff.
Symes, for defendant.

Cur. adv. vult.

14th February, 1945.

COADY, J.: The plaintiff sues for damages for the defendant's failure to honour a cheque drawn by the plaintiff on his account in the defendant bank in the sum of $16.70 in favour of one Harry Moore. This account was opened on August 6th, 1944, and a cash deposit made of $5. On August 15th a further deposit was made of $15, consisting of two cheques, one for $10 and one for $5, both payable to Labor Day Sports Program and endorsed "Labor Day Sports Program, *per* J. C. Davis." This endorsement was accepted by the teller without questioning its validity. The accountant at the end of the day when making up his returns

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for the clearing-house, noticed the endorsement, checked to see if there was any authority on file authorizing it, and finding none, gave some instructions to the teller, presumably as to the irregularity of the endorsement, but nevertheless permitted the two cheques to go through to the clearing-office, thereby parting with possession of them. It was not then known when the plaintiff would return to make a further deposit, but it was the accountant's intention to take the matter up with him when he did and before any further deposits of this nature were accepted. As it happened, the plaintiff came in the following day, August 16th, to make a deposit of eight more cheques all made out in the same way and presumably endorsed in the same manner. Before the deposit was made, however, he was told by the accountant that the deposit could not be accepted unless he agreed to get a form signed showing his authority to sign. A printed copy of form required was handed to him which he agreed to have signed. On his promise to have this completed and returned he was allowed to make a further deposit of $50, the amount of the eight cheques above referred to. He was also informed that he could not operate this account until this completed form was returned. This condition imposed by the defendant, it seems to me, on the evidence before me, was accepted by the plaintiff in reference to the $50 deposit made on August 16th. The evidence is not sufficient, it seems to me, to show the plaintiff's consent to this condition attaching to the prior deposit made by him on August 15th which had been accepted by the bank and the cheques representing which had gone through the clearing at this time. It would seem as though the bank intended it should apply to the whole account exclusive of the $5 deposit made in cash, but as the burden of establishing that is on the bank, and as the evidence has not convinced me that the plaintiff consented to this restriction being imposed upon the deposit already made, that burden has not been discharged. The plaintiff made no effort to get the form signed, and frankly stated in his evidence that he had no intention of getting it signed. He knew, however, that no further deposits of this nature would be accepted until the form was signed. He then endeavoured to negotiate other cheques, made out the same way, through Harry Moore, by endorsing them as

he had previously endorsed those deposited in the bank, and Moore putting these through his account in the same bank. The bank, however, charged these cheques back to Moore's account and returned them to him. The plaintiff knew of this when on August 22nd he issued the cheque in question here in the sum of $16.70 in favour of Moore who endeavoured to have it cashed by the defendant, but his request was refused. As there was a sufficient amount on hand in the account exclusive of the $50 deposit made on the 16th of August to make payment of this cheque, and as I am not satisfied that the bank has discharged the burden of establishing that the condition imposed by it on August 16th was accepted by the plaintiff as applying to the deposits made prior to August 16th, and as the bank had after discovering the invalidity of the endorsement on the two cheques deposited on August 15th permitted these cheques to go through the clearing, I am of the opinion that the bank had no right to refuse payment of the cheque for $16.70. I am further convinced that this cheque for $16.70 was issued by the plaintiff in favour of Moore for the purpose of testing the legal position taken by the bank. He probably expected that payment would be refused. Under the circumstances he is only entitled to nominal damages. I would fix damages at the sum of $1, costs on the county court scale. The plaintiff's claim for $70 special damages is disallowed. He is not prevented, as the evidence shows, from securing payment from the bank of the amount of the deposit of August 16th by the issue of a cheque in favour of Labor Day Sports Program, if for any reason he is unable to supply the completed form that the bank requires.

Judgment accordingly.

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IN RE THE TRUSTEE ACT AND *IN RE* WOODWARD ESTATE. SMITH v. MACLAREN *ET AL.*

Will — Rule in Shelley's Case — Whether applicable to will in question — R.S.B.C. 1936, Cap. 292.

The first requirement for the application of the rule in *Shelley's Case* is that there must be an estate of freehold in the ancestor and the second condition is that the gift over must be to the "heirs" used in the legal technical sense, of the person to whom the freehold estate has been given. If to the heirs of someone else, the rule has no application.

The rule was held not to apply to the will in question because (1) The authorities supporting the principle that, in the absence of a context indicating a contrary intention, a devise of the rents and profits or the income of land passes the land itself both at law and in equity, do not apply to a case such as the present where the obvious intention of the testator as expressed in his will was to confer on the parties no estate in the realty, but to give to them a bequest of the income only as legatees for life or *pur autre vie*, as the case may be, and on the death of each of them before the death of the survivor of a group of five, the trustees were directed to pay that income to the surviving child or children, if any, until the death of the survivor of the group of five named in the will. So the first requirement was absent; (2) assuming that an estate of freehold was given to the first-mentioned beneficiaries there was no gift over or remainder to their respective descendants as such, even if the word "descendants" is to be read as equivalent to "heirs" and therefore the second condition for the application of the rule was absent; (3) assuming said two conclusions were wrong, nevertheless the word "descendants" was used by the testator in a restricted or narrow sense and not in the sense of "heirs" or "heirs of the body" or "issue," he restricted the meaning to a certain class of descendants, those answering that description at a certain time; (4) the rule does not apply as the time for distribution was fixed by the testator; (5) the rule does not apply to personalty, but to realty and as the executors were directed by the will to sell the real property the estate was, under the equitable doctrine of conversion, personalty.

The portion of the income accruing between the time of the death of Mrs. Fisher, one of the first-mentioned legatees, and the time fixed by the will for the sale of the real estate was held to be payable to her personal representative until the death of the survivor of the group of five, the estate given Mrs. Fisher not being an estate for her life only.

APPLICATION by way of originating summons to determine certain questions relating to the interpretation of the will of Charles Woodward, deceased. The facts are set out in the

reasons for judgment. Heard by COADY, J. at New Westminster, on the 13th of September, 1944.

J. L. Lawrence, for Cora L. Smith.

W. S. Owen, and *St. John,* for Elizabeth E. MacLaren, Elizabeth A. MacLaren and Richard R. W. MacLaren.

Donaghy, K.C., for Phyllis G. Serrurier and Charles McC. Smith.

Cur. adv. vult.

28th February, 1945.

COADY, J.: This is an application by way of an originating summons to determine certain questions relating to the interpretation of the will of the above-named deceased. The first question is:

1. Does the rule in *Shelley's Case* apply to the provisions of the will and the second codicil, and if so, in respect of what gifts, devises or property does it apply and to what extent and with what effect does it apply?

The deceased died on or about the 2nd of June, 1937, leaving a will pursuant to which he gave, devised and bequeathed all his estate, both real and personal, to his executors and trustees, upon certain trusts. The will after directing the payment of certain pecuniary legacies, all of which have been paid, provides as follows:

SECOND, subject to the payment of the pecuniary legacies aforesaid I DIRECT my trustees to hold the income arising from my said Vancouver real estate for my two daughters, MRS. MARY CATHARINE FISHER and MRS. CORA LILLEY SMITH and my granddaughter MRS. ELIZABETH ELEANOR MACLAREN, in equal shares and for a period of three years from and after my death to pay to each said daughter and to the said MRS. ELIZABETH ELEANOR MACLAREN the sum of Four Thousand Dollars ($4,000.00) per year and no more on account of her share of such income, the balance of such income during said period of three years to be invested as received by my trustees in the share capital of WOODWARD STORES LIMITED, or, at the discretion of my trustees in any security allowed by law for the investment of trust funds, and at the end of said period of three years to distribute such accumulated income in equal parts among my said two daughters and the said MRS. ELIZABETH ELEANOR MACLAREN, and from and after the said period of three years the whole of such income to be distributed annually during the lifetime of the survivor of the following persons, namely, my said two daughters and the said MRS. ELIZABETH MACLAREN and those children of my said two daughters who are living at the time of my death, such distribution to be amongst my said two daughters and the said MRS. ELIZABETH ELEANOR MACLAREN share and share alike AND UPON the termination of the said period I DIRECT that the said Vancouver real estate be sold and that the proceeds of such sale be

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divided between the descendants of my three daughters MRS. MARY CATHARINE FISHER, MRS. CORA LILLEY SMITH and MRS. ANNIE ELIZABETH SAUNDERS, now deceased, (by way of explanation stating that the said MRS. ELIZABETH ELEANOR MACLAREN is the only child of my said daughter MRS. ANNIE ELIZABETH SAUNDERS, now deceased) in the following manner, that is to say, the proceeds shall be divided into as many equal shares as there are daughters of mine who are then deceased (whether before or after the date of my will) and have descendants them then surviving and the descendants of each deceased daughter of mine shall have divided equally amongst them one of the said shares, the intention being that if any of the said descendants is then dead and has left a child or children him or her surviving that the child or children and if there be more than one, then equally between them, shall take the share which his, her or their father or mother would have taken if he or she were then living.

AND I DECLARE that in construing all the foregoing portions of my will that in the event that any daughter of mine or the said MRS. ELIZABETH ELEANOR MACLAREN shall have predeceased me leaving a child or children her surviving at the date of my death that such child or children shall take and if there be more than one then equally between them the share which his, her or their mother would have taken under the provisions of this my will if she had survived me and further that from and after the death of any daughter of mine or of the said MRS. ELIZABETH ELEANOR MACLAREN PRIOR TO THE termination of the period hereinbefore provided for the annual distribution of the income from my Vancouver real estate that the share of such daughter or of the said MRS. ELIZABETH MACLAREN shall be delivered to her surviving child or children and if there be more than one then equally between them.

Counsel for Mrs. Serrurier and Mr. Smith submits that under the terms of the will the rule in *Shelley's Case* applied to the gift to Mrs. Fisher and Mrs. Smith, and they are thereunder each entitled to an undivided one-third interest in tail in the real estate from which the income payable to them is derived, and by virtue of Cap. 140, R.S.B.C. 1936, Sec. 24, Subsec. (2), which provides that

> Any limitation which before the first day of June, 1921, would have created an estate tail shall transfer the fee-simple or the greatest estate that the transferor had in his land

they each are entitled to an undivided one-third interest in an estate in fee-simple in the said lands.

A statement of the rule in *Shelley's Case* is lucidly set out in the speech of Lord Shand in the case of *Van Grutten* v. *Foxwell*. *Foxwell* v. *Van Grutten*, [1897] A.C. 658. At pp. 684-5 he says:

> In my opinion the rule in *Shelley's Case*, [(1581)] 1 Co. Rep. 93 b is a rule of law and not a mere rule of construction—*i.e.*, one laid down for the

purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that wherever an estate for life is given to the ancestor or *propositus*, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life and no longer, or has endeavoured to graft upon the words of gift to the heirs, or heirs of the body, additions, conditions, or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to. The rule, I repeat, is not one of construction, and, indeed, usually overrides and defeats the expressed intention of the testator; but the question always remains, whether the language of the gift after the life estate properly construed is such as to embrace the whole line of heirs or heirs of the body or issue, and that question must be determined apart from the rule, according to the ordinary principles of construction, including those which I have already referred to.

The testator may conceivably show by the context that he has used the words "heirs," or "heirs of the body," or "issue" in some limited or restricted sense of his own which is not the legal meaning of the words—*e.g.*, he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time. If the Court is judicially satisfied that the words are so used, I conceive that the premises for the application of the rule in *Shelley's Case* [*supra*] are wanting, and the rule is foreign to the case. But I repeat, that in every case the words are to be interpreted in their legal sense as words of limitation, unless it be made plain to the mind of the Court that they are not so used, and in what sense they are used by the testator.

The first requirement for the application of the rule in *Shelley's Case,* as the authorities show, is that there must be an estate of freehold in the ancestor. Is there then an estate of freehold given to Mrs. Fisher or to Mrs. Smith under this will? There is no devise here of an interest in the real estate to either of them. What there is, is a direction to the trustees to pay one-third of the income from the real estate to each of them for a certain period. This is a legacy directed to be paid to them. They are legatees of the income for life or for the life of the last survivor of the group of five, an estate *pur autre vie.* There are no words entitling them to possession of the real estate, legal or

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constructive. There is no control over the realty to be exercised by them or either of them. They are not entitled to the use, occupation or enjoyment of the realty, or to the rents and profits. In fact no interest in the realty, it seems to me, is given to them under this will. In the case of *Van Grutten* v. *Foxwell, supra,* it was held that the party had a freehold estate, for while there the lands were devised to the trustees in trust to receive the rents and profits for the use and benefit of the child or children, yet when the child or children reached the age of 21 years the trustees were to hold in trust to permit and suffer such child and children as they should separately attain the age of 21 years or be married, to take the rents and profits, and it was held that under the terms of the will the legal estate remained vested in the trustees and an equitable freehold estate in the children. That is not so here, it seems to me, since at no stage is any control to be exercised over the real estate by either Mrs. Fisher or Mrs. Smith.

It is submitted, however, that in law a gift of the rents and profits of land, unrestricted, is a gift of a fee-simple in the lands, and there would seem to be ample authority for that submission (*Doe dem. Goldin* v. *Lakeman* (1831), 2 B. & Ad. 30).

Likewise the gift of the income of land, unrestricted, is the gift of the fee-simple in the land. (*Mannox* v. *Greener* (1872), L.R. 14 Eq. 456). Jarman on Wills, 7th Ed., Vol. 2, p. 1264, says:

> In the absence of a context indicating a contrary intention, a devise of the rents and profits or of the income of land passes the land itself both at law and in equity.

The point is likewise discussed in *Re Coward; Coward* v. *Larkman* (1887), 57 L.T. 285, and on appeal in (1888), 60 L.T. 1. I do not think these cases have any application in a case such as the present where the obvious intention of the testator as expressed in his will is to confer on the parties no estate in the realty, but gives to them a bequest of the income only, as legatees for life or *pur autre vie,* as the case may be, and on the death of each of them before the death of the survivor of the group of five, a direction to pay that income to their surviving child or children, if any, until the death of the survivor of the group of five named in the will. I cannot read into this will an intention on the part of the testator to give to either Mrs. Smith or Mrs. Fisher an

equitable freehold estate for life or *pur autre vie* in the lands, or to their children after the death of either of them and before distribution, nor has any case been cited to show that language such as we have here confers a freehold estate in the realty.

So, the first ground for the application of the rule in *Shelley's Case* would seem to be absent.

Now the second condition for the application of the rule is that the gift over must be to the "heirs," used in the legal technical sense, of the person to whom the freehold estate has been given. If to the heirs of someone else the rule has no application. Now assuming that I am wrong in my first conclusion, and that an estate of freehold is given to Mrs. Fisher and to Mrs. Smith under the will then is the subsequent gift over to the "heirs" of each, that is assuming for the moment that the word "descendants" as used here is equivalent to "heirs" or "heirs of the body" or "issue"? I think not. The will provides that upon the death of the last survivor of that group of five the real estate is to be then sold and the proceeds

> divided into as many equal shares as there are daughters of mine who are then deceased (whether before or after the date of my will) and have descendants them then surviving and the descendants of each deceased daughter of mine shall have divided equally amongst them one of the said shares.

It seems clear that there is no remainder here following whatever estate is taken by Mrs. Fisher or Mrs. Smith to "their respective descendants" as such, but there is a remainder over to the descendants of such of the daughters as shall have descendants them surviving, an entirely different thing. There being then no gift over or remainder to their respective descendants (assuming the term is equivalent to "heirs") the second condition for the application of the rule is absent.

But assuming I am wrong in this, and that there is a gift of a freehold estate in the realty to Mrs. Fisher for life or *pur autre vie,* and likewise to Mrs. Smith, and assuming too that there is a gift over in remainder to the respective descendants, meaning heirs, as such, of each, then consideration must be given to the meaning of the word "descendants" as used by the testator in this will. Counsel for Mrs. Serrurier and Mr. Smith submits that it is equivalent to "heirs" or "heirs of the body" or "issue"

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as these words are understood in the technical legal sense. Unless it is, the rule has no application.

"Heirs of the body" in its technical legal sense comprehends all the posterity of the donee in succession. Lord Macnaghten at p. 688 in the *Van Grutten* case, *supra,* says:

> It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word "heirs," though, perhaps, it was not so always.

The word "descendants" it would seem, may, unless restrained by the context, be interpreted as meaning "heirs of the body" or "heirs" (*In re Sleeman. Cragoe* v. *Goodman,* [1929] W.N. 16), and so may the word "issue" (see *In re Hammond. Parry* v. *Hammond,* [1924] 2 Ch. 276; *Roddy* v. *Fitzgerald* (1858), 6 H.L. Cas. 823. Hawkins on Wills, 3rd Ed., 224-5 says:

> "Perhaps the strongest of all rules of construction is that which defines the meaning of 'heirs of the body,' when used in devises of real estate. Not only are the words highly technical, implying both an unlimited series of objects and a fixed order of succession, but it would be difficult in most cases, to find any secondary meaning for them which could carry out any probable intention on the part of the testator."

It seems to me that the word "descendants" is used by the testator here in a restricted or narrow sense and not in the sense as meaning "heirs" or "heirs of the body" or "issue." The testator, it seems to me, by his own dictionary has defined the meaning of the term used by him, and he has restricted that meaning to a certain class of descendants, to those answering that description at a certain time, such as referred to in the case of *Roddy* v. *Fitzgerald, supra,* p. 880. He has given it a meaning which does not embrace all the inheritable issue in succession. He has in effect said, the remainder over is not to go to the inheritable line in succession but to a particular class, living at a certain time. I do not know what language he could have used to more effectively show an exclusion of the whole inheritable issue in succession. The third requirement for the application of the rule is therefore, it seems to me, absent.

There is a further reason why, it seems to me, the rule in *Shelley's Case* has no application here, and that is, that a time for distribution has been fixed by the testator.

Jarman on Wills, 7th Ed., Vol. 3, p. 1907, says:

> The law on this point as to wills made since 1837 may be reduced to a very

simple general rule,—namely, that every devise to a person for life and after his decease to his "issue," in words which direct or imply distribution between the "issue," gives the "issue" an estate in fee in remainder by purchase.

A similar statement of the law may be found in Hawkins on Wills, 3rd Ed., 236.

In *Roddy* v. *Fitzgerald, supra,* Williams, J. at p. 862 quotes the opinion expressed by Vice-Chancellor Wood in *Kavanagh* v. *Morland* (1853), Kay 16, namely, that:

"Where words of distribution, together with words which carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only; and the rule is the same whether the fee be given by the technical words 'heirs' or by such words as 'estate' occurring in the description of the subject of the gift; and whether the gift to the issue be direct or by implication from a power to appoint to them; and whether there is a gift-over on general failure of the issue of the ancestor or not."

(See also *Hockley* v. *Mawbey* (1790), 1 Ves. 143; 30 E.R. 271; *In re Davison's Settlement* (1913), 83 L.J. Ch. 148; *Haight* v. *Dangerfield* (1903), 2 O.W.R. 120).

It would seem, furthermore, that the rule does not apply to personalty but to realty. In this estate pursuant to the direction contained in the will the real property is to be sold by the executors. Invoking the equitable doctrine of conversion the estate would thus appear to be personalty—not realty. The principle is stated in Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 132, as follows:

The general principle is that land directed or agreed to be sold and turned into money, or money directed or agreed to be laid out in the purchase of land is to be considered as that species of property into which it is directed or agreed to be converted.

Jarman on Wills, 7th Ed., Vol. 2, at p. 726 says:

It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character.

Halsbury's Laws of England, 2nd Ed., Vol. 25, p. 228, says:

The rule in *Shelley's Case,* which formerly applied to limitations of real property to one for life with remainder to his heirs or to the heirs of his body, and carried to him the fee, was usually inapplicable to limitations of personalty.

In re Jeaffreson's Trusts (1866), L.R. 2 Eq. 276; *In re Hammond. Parry* v. *Hammond,* [1924] 2 Ch. 276.

Having reached the conclusion that the rule in *Shelley's Case*

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does not apply to the gifts to Mrs. Fisher and Mrs. Smith it is necessary to consider the second question in the originating summons which is as follows:

From and after the death of Mary Catharine Fisher on October 23rd, 1943, to whom and in what portion or portions should be paid that portion of the income derived from the real estate of the said Charles Woodward situate in the City of Vancouver, Province of British Columbia which before her death was payable to the said Mary Catharine Fisher under the provisions of the will and second codicil of the said Charles Woodward.

Counsel for Mrs. Serrurier and Mr. Smith submits that this portion of the income accruing between the time of Mrs. Fisher's death and the time fixed for the sale of the real estate under the will should be paid to the personal representative of the estate of Mrs. Fisher. The will, it will be noticed, provides

from and after the said period of three years the whole of such income to be distributed annually during the lifetime of the survivor of the following persons, namely, my said two daughters and the said MRS. ELIZABETH MACLAREN and those children of my said two daughters who are living at the time of my death, such distribution to be amongst my said two daughters and the said MRS. ELIZABETH ELEANOR MACLAREN share and share alike.

This is clearly a gift to Mrs. Fisher of an estate in the income, for a certain period of time, not necessarily for her own life but for the life of the survivor of the group, a group of five persons. If she were the survivor of that group it would be an estate for her life. If she was not the survivor, and as it transpired she was not, it would be clearly an estate *pur autre vie*. If the will stopped there it would seem therefore that on her death, if she was not the survivor of that group, the income would be paid to her personal representative. But the testator while giving what is clearly a vested interest in this income to Mrs. Fisher of the nature mentioned, does not stop there. He provides further that

from and after the death of any daughter of mine or of the said MRS. ELIZABETH ELEANOR MACLAREN prior to the termination of the period hereinbefore provided for the annual distribution of the income from my Vancouver real estate that the share of such daughter or of the said MRS. ELIZABETH MACLAREN shall be delivered to her surviving child or children and if there be more than one, then equally between them.

Mrs. Fisher left no child surviving her. In fact she never had any child.

The original gift here to Mrs. Fisher is unambiguous in its nature. It is a gift that became vested in her upon the death of the testator. Mr. *Owen*, as counsel for Mrs. MacLaren and her

infant children admits that the gift became vested in Mrs. Fisher but maintains that it was a gift for a life interest only. Jarman on Wills, 7th Ed., Vol. 2, p. 1330, dealing with the general rule in regard to vesting, says:

"The law," says Mr. Jarman, "is said to favour the vesting of estates; the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person *in esse* simply (*i.e.*, without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest."

The gift of Mrs. Fisher therefore having become a vested interest, and a vested interest, it seems to me, for an estate *pur autre vie* or for life if she was the last survivor of the group of five, the interest of the child or children was a contingent remainder to become vested on the death of Mrs. Fisher if she had left any child or children her surviving, and provided she was not the survivor of the group of five, and to remain so vested in them until the death of the last survivor of the group of five. In other words there is a vested interest in Mrs. Fisher *pur autre vie,* subject only to being divested upon her death leaving a child or children her surviving, and this divesting to be dependent upon three contingencies, first, her death, which has occurred, secondly, her death before the death of the last survivor of this group of five, which has occurred, and, thirdly, her leaving child or children her surviving. Unless all of these contingencies are fulfilled the vested estate taken by her on the death of the testator does not become divested. There would seem to be plenty of authority to support that proposition. (Theobald on Wills, 9th Ed., 541; Jarman on Wills, 2nd Ed., Vol. 2, pp. 1338-40; *Jones* v. *Davies* (1880), 28 W.R. 455; *Re Deacon's Trusts; Deacon* v. *Deacon; Hagger* v. *Heath* (1906), 95 L.T. 701; *Hurst* v. *Hurst* (1882), 21 Ch. D. 278; *Doe d. Blomfield* v. *Eyre* (1848), 5 C.B. 713; *Crozier* v. *Crozier* (1873), L.R. 15 Eq. 282).

Counsel for Mrs. MacLaren and her infant children the other interests have submitted a number of authorities to the contrary, but these are largely based upon the premise that the interest taken by Mrs. Fisher is a life interest only, and that being so,

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then on her death having left no children there was consequently no object to receive this secondary gift, and it consequently falls into the residuary estate. Where I think that argument fails is in the assuming that the estate to Mrs. Fisher is an estate for life only. If the will provided for payment to her during her life only, which it does not, as I understand it, and thereafter to her child or children, if any, I think this submission would be sound, but that is not, it seems to me, what the testator has provided in this will. On the contrary the will clearly directs payment to Mrs. Fisher until the death of the survivor of that group of five, but subject to this, that if she left a child or children her surviving the payment would be made to them following her death within the period. The testator has in effect said, first, that payment should be made to his or her personal representative until the death of the last survivor of the group of five; secondly, if she dies before that time and leaves a child or children her surviving, then the executors shall pay that income to these children instead of paying it to the personal representative of the estate of Mrs. Fisher. I therefore hold that Mrs. Fisher, having died without leaving any child or children her surviving, her vested interest did not become divested upon her death since there was no object to take the secondary gift. The gift therefore does not fall into the residuary estate.

The answer to question 2 is therefore that Mrs. Fisher's share of the income is payable to her personal representative until the death of the survivor of the group.

I have not found it necessary to consider Mr. *Owen's* submission by way of preliminary objection that the rule in *Shelley's Case* is not and never was a part of the law of the Province of British Columbia. Since in my opinion the rule does not apply to the will before me, the exploration of the preliminary point would be of academic interest only.

Order accordingly.

GALE v. THE SHIP "SONNY BOY."

In Admiralty.

1945

March 2, 3, 5, 15.

Admiralty—Collision—Channel — Ships meeting — Damages — Pleadings—Defence—Amendment—Counterclaim—Limitation of liability—Canada Shipping Act—Costs—Can. Stats. 1934, Cap. 44, Sec. 649.

At about 12.30 a.m. on Monday, the 21st of August, 1944, the motor-vessel "Colnet," a fish packer of 25 tons and the motor-vessel "Sonny Boy," a fishing-vessel of 13.76 tons were in collision in the fairway of Ogden Channel opposite Carrie Head, the stem of the "Sonny Boy" cutting into the port side of the "Colnet" just forward of midships causing heavy damage. The plaintiff is the owner of the "Colnet" and at the time of the accident the vessel was in charge of his son 19 years old, with one Roberts, 17 years old, a deck-hand and one Ross, 16 years old, an engineer. The "Sonny Boy" was owned by Olav Knutson and Martin Gunstveit as joint owners, Knutson being the master with a crew of four fishermen. At the time of the collision Roberts was at the wheel of the "Colnet" with the master on look-out in the wheel-house. A fisherman Halverson was at the wheel on the "Sonny Boy," the other four men being below. The night was clear and dark. The master and deck-hand on the "Colnet" say that at the time of the collision their lights were burning, but the "Sonny Boy" showed no lights. Halverson in charge of the "Sonny Boy" says the exact opposite. There was evidence of the crew of the "Sonny Boy" drinking on the previous Saturday night and Sunday morning at Queen Charlotte City and there were marks on the faces of two of the crew showing they were fighting. It was held on the evidence that at the time of the collision the "Colnet" was exhibiting the regulation lights and that the "Sonny Boy" was showing no lights, that such default was the cause of the disaster and the "Sonny Boy" must be held alone to blame. The owners of the "Sonny Boy" pleaded they were entitled to limit their liability under section 649 of the Canada Shipping Act, the plaintiff claiming they should have raised this issue in a separate action after their liability had been determined.

Held, that the defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may plead his right to have his liability limited by way of defence in the action of damage in which he is defendant and set up a counterclaim in the same action claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action. The plaintiff not being prejudiced thereby, the defendants are granted leave to file a counterclaim claiming the right to limit their liability.

Held, further, that the *onus* is on Knutson and Gunstveit as joint owners of "Sonny Boy" to prove that the collision occurred without their actual fault or privity and they are not enfitled to limitation unless they discharge that *onus*. As regards Knutson, the *onus* has not been discharged. As Gunstveit was not on board at the time of the accident or otherwise at fault, he is entitled to limit his liability as provided in section 649 of the Canada Shipping Act.

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ACTION arising out of a collision between the motor-vessel "Colnet" and the motor-vessel "Sonny Boy" in Ogden Channel about opposite Carrie Head. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, D.J.A. at Vancouver on the 2nd, 3rd and 5th of March, 1945.

Ginn, for plaintiff.
Clyne, and *Hill,* for defendants.

Cur. adv. vult.

15th March, 1945.

SIDNEY SMITH, D.J.A.: This suit involves a collision which occurred in Ogden Channel, B.C., at approximately 12.30 a.m. on Monday, 21st August, 1944, between the motor-vessels "Colnet" and "Sonny Boy." The "Colnet" is owned by the plaintiff and is a fish packer, 54 feet long, 13 feet beam, 8 knots speed, and of 25 tons net register. She was in the course of a voyage from Prince Rupert to Queen Charlotte City, and was manned by a crew of three young man, the eldest of whom James Gale, a son of the plaintiff, was only 19 years of age. He had no certificate, but had had experience in boats from his youth, and had been in charge of the "Colnet" for a year and a half. Of the other two lads one, Roberts, 17 years of age, was the deck-hand, and the other, Ross, 16 years of age, was the engineer. The "Sonny Boy" is a fishing-vessel 38 feet long, 12 feet beam, 6 knots speed and with a net register tonnage of 13.76 tons. She was owned by Olav Knutson and Martin Gunstveit. They were the registered joint owners of all of her 64-64th shares. The former, also uncertificated, was her master and engineer. In addition, she had a crew of four fishermen. Both vessels were equipped with electric light.

Soon after midnight on the night in question the vessels were approaching each other in the fairway of Ogden Channel about opposite Carrie Head. The night was clear and dark, with the water further shadowed by the mountains on either hand. The master of the "Colnet" had been at the wheel till midnight when he was relieved by Roberts, who had only made four trips through the channel. The master accordingly stayed on look-out in the wheel-house until the vessel should get into open water.

The third lad was below. The crew of the "Sonny Boy" at this time were all below except one fisherman, Halverson, who was at the wheel, and who, somewhere about midnight, had taken over charge of the vessel from the master. About half past 12 the two ships collided, the stem of the "Sonny Boy" cutting into the port side of the "Colnet" just forward of midships, causing heavy damage. The master and deck-hand of the "Colnet" say their lights were burning while the "Sonny Boy" showed no lights. Halverson in charge of the "Sonny Boy" says the exact opposite. He says the "Sonny Boy" lights were burning while the "Colnet" lights were out. There is also evidence as to the lights from the other members of the crew of the "Sonny Boy," who say generally that at various times during the earlier part of the night the lights of their vessel were burning. On behalf of the "Sonny Boy" there is also evidence from one, Jonson, who was in charge of a fishing-vessel that passed the "Sonny Boy" earlier in the evening, just at dusk, and who said the "Sonny Boy's" lights were then burning. But this testimony was weakened by other evidence he gave which I thought unfounded and which I thought showed a bias against the "Colnet." On the other hand, the engineer Ross of the "Colnet" said that the lights of his vessel were burning when he went below, and also when he came on deck again immediately after the collision. It should be noticed here also that the crews of both vessels say that the lights of the other ship became visible shortly after the collision, while the "Sonny Boy" was manœuvring alongside preparatory to beaching the "Colnet."

The defendants in their defence set up in the alternative contributory negligence on the part of the "Colnet," but this was not pressed in argument by either counsel. Both counsel submitted that it was merely a question of lights or no lights, which again was one of credibility. But I have not excluded from consideration that there may be a middle view, either that the lights of both vessels were out or that the lights of both vessels were burning but that each kept a bad look-out.

I am quite unable to find, as I was invited to find, that the three lads in the "Colnet" concocted their story in order to deceive the Court. On the contrary, I think they all dealt fairly

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with the Court. I was particularly impressed with the master. He seemed to me to be a truthful witness and in my opinion any alleged inconsistencies between his evidence at the trial and his casualty report, or between his evidence and his previous statements, were not such as to throw any doubt upon his veracity. I therefore accept the evidence of those on board the "Colnet," and find that at the time of the collision the "Colnet" was exhibiting the regulation lights, that the "Sonny Boy" was showing no lights, that such default was the cause of the disaster and that the "Sonny Boy" must be held alone to blame.

There was much evidence and argument as to whether the crew of the "Sonny Boy" had been drinking while at Queen Charlotte City. The crew of the "Colnet" said that when taken on board the "Sonny Boy" they found certain members of her crew showing signs of a "hang-over," and two of them with face marks indicative of a fight. I accept this evidence. I think there can be no doubt that the master, another fisherman named Murray (who acted as cook), and Halverson, had been drinking during Saturday night and into early Sunday morning, and that the first two named had been fighting. Halverson said that whisky had been purchased on Saturday night, that he had paid $15 for his share and that he and others had been drinking in an hotel room. He gave no clear account of how much he had taken and contradictory accounts of the time when he returned on board his ship. All this is in striking contrast with the seemly conduct of the crew of the "Colnet" on the Saturday night and on the Sunday afternoon prior to leaving Prince Rupert.

The defendants in their defence pleaded, in the alternative, that they were entitled to limit their liability under the provisions of section 649 of the Canada Shipping Act, Can. Stats. 1934, Cap. 44. Counsel for the plaintiff contended that this was a wrong method of procedure, and that the defendants should have raised this issue in a separate action after their liability had been determined, or admitted. I am of the opinion that, both in England and in Canada, a defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may, if he chooses, plead his right to have his lia-

bility limited, by way of defence in the action of damage in which he is defendant, and set up a counterclaim in the same action, claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action of limitation of liability (Williams & Bruce's Admiralty Practice, 3rd Ed., 349. *The Satanita,* [1895] P. 248, at p. 250; [1897] A.C. 59; *Waldie* v. *Fullum* (1909), 12 Ex. C.R. 325, at p. 372). The defendants' pleadings are therefore not in order; but as the plaintiff clearly has not been prejudiced thereby, and in view of the point not having been settled in Canada, I now grant the defendants leave to file a counterclaim, claiming the right to limit their liability.

It remains to consider whether Knutson and Gunstveit, as joint owners of the "Sonny Boy," are in these circumstances entitled to such limitation. The *onus* of proving that the collision occurred without their actual fault or privity is upon them, and they are not entitled to limitation unless they discharge that *onus*. In my opinion, as regards Knutson, the *onus* has not been discharged. I am not satisfied either that the lights of "Sonny Boy" were burning when he, as master, handed over charge of the vessel to Halverson some half-hour before the collision; or that Halverson was then in a fit condition to take charge. Either contingency would constitute default on the part of the master. I therefore find that Knutson is not entitled to limitation of his liability.

As regards Gunstveit the position is different. The evidence is clear that he was not on board the vessel at the material time, and there is nothing to indicate that he had anything to do with the events at Queen Charlotte City.

It has been decided that if the loss is occasioned by the actual fault of one of several part-owners, his co-owners are not thereby precluded from a right to the limited liability. (*The "Spirit of the Ocean"* (1865), Br. & L. 336; 167 E.R. 388). Neither counsel was able to furnish me with authority as to whether this principle held good in the case, as here, of joint ownership; nor have my own researches disclosed any. But from the reasoning of Dr. Lushington in the above decision I am prepared to hold, lacking authority to the contrary, that the principle is the same

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in both cases. I therefore find that Gunstveit is entitled to limit his liability as provided in section 649 of the Canada Shipping Act.

There will be a reference to the registrar to assess the damages.

There is one point as to costs to which reference must now be made. The trial was originally set for February 5th and the plaintiff, in setting it down, observed the provisions of rules 115 and 119. But the defendants were unable to proceed on that day as their witnesses were at sea, fishing, and they were without means of communicating with them. I think the costs thereby incurred by the plaintiff, and which were thus thrown away, should be borne by both parties equally. The plaintiff had several witnesses from Queen Charlotte Islands. Transportation facilities are limited to and from these islands. I think he should have made sure that the action would go on before bringing them down. On the other hand, the defendants knowing this action was pending, should not have allowed their witnesses to go to sea where they could not be reached, without some understanding with the plaintiff. There was unfortunately lack of co-operation on both sides and both should share the needless expense thereby incurred.

The plaintiff is entitled to his costs.

Judgment for plaintiff.

ALASKA CEDAR PRODUCTS LTD. v. ARBUTHNOT.

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Feb. 12;
March 7.

Contract—Sale of timber—Timber licences—Renewal fees—Non-payment of certain renewals—Effect of—Subsequent acceptance of monthly payments—Estoppel, silence, delay.

By contract of the 8th of December, 1939, the defendant agreed to sell to the plaintiff all the timber accessible according to good logging practice on lands covered by ten timber licences held by the defendant. The plaintiff agreed to pay to the Province the annual renewal licence fees on the timber licences and pay the defendant monthly certain sums to be subsequently deducted from the stumpage payable to the defendant. The defendant gave no guarantee or warranty in respect to the amount of timber on the area covered by the licences. The timber licences were assigned by the defendant to a trustee pursuant to the terms of the contract. On report of a cruiser in 1940, the plaintiff concluded that the amount of timber on three of the timber licences would not warrant the expenditure necessarily required in their renewal. On September 19th, 1940, the plaintiff wrote the trustee, enclosing copy of the cruiser's report and advising that it would seek to obtain a variation of the contract, and on February 10th, 1942, the plaintiff wrote the solicitors for the defendant advising that they would pay the licence fees on the seven licences and allow to remain unpaid the fees on the other three. The fees were not paid on the three licences by the plaintiff when due in April, 1942. The plaintiff continued to make its monthly payments to the defendant which were accepted, but the defendant at no time consented to release the plaintiff from its liability to pay the licence fees on the three licences. On January 11th, 1943, the defendant gave the plaintiff 60 days' notice of cancellation of the contract for failure to pay the licence fees on the three licences and payment not being made within the 60 days, gave the plaintiff further notice on March 19th, 1943, that the contract was at an end. No further monthly payments were accepted by the defendant. In an action for a declaration that the agreement of December 8th, 1939, had not been forfeited and cancelled and was still in force and effect:—

Held, that the defendant by her acceptance of the monthly payments and by her request for and acceptance of delivery of the three licences from the trustee, had not thereby waived the default of the plaintiff under the contract and is not estopped by her conduct from claiming cancellation of the contract under the terms given and the action is dismissed.

ACTION for a declaration that an agreement of the 8th of December, 1939, whereby the defendant agreed to sell to the plaintiff all the timber on lands covered by ten timber licences held by the defendant had not been forfeited and cancelled and

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was still in force and effect. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 12th of February, 1945.

Lennie, K.C., for plaintiff.
A. deB. McPhillips, for defendant.

Cur. adv. vult.

7th March, 1945.

COADY, J.: By contract dated 8th December, 1939, the defendant agreed to sell to the plaintiff all the timber, accessible according to good logging practice, situate lying and being on lands covered by the ten timber licences held by the defendant. The plaintiff, *inter alia,* agreed to pay to the Province of British Columbia the annual renewal licence fees on the timber licences and save harmless and indemnify the defendant with respect thereto, and to advance and pay to the defendant monthly certain sums to be subsequently deducted from the stumpage payable to the defendant when the logging of the timber was commenced.

The defendant on her part gave no guarantee or warranty with respect to the amount of timber on the area covered by the licences or any of them.

The timber licences were assigned by the defendant to a trustee pursuant to the terms of the contract.

The plaintiff, it would appear, sometime in the year 1940, engaged a cruiser to cruise the timber on the lands in question, and the report of the cruiser seemed to satisfy the plaintiff that the amount of timber on three of the timber licences would not warrant the expenditure necessarily required in its removal. The plaintiff in a letter to the trustee dated September 19th, 1940, enclosing copy of the cruise report, advised the trustee in effect that in view of this report it would seek to obtain some variation in the contract with the defendant. On or about 10th February, 1942, the plaintiff wrote to the solicitors for the defendant, and after referring to the cruise reports concluded as follows:

In view of these circumstances we have concluded to pay the licence fees on the remaining 7 and allow to remain unpaid the fees on the first 3, namely, on lots 691, 692 and 693, with the hope of arriving at a satisfactory compromise arrangement with Mrs. Arbuthnot. We might even consider

making an additional cash payment on our stumpage amount to her in the amount which would normally be paid to the Government for the said licence fees if we could mutually agree that they should be dropped. Nevertheless, while we realize that our failure to pay promptly as due the fees on these 3 limits might place us in an embarrassing position should some legal controversy later arise between us, we feel that the circumstances are so clear and our good faith so evident that we are willing, if necessary, to take our chances in Court with Mrs. Arbuthnot on this particular item.

The licence fees on these three licences were not paid by the plaintiff when due in April, 1942. However, there is provided in the Forest Act a period of redemption when, if the renewal fees are not paid on the due date, payment will be accepted at any time within a period of a year, subject to the penalties therein provided.

The plaintiff continued to make its monthly payments which the defendant accepted, but at no time did she consent to release the plaintiff from its liability to pay these licence fees. It is not contended in these proceedings that any such consent was given by her. On or about 11th January, 1943, the defendant gave to the plaintiff a 60-days' notice of cancellation of the contract for failure to pay the licence fees on the said three licences, and payment not having been made within the period of 60 days did, on March 19th, 1943, give to the plaintiff a further notice that the contract was at an end. No monthly payments were accepted by the defendant thereafter. The plaintiff disputed the legal right of the defendant to cancel the contract, and while consenting to the delivery-up upon demand, to the defendant by the trustee of the three timber licences, opposed the request of the defendant on the trustee for the delivering up of the remaining seven licences. The defendant having refused the plaintiff's request to withdraw the notices of cancellation this action was then commenced for a declaration that the agreement of the 8th of December had not been forfeited and cancelled, and was still in force and effect.

The plaintiff rests its case upon four grounds: The first is that it had the right to discontinue the payment of the three licence fees, having satisfied itself that the amount of timber on the lands covered by these licences was not sufficient to warrant the expenditure necessarily required for its removal. I cannot agree that the plaintiff had any such legal right. The contract

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provided for the payment by the plaintiff of the annual licence fees as they fell due from year to year upon all of the ten licences, and to save harmless and indemnify the plaintiff with respect thereto. Having so contracted, I do not think it is open to the plaintiff to decide that it would carry out the contract with respect to seven licences, but should be relieved of its obligation with respect to the remaining three.

The second ground advanced by the plaintiff is that the notices of cancellation were ineffective to determine the contract since the matter of the dispute between the parties should have been referred to arbitration. I cannot agree with this submission. It seems clear under clause 16 of the agreement that this matter of the payment of taxes and government fees was one that was specifically excluded from the arbitration clause of the agreement.

The third submission of the plaintiff is that the defendant by her acceptance of the monthly payments and by her request for and acceptance of delivery of the three licences from the trustee, has thereby waived the default of the plaintiff under the contract, and is now estopped by her conduct from claiming cancellation of the contract under the notices given.

It is not claimed that the acceptance of these monthly payments by the defendant or her receipt of the three licences led the plaintiff to believe that the defendant in any way consented to the change in the contract suggested by the plaintiff. Negotiations to secure her consent were in fact continued after the plaintiff's default in payment in April, 1942, and after the acceptance thereafter of monthly payments by the defendant, and particularly in July, 1942 (see Exhibits 15, 16 and 17). What further negotiations were had is not clear. This, however, is clear, the plaintiff was not misled nor induced to alter its position by what was done by the defendant.

By the defendant's delay in taking proceedings for the cancellation of the contract she was in effect giving to the plaintiff an extension of time within which to recede from a position that was untenable. When it became necessary for her to protect, if possible, her interest in these licences she then gave notice of cancellation in time to enable her to pay the licence fees on or

before April, 1943, if the necessary financial arrangements could be made which, however, it would appear she was unable to make.

To hold that she is estopped under these circumstances would be to hold that one party to a contract can decide to carry out the contract in part only, and when the consent of the other party is refused, then notwithstanding that refusal, can make further payments under the contract which he is bound to do in order to keep the contract in good standing, and if these payments are accepted, thus secure in effect a modification of the contract more advantageous to himself. That is not my understanding of the law, and no case has been cited to sustain any such proposition.

Waiver as pleaded by the plaintiff here is as pointed out in *Teasdall* v. *Sun Life Assurance Co. of Canada* (1926), 60 O.L.R. 201, only another name for the doctrine of estoppel which is there discussed. I would refer also to the cases of *Ball* v. *McCaffrey* (1892), 20 S.C.R. 319, and *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E.R. 367, and particularly at p. 373 where the learned judge says:

> There was thus on the one hand no evidence of any detriment to the appellants as a consequence of the silence of the respondent, and on the other hand no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants.

While the plaintiff's pleading is waiver and estoppel, the argument before me was directed to the question of election on the part of the defendant. Election, however, is but another aspect of the doctrine of estoppel. Counsel on this branch of the case referred to *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, and *Orpheum Theatrical Co.* v. *Rostein* (1923), 32 B.C. 251. Neither of these cases help him, it seems to me, on the particular facts of this case.

The fourth ground advanced by the plaintiff is that on equitable grounds it is entitled to relief against forfeiture considering the amount of money advanced to the plaintiff under this contract. It seems to me that this is not a case where the plaintiff is entitled to the equitable relief claimed. That would have the effect of making a new contract between the parties. The plaintiff took its position upon legal grounds based upon its alleged right to discontinue the payment of these three licence fees, and

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indicated that it would resist any attempt on the part of the defendant to cancel the contract by reason of the plaintiff's failure to pay, and indicated, too, its willingness to have the matter decided in Court. Having taken that position on what it considered strong legal grounds, and having allowed these licences to lapse by reason of non-payment the parties cannot be put back in their original positions. Under these circumstances, it seems to me this is not a case where the plaintiff has shown that it is entitled to relief upon equitable grounds, and no case has been cited to me where a Court of equity has gone so far.

The plaintiff's action therefore must be dismissed with costs.

Action dismissed.

REX v. SMART.

C. A.
1945
Jan. 15, 26.

Criminal law—In possession by day of housebreaking instruments—Evidence of intent—Sufficiency—Criminal Code, Sec. 464 (b).

On appeal from a conviction for being in possession by day of a housebreaking instrument with intent to commit an indictable offence, it was held that the secret dropping of pieces of celluloid coupled with the explanation given by accused for having the celluloid in his possession was sufficient evidence in the surrounding circumstances from which intent may be inferred.

APPEAL by accused from his conviction by police magistrate H. S. Wood, Esquire, for Vancouver, on a charge of having in his possession by day an instrument of housebreaking with intent to commit an indictable offence.

The appeal was argued at Victoria on the 15th of January, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Accused, in person.
Jackson, K.C., for the Crown.

Cur. adv. vult.

26th January, 1945.

O'HALLORAN, J.A.: The Court has been giving this case anxious consideration. You have been charged and convicted under section 464 (*b*) of the Criminal Code, of having in your possession, by day, an instrument of housebreaking, with intent to commit an indictable offence.

The question raised in your appeal was whether or not there was evidence of intent to commit "any indictable offence." For that reason we asked Crown counsel to obtain the transcript. We have all read that transcript, and we have heard counsel for the Crown, and we have heard you in reply. There is no doubt you were in possession of "housebreaking instruments" within the meaning of section 464 (*b*).

In our opinion, the principle upon which we must approach a decision under section 464 (*b*) has been settled by this Court in its recent decision in *Rex* v. *Ellis* (1943), 59 B.C. 393. In your case, the secret dropping of the pieces of celluloid under the

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circumstances detailed in the evidence, coupled with the explanation you gave for your possession of them, furnish in our minds significant external evidence from which, in the surrounding circumstances, intent may be properly inferred.

Proof of guilt is not insufficient because it may not be demonstrated with mathematical precision. It is enough (with the principle in *Hodge's Case* (1838), 2 Lewin C.C. 227 in mind), 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 unhesitatingly draw from the cumulative effect of the proven facts. We are of opinion that this case comes within what I have said, and that there is sufficient evidence of intent, within the law, to justify the conviction. Therefore the appeal from conviction must be dismissed.

On the appeal against sentence: You were sentenced to two years in the penitentiary. In the view that I take, that period of imprisonment and that place of imprisonment are the best for you, under the circumstances. No reason has been advanced to reduce the period of imprisonment. Compare *Rex* v. *Zimmerman* (1925), 37 B.C. 277. The appeal from sentence is also dismissed.

SIDNEY SMITH, J.A. (oral): I feel bound to come to the same conclusion as my brother O'HALLORAN. I think the evidence was sufficient to justify the magistrate in concluding there was guilty intent. It does seem to me that celluloid is not a substance that the average man carries about at all. That, together with the fact that you deliberately threw away the pieces of celluloid, and the other evidence justifies the conclusion of intent.

I think the sentence is an appropriate one, and I hope, for your own sake, that you carry along the path that you say you wish to follow. I agree with my learned brother O'HALLORAN.

BIRD, J.A. (oral): I agree in the result. In my view, the evidence here brings this case within the principle laid down in *Rex* v. *Ellis* (1943), 59 B.C. 393. I would dismiss the appeal from conviction.

As to the appeal from sentence, no sufficient reason for reduc-

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tion has been shown. Moreover I consider that it is in the best interest of the accused that this sentence should be maintained, in view of his acknowledged drug habit. I believe there will be much greater opportunity for his redemption if the sentence is served in the penitentiary where facilities for treatment are more readily available than in another institution.

Appeal dismissed.

IN RE THE OPTOMETRY ACT AND *IN RE* CHARLES H. RODGERS.

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Feb. 21;
March 2.

Optometry—Registered practitioner retires from practice owing to ill health —Application later to resume practice refused—Regulation requiring passing of examination as condition of resumption of practice—Whether authorized—R.S.B.C. 1936, Cap. 209, Sec. 7, Subsec. (1).

The power to make regulations conferred on the board of examiners by section 7, subsection (1) of the Optometry Act does not authorize the making of a regulation which requires as a condition precedent to the receipt of an annual licence, the making of an application for and the passing of prescribed examinations by any registered optometrist who has not practised for a period of five years.

APPEAL by Charles H. Rodgers from the order of the board of examiners in optometry erasing the name of the appellant from the register of the British Columbia Optometric Association. Heard by HARPER, J. in Chambers at Vancouver on the 21st of February, 1945.

Marsden, for appellant.
J. A. MacInnes, and *Aubrey,* for respondent.

Cur. adv. vult.

2nd March, 1945.

HARPER, J.: The appellant on the 6th of March, 1922, was duly licensed to practise optometry under the provisions of the

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Harper, J.

Optometry Act. He is an Honour Graduate of the Canadian Ophthalmic College of Toronto. He paid his licence fee of $15 and carried on practice until December 31st, 1922. Being in ill health he retired from the practice of his profession and went to reside at Whytecliffe, West Vancouver, and later went to the United States.

On January 16th, 1924, purporting to act pursuant to section 11 of the Optometry Act his certificate was revoked by the board of examiners for non-payment of fees. The submission is now made that he received no notice of its proceedings and in any event that there was no jurisdiction to revoke for non-payment of fees.

On January 15th, 1945, the appellant tendered to the board his annual fee of $35 and requested his certificate. On February 15th last, the secretary to the board of examiners advised him that he was not the holder of a certificate to practise and the board could not comply with his request.

On December 27th, 1922, the board of examiners passed a resolution that those who had not paid their licence fees for the year 1923 should be notified that unless this fee was paid by January 15th, 1923, their certificates would be revoked. Section 11, subsection (1), of the Optometry Act, B.C. Stats. 1921, Cap. 48, gave power to the board of examiners to revoke certificates for violation of the law, incompetence, inebriety, fraud or misrepresentation, or unprofessional conduct. In the Optometry Act, R.S.B.C. 1936, Cap. 209, the wording and number of this section was changed. It then became section 10, subsection (1), stating:

> Any certificate issued by the Board may be revoked by the Board for violation of the provisions of this Act, incompetency, inebriety, fraud, or misrepresentation or unprofessional conduct.

None of the grounds set forth above is invoked against the appellant, but it is submitted that regulation 29 (a) of the board of examiners passed pursuant to section 7, subsection (1) of the Optometry Act gave the board of examiners jurisdiction to require that the appellant should make application to the board for examination and then pass the examination prescribed. It is admitted that for a period exceeding five years, on account of

ill health, the appellant did not practise his profession of optometry. Section 29 (a) of the regulations reads as follows:

29. (a) Every holder of a certificate of registration or of a certificate of exemption, who has not practised optometry for a period of five years immediately preceding his application for an annual licence shall before receiving his annual licence, make application for examination and take and pass the examinations provided for in these regulations.

The board have assumed jurisdiction to fix a term of five years as the limit of time within which a holder of a certificate of registration or a certificate of exemption may abstain from practise of his profession without the necessity of passing the examinations. If this regulation is *intra vires* there would be nothing to prevent the board of examiners in their discretion from fixing a much shorter period. The result would be that any optometrist suffering from ill health for a considerable period of time would be deprived of the right to carry on his means of livelihood, until at least he had submitted himself for examination and had passed this test.

If the Legislature intended to delegate any such drastic power to the board of examiners, considering the gravity of the matter and its far-reaching effect, clear and precise language of such delegation should be found in the Optometry Act. I can find no such delegation of power in section 7 of the statute.

Accordingly, the appeal is allowed with costs.

Appeal allowed.

BLUECHEL AND SMITH v. PREFABRICATED BUILDINGS LIMITED AND THOMAS.

Company—Meeting of shareholders—Shareholder—Whether alien enemy—Rejection of his votes—Action for damages against chairman—In nature of judicial act.

The defendant Thomas was president of the defendant company and chairman of a meeting of shareholders on the 27th of January, 1943. The plaintiff Smith regularly tendered proxies from a number of shareholders. Of these, 62,615 shares were the property of the plaintiff Bluechel and 25,000 shares were his own. Six months prior to the meeting, the secretary of the company, who was also its solicitor,

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received from the sergeant-in-charge, British Columbia Police, a letter stating the plaintiff Smith was then reporting as an enemy alien. The secretary read the letter and advised that as an enemy alien Smith was not entitled to vote. The chairman ruled that Smith's votes either in person or as proxy would not be allowed. At the hearing the defendant company admitted that the votes tendered by the plaintiff Smith should have been counted, that the resolutions referred to in the statement of claim, had the said votes been counted, would have been lost and should be declared null and void. Other than costs, no further relief was required against the company. The plaintiffs claimed general damages as against the defendant Thomas.

Held, that the act of the chairman is in the nature of a judicial act and that he should be entitled, if he acts in good faith and without malice (and it has been so found in this case), to be protected from liability.

ACTION for damages owing to the refusal by the president and chairman of the defendant company to allow the plaintiff Smith to vote at a meeting of the shareholders of said company. Smith tendered proxies for a number of shareholders, including one from the plaintiff Bluechel. The facts are set out in the reasons for judgment. Tried by MACFARLANE, J. at Vancouver on the 30th of May, 1944.

Guild, for plaintiffs.

Bull, K.C., for defendants.

Cur. adv. vult.

8th March, 1945.

MACFARLANE, J.: The principal part of this action was disposed of at the hearing. The defendant company admitted that the votes tendered by the plaintiff Smith should have been counted, and that the resolutions referred to in paragraphs 8 and 9 of the statement of claim which, had the said votes been counted, would have been lost, should be declared null and void. Other than costs, no further relief was required as against the defendant company.

The plaintiffs, however, claimed general damages as against the defendant Thomas. The facts, briefly, are that the plaintiff Smith attended a regularly-convened meeting of the shareholders of the company on the 27th of January, 1943. Thomas was president of the company and chairman of the meeting. Smith regularly tendered proxies from a number of shareholders covering shares which with his own gave him a total of 100,595 votes.

Of these shares 62,615 were the property of the plaintiff Bluechel and 25,000 were the property of the plaintiff Smith. Some six months before the date of the meeting the secretary of the company, who was also its solicitor, had received from the sergeant-in-charge, British Columbia Police, District of Burnaby, a letter, in which he said that the plaintiff Smith was then reporting as an enemy alien. The secretary read this letter to the meeting, and advised that, as an enemy alien, Smith was not entitled to vote at shareholders' meetings. Mr. *Sheppard,* solicitor for Smith, and a shareholder in his own right urged that Smith should be entitled, at least, to vote the shares for which he held proxies. Following a reference to some authorities produced by the solicitor for the company, the defendant Thomas, as chairman, ruled that Smith's votes, either in person or as proxy, would not be allowed. When the resolution objected to was put before the meeting, Mr. *Sheppard* again addressed the meeting and stated that he could not accept the ruling of the chairman that Mr. Smith's shares could not be voted. He then moved that the meeting be adjourned with the object of protecting the rights of the people whose votes were involved, but this on a show of hands was defeated. He then demanded a poll. It was agreed that the resolutions be formally put and the poll taken on the resolution. The resolution passed on a show of hands. The chairman appointed scrutineers. The chairman again stated that he was ruling that the Smith votes be excluded. On the poll being taken Mr. Smith tendered his votes. The scrutineers reported the result excluding the Smith votes. They also reported what the result would have been had the votes tendered by Smith in person and as proxy been counted. In the former case the resolution would have had the requisite majority; in the latter case it would not. The chairman then said that as chairman he was bound by the law and that (I quote from the minutes)

in the circumstances he could not permit Mr. Smith to vote. He therefore declared the resolution carried as a special resolution.

Mr. Smith shortly thereafter left the meeting.

It now appears that Mr. Smith, though born in Leipzig, Germany, was naturalized in Canada at Edmonton, Alberta, in 1924. Neither to Mr. *Sheppard* nor to the chairman did he disclose the

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fact that he was naturalized. He says he was not asked. Thomas says, on the advice of the solicitor, he asked Smith to assist the chair, to state whether he was or was not an enemy alien and that he said nothing. No reference is made, however, to this request in the minutes.

There were statements by the secretary and chairman that he was an enemy alien. He does not say he denied it. What he does say is that Thomas knew he was naturalized; that in a conversation with him in the latter part of 1940 he told him he was naturalized and that he considered himself a British subject. Thomas says he does not recall any conversation with Smith as to his national *status*, although he does remember Smith telling him that he had to go to the police to register or report. That would be according to Smith some 15 months before the meeting.

On the evidence here I am not prepared to find that Thomas acted maliciously, either out of spite or ill-will toward the plaintiff or with a corrupt or wrong motive. Thomas personally felt that the plaintiff had obstructed what he and the directors associated with him had considered in the best interest of the company. He, I think, thought that the persons in it, originally of German nationality, were an embarrassment. But from my observation of him and of the way he gave his evidence and visualizing the situation he had to deal with at the meeting, as well as taking into consideration the same features with regard to the plaintiff, I am convinced that Thomas was not moved in making his decision by malice as I have defined it, but that he honestly tried to do his duty. I think he did, as he said, ask Smith to assist the chair by stating if he was or was not an enemy alien. I think he had no doubt that he was, but wished to have Smith admit the fact before he made his ruling. Smith could easily have advised the chairman or Mr. *Sheppard* that he held a Certification of Naturalization.

The basis of the claim for damage is that the right of a shareholder of a company to have his vote recorded is a right of property (*Pender* v. *Lushington* (1877), 6 Ch. D. 70, *per* Jessel, M.R. at p. 75); that on the invasion or violation of such a right the law will presume damage; and that it is not indispensable to show actual perceptible damage in order to found a cause of

action. *Ashby* v. *White* (1703), 2 Ld. Raym. 938; *Embrey* v. *Owen* (1851), 20 L.J. Ex. 212. It was submitted in reply that no action for damages lies against a person having a limited authority who is acting in a *quasi*-judicial capacity, and that the president of the company, or chairman of the board of directors presiding as chairman at a meeting of shareholders is acting in such a capacity.

The first thing necessary to consider is the nature of the right of property referred to by Jessel, M.R. in *Pender* v. *Lushington, supra.* Is this right one of those absolute rights in respect of which English law imposes liability irrespective of damage? The conception of such rights is inherited from the writ of trespass. "By the laws of England," said Lord Camden in *Entick* v. *Carrington* (1765), 19 St. Tri. 1029, at p. 1066,

> every invasion of private property, [however slight,] is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing.

While this conception is still to be reckoned with, it is contrary to the trend of modern development, and I think should not be extended.

It may be well to refer to the language of Jessel, M.R. in *Pender* v. *Lushington, supra,* where he says (pp. 80-1):

> This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss* v. *Harbottle,* [(1843)] 2 Hare 461 and that line of cases. He has a right to say, "Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you." What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.

In that case Jessel, M.R. held that the right entitled the member to protection by way of an injunction. The right to damages against the chairman was not raised. Here what is asked is the application of the principle laid down in *Ashby* v. *White, supra.* In that case as in most of the cases cited to me, the right involved is a public right conferred either by common law or by statutory authority. An unsuccessful attempt was made to apply that decision in an action for damages by an elector against the member of Parliament for the constituency in which the elector

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resided, for a refusal to present his petition to Parliament, in *Chaffers* v. *Goldsmid,* [1894] 1 Q.B. 186, at pp. 188-9, where Wills, J. said:

> The action is one for which there is no precedent, and that is a fact of importance when we are considering whether the action will lie. I do not desire to say a word which is not strictly in accordance with the decision in *Ashby* v. *White*, a case which forms a great landmark in legal history, and which called attention to the fact that whenever a common law right, which is also a public right, is violated, an action lies at the suit of the sufferer. All doubt as to the legal principle was laid at rest by that decision; the principle there laid down has been acted upon ever since, and it is impossible to disregard the fact that conduct which since that decision was given must have occurred hundreds of times has never been called in question.

I quote what was said by Wills, J. to show the nature of the right considered in *Ashby* v. *White* and also to show that the fact that the action is one for which there is no precedent is a fact of importance to be considered.

I am inclined, however, also to regard the right of property to which Jessel, M.R. refers, certainly not as a public right, nor even as an absolute right but a right qualified by the very nature of the association out of which it arises. Every member of an incorporated company holds his shares subject to the provisions of the Companies Act and subject to the conditions imposed in the memorandum and articles of association of the company. No evidence was submitted here as to there being any special relevant articles, and I suppose I may assume, as it appeared to be assumed in argument, that the relevant articles are those of Table A to the Companies Act. I need refer to them now only to mention that they provide that the chairman shall preside at every general meeting of the company; prescribe the method of voting and other analogous matters. If I am wrong in that, then the question arises as to the duty of the chairman and as to whether in the circumstances he is acting in a judicial or *quasi*-judicial capacity, and if so, whether he is entitled to immunity and to what extent.

> Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting:

vide Chitty, J. in *National Dwellings Society* v. *Sykes,* [1894] 3 Ch. 159, at p. 162.

If he is to see that

the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting,

he can do this only by seeing that only the persons entitled to vote, vote. Ordinarily the right to vote is determined by reference to the register of shareholders, but it is clear here that if the plaintiff were an alien enemy, his right could not be exercised. (*Robson* v. *Premier Oil and Pipe Line Company, Limited*, [1915] 2 Ch. 124, at p. 136. It was a duty of the chairman then to make this decision. It was a duty imposed on him by virtue of his office. That is not contested. The complaint is that he erred in the decision that he made with the result that the votes of the plaintiff were improperly excluded from the count.

The next question which arises is whether the chairman, in the particular duty being performed by him, was acting in a judicial or *quasi*-judicial capacity and whether if he was so acting he is entitled to immunity, where it is found as I have found here that he acted without malice. I have not been referred to any cases in which it has been held that a chairman of a company meeting is so entitled. In *Dickson* v. *McMurray* (1881), 28 Gr. 533, at p. 537, Vice-Chancellor Proudfoot in Ontario held that scrutineers who were called upon to consider an agreement affecting the right to vote of shareholders of a company were acting in a *quasi*-judicial capacity.

As scrutineers they had to determine what votes they would receive or that were entitled to be cast. Their duty was to some extent a judicial one. It was not merely ministerial, for, if so, they would have received or given effect to the vote of the plaintiff on his 1,071 shares, while they only allowed him to vote on 271 shares, a vote that would have overcome those on the opposite side. They also determined, it must be assumed judicially, that they were not bound to regulate the votes by the stock book, which would have been equally decisive in favour of the plaintiff's contention, but deemed themselves at liberty, and bound, to peruse and construe, under the advice of counsel, the agreement of 6th July, 1880, and to decide that there was a present trust for the benefit of McMurray, Scarth and Smith, and also to determine that these *cestuis que trust* were entitled to vote in respect of the shares so held in trust.

In that case the election was set aside on the ground that the duty of the scrutineers was in conflict with their interest as candidates for re-election and the question of their immunity from a claim for damages was not discussed.

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I do not think that the liability of a chairman at a general meeting should be put on any higher basis than the liability of a returning officer.

I think he had here a duty to perform. That fact distinguishes this case, I think, from the case which Jessel, M.R. had to decide in *Pender* v. *Lushington* for there he held that the chairman has no right to make the enquiry which the chairman in that case made. There also was no claim in damages.

The cases cited to me do not give me the help I would wish because they are concerned with the exercise of a duty in respect of a public or statutory right. The right of a shareholder in a company cannot in my opinion be considered a public right, nor can the chairman be considered as acting in the exercise of a public duty. I will, however, refer to them as they bear on the question as to whether the duty of the chairman is *quasi*-judicial in character.

In one of these cases it is held that if the duties are purely ministerial, an action lies for breach of them, without proving malice or negligence: *vide Pickering* v. *James* (1873), L.R. 8 C.P. 489, *per* Bovill, C.J. at p. 503. In another case cited to me, *viz.*, *Tozer* v. *Child* (1857), 7 El. & Bl. 377, an action was brought against a church warden presiding under the Metropolis Management Act (18 & 19 Vict. c. 120), at the election of vestrymen for refusing the vote of a person who under the relevant section of that Act was found entitled to vote. Cresswell, J. refused relief. In that case the learned judge cites what Abbott, L.C.J. in the Exchequer Chamber on Error from the Court of Queen's Bench said in *Cullen* v. *Morris* (1819), 2 Stark. 577. Abbott, L.C.J. there held that malice was essential to such an action, and pointed out that in *Ashby* v. *White*, *supra*, upon the face of the record the defendant was charged with malice. He then said (p. 587):

> The returning officer is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial; they are of a mixt nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril

and apprehension, if, in consequence of a mistake, he became liable to an action.

It was contended before me that *Tozer* v. *Child, supra,* applies only where there has been a statutory authority given to a public officer. I agree that on the facts that case is so limited. The question then arises as to whether protection is to be afforded on the basis of the nature of the act done or required to be done, or on the nature of the tribunal. There are, of course, tribunals of the nature of a Court "in law" to whose officials absolute immunity is extended. There are also bodies whose duties are purely administrative and to the officials of these no degree of immunity is afforded. But there is an intermediate class. The learned editor of Sm. L.C., 13th Ed., Vol. 1, at p. 286 says that:

> The precise area occupied by cases of this . . . class has not been exhaustively defined, and can probably be only . . . marked out by the accumulation of decisions upon various states of fact.

In *Everett* v. *Griffiths,* [1921] 1 A.C. 631, Lord Atkinson at pp. 682-3, in defining what is a judicial proceeding adopts the language of May, C.J. in another case, where he refers to a competent authority. Lord Atkinson says:

> Whether a proceeding is a judicial proceeding or merely an administrative proceeding depends much more on what is authorized to be done by the named authority; what is done, and the effect of the act upon the rights and interests of others. And it is, I think, well established that no person can be sued in an action such as the present one for doing a judicial act if, in doing it, he acts honestly. I know no better definition of a judicial act than that given by May C.J. in the Irish case of *Reg.* v. *Dublin Corporation* (1878), 2 L.R. Ir. 371, 376. In that case the corporation by certain orders, directed (illegally it was alleged) that certain liabilities should be paid out of their borough fund . . . "In this connection the term 'judicial' does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others." . . .

I am not unaware of the fact that in *Everett* v. *Griffiths, supra,* several of the learned members of the House, in terms limit what they say to persons acting in the exercise of a public duty. If it were clear that a chairman of a general meeting of a company were presiding under the provisions of a statute which in terms prescribed his duties, then it would appear that there

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would be no doubt that a decision such as the one he made here, if made in good faith, would be protected.

I have already dealt with the duties of the chairman. I confess, when I apply the definition of a judicial act above set out, I can see no substantial difference between the position of a chairman of a general meeting of a company incorporated under the provisions of a statute such as the Companies Act required to make decisions of a judicial nature and that of a chairman presiding at an election of vestrymen as in *Tozer* v. *Child, supra.*

I do not know that I need go further in this case than to say that I think the act of the chairman is in the nature of a judicial act and that he should be entitled, if he acts in good faith and without malice, as I have found he has in this case, to be protected from liability.

It can be noted also that no case has been discovered of abuse of *quasi*-judicial functions in which damages have been successfully claimed as for a tort.

I would therefore dismiss the action as against the defendant Thomas.

The plaintiff will have his costs of the action. I do not think there should be two sets of costs, but any costs incurred solely by reason of the claim against the defendant Thomas will be costs to the defendant Thomas and after taxation paid by the plaintiff.

Judgment accordingly.

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REX v. RALPH TARTAGLIA.
REX v. MARCO TARTAGLIA.

Mar. 23, 29.

Criminal law—Damaging property and theft—Army deserters—Crimes committed to avoid overseas service—Sentence—Appeal.

The two accused, after deserting from the army, broke a window and snatched a purse containing $60. They then surrendered themselves at the police station when they stated they had committed the crimes to be sent to gaol, hoping thus to avoid being sent overseas with re-enforcements for the Canadian Army. On charges of damaging property and theft they pleaded guilty to both charges and were sentenced to five years on the first charge and seven years on the second to run concur-

rently. Since conviction, restitution of the $60 was made and full compensation was paid to the owner of the broken plate-glass window.

Held, on appeal, that the sentences of both men be reduced to three months for the first offence and six months for the second, to run concurrently, with hard labour. This will permit them to be returned to the army at an early date to face trial for desertion or to be sent overseas, whichever course army policy may decide.

Rex v. *Soanes* (1931), 23 Cr. App. R. 142, applied.

APPEAL by accused from their conviction by police magistrate Mackenzie Matheson, Esquire, Vancouver, on the 22nd of February, 1945. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 23rd and 29th of March, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

McLennan, for appellants.
Scott, for the Crown.

The judgment of the Court was delivered by

O'HALLORAN, J.A.: These two young men of previous good character aged 23 and 20 respectively are deserters from the active army. They broke a window and snatched a purse containing $60 and then surrendered themselves at the police station next morning when they stated they had committed the crimes to be sent to gaol, hoping thus to avoid being sent overseas as re-enforcements for the Canadian Army.

They were charged with damaging property and theft. They pleaded guilty to both charges. The magistrate sentenced them to five years on the first charge and seven years on the second charge, to run concurrently. They were given leave to appeal against these sentences. On the 23rd instant we adjourned the hearing of the appeals until today, to learn whether the army would take them back and allow them to proceed overseas for active service, and also to be informed whether restitution had been made for the damage done and property stolen. We are informed now by Crown counsel that since conviction restitution of the $60 has been made and also that full compensation has been paid to the owner of the broken plate-glass window. The question of punishment for desertion is of course a matter for the army.

In passing on an unusual case of this nature certain major

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considerations cannot be forgotten. In a time of war, men who are eligible for active service overseas, and who are in the active army, ought not to be allowed deliberately to evade that obligation by committing an offence punishable by the civil power. Another consideration is that desertion from the active army in time of war is a grave military offence, punishable by the military authorities under military law. Finally, there ought not to be a need to say that the Courts do not impose sentences for acts or conduct for which an accused has not been charged and convicted.

Considering the youth of the prisoners, coupled with the fact that they are first offenders and their prompt surrender to the civilian police, in our judgment it is rationally impossible to come to any other conclusion than that these extremely severe sentences were imposed, not because of the nature of the criminal offences with which the men were charged, but because they admitted they were guilty of the military offence of desertion punishable under military law. What appears to be the most appropriate, as well as the just and balanced course to adopt in the unusual circumstances this case presents, is to reduce the sentences to the terms that would ordinarily be imposed on youthful first offenders. This will ensure that the men will be returned to the army authorities at an early date to face trial for desertion under military law, or it will enable the army to send them overseas for service against Germany or Japan, whichever course army policy may dictate.

Rex v. *Soanes* (1931), 23 Cr. App. R. 142 supports that approach to what is necessarily a difficult decision. Soanes, aged 21 and a deserter from the army, was convicted on two charges of stealing motor-cars. His previous conduct was euphemistically described as "not satisfactory." He was sentenced to 18 months' imprisonment. The army would not take him back except to deal with him as a deserter. The Court of Criminal Appeal, despite his previous unsatisfactory character, reduced his sentence of 18 months to what was in effect eight months, and said it was quite apparent that when he served that sentence he would have to face a military trial for desertion. It is true that occurred in peace time. But in war time it is more

important than ever to preserve the army's jurisdiction over deserters. Soanes had not a previous good civilian record, such as the men before us have.

We would therefore, in view of their youth and previous good record, reduce the sentences of both men to concurrent sentences of three months for the first offence and six months for the theft, with hard labour in each case, to run from the date of their arrest (17th February). This will permit them to be returned to the army at an early date to face trial for desertion or to be sent overseas, whichever course army policy may decide.

The appeals are allowed to the extent indicated.

Appeals allowed in part.

GATES v. HODGSON AND SMITH.

Negligence—Collision between car and truck—Drivers' lack of care in keeping on their own side of road—Contributory Negligence Act—Application—R.S.B.C. 1936, Cap. 116, Sec. 19.

On the night of the 22nd of July, 1944, the plaintiff's car, driven by one Mrs. Coy, was proceeding on the Penticton-Keremeos road towards Penticton, two men and two women being in the car. When about 14 miles from Penticton, shortly before 10 o'clock, the left side of the car was badly torn when in collision with the defendant's truck going in the opposite direction. The truck was heavily loaded with a rack over it which protruded four and a half inches on both sides. Both cars were properly lighted and both sides claimed they were respectively on their right side of the middle of the road. Mrs. Coy, driving the car, stated the truck suddenly turned to the left when close to her car. Judgment was given in favour of the plaintiff.

Held, on appeal, varying the decision of HARPER, J. (ROBERTSON, J.A. dissenting), that both drivers were at fault and one is unable to differentiate between the conduct of one and the other. The Contributory Negligence Act should be applied and each party is equally responsible.

APPEAL by defendants from the decision of HARPER, J. of the 3rd of November, 1944, in an action for damages arising out of a collision between the plaintiff's car and the defendant Hodgson's truck on the Penticton-Keremeos Highway on the 22nd of July, 1944. The facts are set out in the reasons for judgment.

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GATES v. HODGSON AND SMITH

The appeal was argued at Vancouver on the 17th and 20th of March, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Farris, K.C., for appellants.
Wismer, K.C., for respondent.

Cur. adv. vult.

3rd May, 1945.

O'HALLORAN, J.A.: I would allow the appeal to the extent indicated in the reasons for judgment of my brother BIRD with whom I agree.

ROBERTSON, J.A.: On the evening of the 22nd of July, 1944, the plaintiff's motor-car and the defendant Hodgson's truck, driven by the defendant Smith, were in collision, with the result that the plaintiff's motor-car was badly damaged.

The cars were proceeding in opposite directions on the Penticton-Keremeos Highway. The plaintiff's car was driven by a Mrs. Coy. The learned trial judge found that the accident was caused by the truck swerving towards, and striking, the plaintiff's car. I think there was ample evidence to support this finding. The vehicles were visible to each other when about 500 yards apart. They were proceeding at a reasonable rate of speed. Mrs. Coy says that the motor-car was on its right side of the road; and she is supported in this by two of the passengers in her car, Nagle and the plaintiff Gates, and also by Smith, who says that when the plaintiff's car "came off the bridge" it was on its own side of the road; that he never saw it change its course to the left; that as far as he knows it never turned over to its left; and it had plenty of room. Smith says that his car was on its right-hand side of the road. He denies that he turned to the left just prior to the collision, thus bringing it about. He says he kept "in a straight track right down the road." Then how did the accident happen? Smith says:

> At that time, practically up to the moment of collision, as far as you know the Gates car was on its own side of the road? Yes, we both were. We were both practically on our own side, but more to the centre, I guess.
>
> And that is the trouble? Yes, I guess so. My truck is quite a bit wider. Maybe I was out, maybe I wasn't.
>
> Do you suggest you both misjudged the clearance that the both cars had? Yes, I think we did.

There is evidence that the truck swerved. Mrs. Coy says that "he just seemed to swerve as he got right to us. It just happened all of a sudden," and that the swerve was "towards us." Mrs. Gates says:

> The truck seemed to be coming down all right. I didn't give it a moment's thought that he was over on our side of the road at all. All at once it seemed he must have turned towards us because the truck was coming straight towards us.
>
> Where was he with relation to your car when you first became aware there was going to be a collision, beside you, or where? He seemed to be coming towards us.

It was urged that these statements as to "seeming" to swerve or to turn or to come towards us are not evidence. I think Mrs. Gates' evidence is positive because she says the truck was coming straight towards her. In any event, evidence of this nature is admissible although the weight of it is a matter for the judge. See Taylor on Evidence, 12th Ed., Vol. 2, p. 899, par. 1415 and Wigmore on Evidence, Canadian Ed., Vol. 1, p. 753, par. 658.

Then there is direct evidence of Gates, Nagles and Mrs. Coy that the truck struck the motor-car at its left front door. Smith admits that the front of the plaintiff's car was not involved in the accident and that the damage to his truck was to its left front fender and to the left front end of the rack. This is confirmed by the photograph of the damage to the motor-car. This supports the view that the truck must have swerved.

Finally, immediately after the accident, Smith says that Mrs. Gates "said something about me running into her." He made no reply.

In view of this direct evidence by the defendant's witness as to how the accident was caused, which was accepted by the trial judge, I can see no reason to interfere with his judgment.

In my opinion the appeal should be dismissed.

BIRD, J.A.: This appeal arises out of a collision between appellant's motor-car and the defendant's truck, proceeding in opposite directions on the Penticton-Keremeos Highway on the evening of July 22nd, 1944, between 9 and 10 o'clock.

The roadway in the immediate vicinity of the point of impact was of sufficient width to permit reasonable clearance for the vehicles involved. Each driver had observed the other when 500

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yards away and both proceeded at reasonable rates of speed to the point of impact. The learned trial judge found the appellant truck-driver at fault in that the truck swerved to the left at the time of or immediately before the impact. The finding so made is expressed in his reasons to be based upon the "direct evidence" of Mrs. Coy, the car-driver, wherein she said as follows:

> You saw this truck coming after you crossed the bridge? Yes, I saw it before.
>
> Did it occur to you there was going to be an accident? No.
>
> When did you first become aware there was going to be an accident? Not until it just actually happened. He just seemed to swerve as he got right to us. It just happened all of a sudden.

I am unable, with all deference, to accept this interpretation of her evidence. I do not consider that her statement supports the finding that the truck did in fact swerve to the left. On the contrary, this evidence leaves the impression upon my mind that the witness when she made the statement was reconstructing the accident. Since she believed as she said that her car immediately before the impact was on the proper side of the road, in my opinion, she therefore concluded that the truck had swerved. The same may be said of the evidence of Clara Gates, a passenger in the motor-car, who said:

> All at once it seemed he must have turned towards us because the truck was coming straight towards us.

I am fortified in this interpretation of the evidence of both witnesses by the fact that the respondent's pleadings did not charge negligence by making a sudden change of course, nor does the photograph of the car show any evidence of a lateral or diagonal blow, rather does it show a direct impact from front to rear.

Since the trial judge has made no finding upon credibility, and as I consider that the inferences which are open on the evidence adduced can as well be drawn by this Court as by the trial judge, I think it is open to this Court to make the finding which, with deference, should have been made below. *S.S. Hontestroom* v. *S.S. Sagaporack*. *S.S. Hontestroom* v. *S.S. Durham Castle*, [1927] A.C. 48.

Then in the absence of evidence to support the finding of negligence by a change of course on the part of the truck, is there

other evidence of negligence on the part of either the truck-driver or the car-driver?

It is obvious to me from an examination of the evidence that since each had observed the other when the vehicles were separated by 500 yards and neither had anticipated the possibility of a collision, that both drivers must have continued to drive too close to the middle of the highway.

In these circumstances there was in my opinion a duty upon both drivers to maintain a careful look-out and to give reasonable clearance to the other to permit a safe passage to both cars.

While I am unable to point to any evidence from which I consider that the Court could safely have found or could fairly have drawn an inference that either car encroached upon the wrong side of the middle of the road yet I think it is clear upon all of the evidence that both drivers were guilty of negligence in the following respects: First, that each of them, after having seen the other, maintained a course which brought their respective cars too close to the middle line of the highway in view of the traffic known to exist there; secondly, that neither of them, after having seen the other car, maintained an adequate look-out; thirdly, that neither of them made any effort to change course to the right so as to avoid a collision with the other.

It is abundantly clear upon the evidence of all eye witnesses called both for the plaintiff as well as the defendants that either or both of them could have avoided the accident by swerving to the right. Consequently I am of opinion that both drivers were at fault and in equal degree as I am unable to differentiate between the conduct of one and the other. I would therefore allow the appeal to the extent of applying the Contributory Negligence Act and finding each party equally responsible.

Appeal allowed; decision of trial judge varied, Robertson, J.A. dissenting.

Solicitor for appellants: *H. H. Boyle.*
Solicitor for respondent: *H. W. McInnes.*

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BURNETT v. BURNETT.

Husband and wife—Judicial separation—Alleged desertion—Domicil—Can. Stats. 1930, Cap. 15.

The petition of a wife for judicial separation on the ground of desertion was dismissed for the reasons that the facts of the alleged desertion do not constitute desertion within its legal meaning; that at the time of the institution of the action the respondent was not domiciled in British Columbia, but in the Province of Saskatchewan, and further assuming the respondent was at the time domiciled in British Columbia, The Divorce Jurisdiction Act, 1930, does not apply to an action for judicial separation. It is limited to the relief given in the Act, namely, when the action is for a divorce *a vinculo matrimonii.*

ACTION by petitioner for judicial separation on the grounds that the respondent had deserted her. The facts are set out in the reasons for judgment. Tried by FARRIS, C.J.S.C. at Vancouver on the 12th of March, 1945.

Scwencisky, for petitioner.
Gillespie, for respondent.

Cur. adv. vult.

19th March, 1945.

FARRIS, C.J.S.C.: This was an action by the petitioner for a judicial separation on the ground that the respondent had deserted her. The domicil of the respondent was alleged to be in the Province of British Columbia.

The facts briefly are: The respondent was born in Ontario in 1900, and in 1910 as a child was taken to Saskatchewan with his father. In 1920 he went to the city of Edmonton, where he was married to the petitioner in 1926. They resided in Edmonton until 1939, and he clearly established a domicil in the Province of Alberta. The respondent and petitioner while in Edmonton were engaged in the business of beauty-parlour operators. In November of 1939, the business of the petitioner and respondent having become financially involved, the respondent came to the city of Vancouver, apparently clearly having intended to abandon his domicil in Alberta. He was seeking to make a new start. He acquired the right to buy a beauty parlour in Vancouver. Early in 1940, the petitioner also came to Van-

couver, and entered into the active control of the beauty-parlour business which the respondent had obtained the right to purchase. The respondent in the meantime had been called to Wadena, Saskatchewan, where his father was very ill and who shortly thereafter died. The father had a farm in that Province, and the respondent as well owned land adjacent to the father's farm. After the father's death the respondent continued to reside in Wadena, Saskatchewan, looking after his late father's farm until November of 1940 when he returned to Vancouver. The petitioner in the meantime had been operating the beauty parlour in question in Vancouver. Upon the respondent's return to Vancouver he took no active part in the beauty-parlour operations, but he did work for his mother who was the vendor of the beauty parlour and as the result of this work $250 was credited by the mother on the purchase of the beauty parlour. He returned in July of 1941 to Wadena where he has since lived and operated the farm and has entered into an agreement to purchase the farm and the evidence clearly shows he intends to permanently reside in the Province of Saskatchewan. In the meantime the wife was making a living out of the beauty parlour and sufficient to pay the balance of the payments, except at one time after the respondent's return to Saskatchewan the wife required $65 to help her out in the operation and wrote to the respondent for the same. This was forthwith sent by the respondent to the petitioner.

It is quite clear that the petitioner at all times knew of the respondent's address and that the amount of $65 which was asked from the respondent, and received, was the only assistance asked by the petitioner from the respondent. There is some evidence to indicate that the respondent had suggested that the petitioner should come to Saskatchewan to live there with the respondent, but upon this point the evidence is not satisfactory.

Counsel for the respondent contends: First, that in view of the fact that the petitioner had the beauty-parlour business, the arrangements for the purchase of which had been made by the respondent, and that the petitioner knew where the respondent was and on being requested for assistance the respondent furnished the same and the petitioner not wishing to go to Sas-

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katchewan to reside with the respondent that there was in fact and law no desertion. Secondly, that the respondent was not domiciled in British Columbia at the time of the instituting of this action; and, thirdly, that if the respondent had deserted the petitioner and has been living separate and apart from her for two years and at the time of the desertion was domiciled in the Province of British Columbia that Cap. 15, Can. Stats. 1930, being "An Act respecting jurisdiction in Proceedings for Divorce," only applies to "*a vinculo matrimonii* and not in an action for judicial separation."

It is my opinion that the facts of the alleged desertion do not in my mind constitute desertion within the legal meaning of desertion.

In regard to the second point, I am satisfied that at the time of the institution of the action the respondent was not domiciled in British Columbia, but in the Province of Saskatchewan.

In regard to the third point, the evidence does not convince me that at the time of the alleged desertion the respondent was domiciled in British Columbia. But in any event it is my opinion that whether the respondent was at that time so domiciled in British Columbia, that Cap. 15 of Can. Stats. 1930, being "An Act respecting jurisdiction in Proceedings for Divorce," does not apply to an action brought for judicial separation. It is limited to the relief given in the Act, namely, when the action is for a divorce *a vinculo matrimonii.*

The action will accordingly be dismissed.

Action dismissed.

MAXINE, LIMITED v. CUILLERIER.

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Mar. 7, 8, 29.

Landlord and tenant—Application by landlord for possession—Rental regulations of Wartime Prices and Trade Board—Orders 294, 315, 358 and 470—Whether premises housing or commercial accommodation—R.S.B.C. 1936, Cap. 143, Sec. 19.

By a lease of the 29th of September, 1943, the appellant leased to the respondent a premises known as the Maxine Apartments in Vancouver for a term of one year from the 15th of October, 1943. The respondent refused to vacate the premises pursuant to a notice to vacate at the expiry of the lease and the appellant then applied under section 19 of the Landlord and Tenant Act for an order that the tenancy had been terminated by said notice. Prior to the 15th of October, 1943, the then lessee operated the premises as an hotel and the respondent occupied a suite in the building during said tenancy. Upon the respondent taking over on the 15th of October, 1943, the operation of the premises was changed by him to that of an apartment or lodging-house during the currency of the lease. On the hearing, it was found that the premises were operated as a "business," but the application was refused.

Held, on appeal, reversing the decision of LENNOX, Co. J. (ROBERTSON and SIDNEY SMITH, JJ.A. dissenting), that it was found on the hearing below that this accommodation is a "business," a finding that is fully supported by the evidence. It is true that the nature of the operation of the premises appeared to have been changed by the respondent to that of an apartment or lodging-house during the currency of the lease, but no such change could be made to affect the classification of the premises under these orders. The lease, being the lease of an hotel and therefore "commercial accommodation" is subject to regulations under Wartime Prices and Trade Board order No. 315. Consequently order No. 294, relating to "housing accommodation," has no application. The notice to vacate given under the relevant provisions of the Landlord and Tenant Act was effective to determine the tenancy.

Law v. *Smith* (1944), 60 B.C. 437, distinguished.

APPEAL by plaintiff from the decision of LENNOX, Co. J. of the 22nd of December, 1944, dismissing the appellant's application under section 19 of the Landlord and Tenant Act for an order for the possession of premises known as Maxine Apartments, Bidwell Street, Vancouver, as against J. E. Cuillerier, the tenant who refused to vacate the premises pursuant to a notice to vacate given by the plaintiff whereby the tenant was required to deliver possession at the expiry of the lease on October 15th, 1944.

The appeal was argued at Vancouver on the 7th and 8th of

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March, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

D. J. McAlpine (*Bradshaw,* with him), for appellant: The appellant is landlord of the Maxine Apartments. The lease to the tenant was for one year expiring on the 15th of October, 1944. Notice to vacate was given on September 14th, 1944, but the tenant refused to give up possession. These proceedings were then taken under section 19 of the Landlord and Tenant Act. The learned judge found that this was a "business," but refused the application. That it is a business see *Rolls* v. *Miller* (1884), 27 Ch. D. 71, at p. 80; *In re Kleckner and Lane,* [1944] 3 W.W.R. 43. This is a business and is commercial accommodation and not housing accommodation.

Wismer, K.C., for respondent: It has already been held that in circumstances the same as these, it is "housing accommodation": see *Law* v. *Smith* (1944), 60 B.C. 437. The place is entirely for dwelling purposes.

McAlpine, in reply: The facts are not the same and it can be distinguished from *Law* v. *Smith* [*supra*]. He found it was a "business" and he should have made the order asked for.

Cur. adv. vult.

29th March, 1945.

SLOAN, C.J.B.C.: The learned judge below held that the premises in question were being operated by the respondent as a "business." The evidence supports that conclusion. It follows that whatever other classification could be applied thereto such premises were not "housing accommodation." In consequence the regulations relating to "housing accommodation" did not extend to these premises.

If, as suggested, the "business" fell within the definition of "commercial accommodation" order 470 effective as of January 2nd, 1945, cannot apply for the reason that such order divesting vested rights is not retrospective in operation. *Dixie* v. *Royal Columbian Hospital* (1941), 56 B.C. 78.

In my view, because no effective Dominion order is applicable in the circumstance herein, the notice to vacate given under the

relevant provisions of the Landlord and Tenant Act, R.S.B.C. 1936, Cap. 143, was effective to determine the tenancy.

In my opinion *Law* v. *Smith* (1944), 60 B.C. 437 is distinguishable. The basic fact found below in that case was that the premises there in question consisted of a "multiple family dwelling" which is a class of "housing accommodation."

In the result I would, with deference, allow the appeal.

O'HALLORAN, J.A.: Maxine, Limited, appeals from an order refusing it a writ of possession to place it in control of its premises described as a 13 self contained suite apartment-hotel which its lessee the respondent Cuillerier refused to vacate upon the expiration of the lease. I do not think it is denied that if Wartime Prices and Trade Board regulations do not apply, a writ of possession ought to be ordered under the Landlord and Tenant Act of this Province. Several of the Wartime Prices and Trade Board orders or regulations were produced, but I am far from satisfied they apply to the facts and circumstances of this case.

The evidence discloses that when the premises were leased to the respondent on 29th September, 1943, they were then operated as an apartment-hotel within the meaning of the term "hotel" as it is defined in Wartime Prices and Trade Board order 294, which also defines "commercial accommodation" (and identically defined in order 315) and "housing accommodation." "Hotel" is there defined as a public house the operation of which

(i) in one or more building, furnishes sleeping and living accommodation, with or without meals, to the travelling public; and

(ii) receives and lodges all persons seeking shelter, unless there is reasonable ground for refusal; and

(iii) has customarily kept a register in which the guests, on arrival, record their names and addresses; and

(iv) assumes responsibility for the goods and chattels of its guests in accordance with the law of the province in which the hotel is situated.

The greatest difficulty was experienced in learning what and which Wartime Prices and Trade Board orders were passed or amended. But I understood counsel for the respondent to concede that if the premises can be classed as an "hotel" as defined in order 294, *supra*, then there is no Wartime Prices and Trade Board order which interferes with the operation of Provincial

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law and the consequent issuance of the writ of possession which the appellant seeks. Perusal of the appeal book satisfies me there is abundant evidence that when Cuillerier went into possession under his lease the premises then possessed all the *indicia* of an "hotel" specified in order 294, *supra*.

Some question arose regarding the existence of a register for guests to record their names and addresses (sub-clause (iii) of "hotel" definition in order 294). But Cuillerier admitted he had signed the register as a guest before he ever became the lessee. And he also admitted the register was there when he took over as lessee, but said that he had never asked anyone to sign it. His neglect or omission to keep the register cannot be taken advantage of by him to deny the character of the premises he leased. It is in evidence also that in writing the rental board on 17th March, 1944 (Exhibit 4), Cuillerier stated he had leased the premises as "hotel premises."

In view of the foregoing conclusion, I do not need to express an opinion upon other grounds touched on during the argument. I would make the order I think ought to have been made below and therefore direct a writ of possession to issue.

I would allow the appeal accordingly.

ROBERTSON, J.A.: It is submitted that, while as between the respondent and his sub-tenants the alleged hotel in question may be said to be housing accommodation, as between the respondent and the appellant, the former is carrying on an hotel business and therefore the hotel comes within the words "any place of business" in subsection (*c*) of section 1 of order 294 and is therefore "commercial accommodation."

I adhere to the view which I took in *Law* v. *Smith* (1944), 60 B.C. 437. I am of the opinion that the intention of this order was to preserve for living accommodation and, for those presently occupying them, all places which were actually "places of dwelling" occupied for that purpose, although the landlord or head tenant of the premises might be operating the same as a business.

If the words "commercial accommodation" were to include an hotel, then if there is substituted for the words "commercial accommodation" the word "hotel" in the definition of "housing

accommodation" (subsection (*g*) of section 1) the definition would read as follows:

"Housing accommodation" means any place of dwelling . . . , but shall not include a hotel . . . or any room in a hotel or clubhouse.

If "hotel" is not included in the definition of "housing accommodation" then, *a fortiori,* a room in an hotel would not be included. In my opinion the words "or any room in a hotel" were inserted in the definition of "housing accommodation" by way of exemption because that term included an hotel.

"Hotel" and "clubhouse" are fully defined in section 1. I think the reason for this was so to make it clear that in these classes of premises a room would not be included in the term "housing accommodation."

For these reasons I think the appeal should be dismissed.

SIDNEY SMITH, J.A.: The learned trial judge thought that the premises herein were being operated as a business, but felt himself bound by the decision of this Court in *Law* v. *Smith* (1944), 60 B.C. 437. He therefore dismissed the application.

I agree with the learned judge that there is no substantial difference between the premises in this case and those in question in *Law* v. *Smith, supra.*

I therefore think that this appeal must be dismissed.

BIRD, J.A.: This appeal involves the interpretation of certain orders of the Wartime Prices and Trade Board relating to termination of leases and raises for decision a question as to the classification under those orders of premises known as Maxine Apartments, 1223-1225 Bidwell Street, Vancouver, B.C., the subject of a lease dated September 29th, 1943, for a term of one year computed from October 15th, 1943, made between the appellant as lessor and the respondent as lessee.

The respondent refused to vacate the premises pursuant to a notice to vacate given by the appellant, whereby the former was required to deliver possession at the expiry of the lease on October 15th, 1944.

The appellant then applied under the provisions of the Landlord and Tenant Act, R.S.B.C. 1936, Cap. 143, Sec. 19 for a decision that the tenancy had been duly determined by that

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notice. Upon the hearing LENNOX, Co. J. found that the premises were held and operated by the respondent "as a business" but notwithstanding that finding, the learned judge refused an order for possession and dismissed the application, being of opinion that in consequence of the judgment of this Court in *Law* v. *Smith* (1944), 60 B.C. 437 he was bound to hold the premises to be "housing accommodation" under Wartime Prices and Trade Board order No. 294. He held that in the circumstances the lease was not subject to termination under the provisions of that order.

It is to be observed that in *Law* v. *Smith* the learned trial judge had found that the accommodation there under consideration was a "multiple family dwelling," *i.e.*, "housing accommodation" as defined by the same order; whereas here there is in effect a finding that the accommodation, being operated as a business, is under the same order something other than "housing accommodation," *i.e.*, either an "hotel" or "commercial accommodation," though the learned judge felt that he could not give effect to the finding in view of the decision before mentioned.

Wartime Prices and Trade Board order No. 294, which relates to housing accommodation, defines the several types of accommodation in part as follows:

1. (*c*) "commercial accommodation" means

(iii) Any place of business;

(iv) any structure or part of a structure used for combined business and dwelling purposes under a lease that is made to one tenant . . . and the rental payable under which has not been apportioned in respect of that part used for business purposes and that part used as a place of dwelling;

1. (*f*) "hotel" means a public house the operator of which

(i) in one or more building, furnishes sleeping and living accommodation, with or without meals, to the travelling public; and

(ii) receives and lodges all persons seeking shelter, unless there is reasonable ground for refusal; and

(iii) has customarily kept a register in which the guests, on arrival, record their names and addresses; and

(iv) assumes responsibility for the goods and chattels of its guests in accordance with the law of the province in which the hotel is situated;

1. (*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.

Under Wartime Prices and Trade Board order No. 315, which

relates to commercial accommodation, "commercial accommodation" is defined in terms identical to those contained in order No. 294, but this order omits any definition of "hotel" or of "housing accommodation."

Rates or rental of hotel rooms, *i.e.*, hotel accommodation, are regulated by Wartime Prices and Trade Board order No. 316.

Upon consideration of those orders I conclude that order 294 has no application to that type of accommodation covered by the definition of commercial accommodation which is covered by order 315, nor does it apply to accommodation in an hotel to which order 316 relates, and that an hotel considered as a business enterprise as distinct from its room accommodation is included in the definition of "commercial accommodation" and therefore is subject to the provisions of Wartime Prices and Trade Board order No. 315.

The learned trial judge has found that this accommodation is a business, a finding which in my opinion is fully supported by the evidence hereafter mentioned.

For some time before the month of September, 1943, the premises were operated by one Gillette as an apartment-hotel.

On October 15th, 1943, the respondent became tenant of the appellant under the terms of the lease before mentioned, he having been in possession of the premises and in charge of the operation thereof at and for some weeks prior to the making thereof, as the representative of the appellant (landlord) and of the landlord's bailiff pursuant to process for default in payment of rent.

The evidence discloses that Gillette operated the premises as an hotel as defined in Wartime Prices and Trade Board order No. 294. He furnished sleeping and living accommodation to the extent of the accommodation available, to permanent guests as well as transients at weekly and daily rates and kept a register. Responsibility for the goods of guests in my opinion was imposed upon him under the law of the Province in consequence of his *status* as an hotel proprietor, and in that sense such responsibility was assumed by him.

The respondent had a suite in the building under Gillette's tenancy of the entire premises and no doubt was familiar with the character of the establishment and the nature of its operation.

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Bird, J.A.

He said on the hearing that the premises were represented to him as an hotel. That he considered it as a business I think appears from his protest that the revenues derived were less than represented. He took possession of the premises as a going concern at the commencement of the term and I think must be held to have taken possession thereof *qua* hotel. The *status* or classification of the premises under the Wartime Prices and Trade Board orders under review I think must be taken to be the classification of the premises at the date of the lease.

It is true that the nature of the operation of the premises appears to have been changed by the respondent to that of an apartment or lodging-house during the currency of the lease, but in my opinion no such change can be made to affect the classification of premises under those orders.

Then the lease being, in my opinion, a lease of an hotel and therefore a commercial accommodation, is subject to regulation under Wartime Prices and Trade Board order No. 315. Consequently order No. 294 relating to housing accommodation has no application thereto.

Order No. 315 as at the date of the order from which this appeal was taken contained provisions relating to maximum rentals only and was silent on the subject of termination of such lease. However, by order No. 470 which became effective January 2nd, 1945, order No. 315 was amended by adding Part II., in which is incorporated sections 12 and 13, which read in part as follows:

12. Except as provided in sections 13 and 14, no tenant of any commercial accommodation shall be dispossessed of such accommodation or be evicted therefrom and no landlord shall demand that any tenant vacate or deliver up possession of any commercial accommodation.

13. The landlord may recover possession of the accommodation in accordance with the law of the province in which it is situated if the tenant . . .

(*c*) is, or was at the time of making the lease, the landlord's employee, servant, or agent.

It is conceded by counsel for the respondent that if the premises are classified as commercial accommodation, the notice to vacate was an effective notice under the law of the Province and regulations in effect at the date when the notice was given as well as at the date of the order appealed from; and that an effective order for possession could then have been made by the

learned judge below. But he submits that no such order having then been made Wartime Prices and Trade Board order No. 470 now operates as an absolute bar to dispossession or eviction except by virtue of the provisions of that order.

Assuming that the effect of order No. 470 is as thus submitted, an assumption which I think is unwarranted, since, in my opinion, order No. 470, being a regulation which divests vested rights and is therefore to be construed as prospective—*Dixie* v. *Royal Columbian Hospital* (1941), 56 B.C. 78—then, I am of opinion that section 13 (*c*) of order No. 470 applies in the circumstances here.

The lease of these premises was made at a time when respondent, the tenant thereunder, had possession of and was operating the premises as the agent of either the bailiff or of the landlord or both of them. The evidence discloses a conflict as to whether the respondent was the agent of the landlord or of the bailiff, but I think it is clear from all of the evidence that whether the respondent's appointment as agent was made by one or other of them, the appointment, if made by the bailiff alone, was made with the knowledge and authority of the landlord and in my opinion the relationship of principal and agent between the landlord and the respondent was thereby created. *De Bussche* v. *Alt* (1877), 8 Ch. D. 286.

I would therefore allow the appeal with costs here and below and direct that a writ of possession issue under section 22 of the Landlord and Tenant Act.

Appeal allowed, Robertson and Sidney Smith, JJ.A., dissenting.

Solicitor for appellant: *H. E. M. Bradshaw.*
Solicitor for respondent: *Gordon S. Wismer.*

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NANAIMO COMMUNITY HOTEL LIMITED v. BOARD OF REFEREES APPOINTED UNDER THE EXCESS PROFITS TAX ACT.

Practice—The Excess Profits Tax Act, 1940—Order of board of referees—Certiorari—Jurisdiction—Appeal—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: "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 under this Act."

On motion of the Nanaimo Community Hotel Limited 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 of 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, it was 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.

Held, on appeal, affirming the decision of MACFARLANE, J. (SLOAN, C.J.B.C. and O'HALLORAN, J.A. dissenting), that under section 66 of the Income War Tax Act, the Exchequer Court has exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and the application for a writ of *certiorari* was properly dismissed for lack of jurisdiction.

Per ROBERTSON and BIRD, JJ.A.: In view of the history of the Exchequer Court of England and its exclusive jurisdiction in matters of revenue and the legislation in Canada referred to, the intention was to give to the Exchequer Court of Canada the same jurisdiction as the English Court of Exchequer has enjoyed, and to oust the jurisdiction of all other Courts where exclusive jurisdiction is conferred; and to carry out this purpose the words in section 66, conferring exclusive jurisdiction are clear and express.

APPEAL by plaintiff from the decision of MACFARLANE, J. of the 26th of July, 1944 (reported, 60 B.C. 558), on a motion for a writ of *certiorari* to remove into the Supreme 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 of May, 1943.

The appeal was argued at Vancouver on the 7th, 8th and 9th of November, 1944, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Cunliffe, for appellant: The Exchequer Court of Canada has no jurisdiction to deal with the decision of the board of referees on the merits or otherwise. Such a construction would treat as surplusage the language of Parliament that such a decision of the board shall be final and conclusive upon approval by the Minister: see *The Queen* v. *The Bishop of Oxford* (1879), 48 L.J.Q.B. 609, at p. 620. It is well established that when an Act of Parliament declares that a decision of a tribunal is "final and conclusive," it is intended there shall be no appeal: see *Waterhouse* v. *Gilbert* (1885), 54 L.J.Q.B. 440; *Bryant* v. *Reading* (1886), 55 L.J.Q.B. 253; *Lyon* v. *Morris* (1887), 56 L.J.Q.B. 378; *Van Laun & Co.* v. *Baring Brothers & Co.* (1903), 72 L.J.K.B. 756. Even if the Exchequer Court has any jurisdiction, it only relates to the merits and does not oust the *certiorari* powers of the Supreme Court: see *The Queen* v. *Willatts* (1845), 14 L.J.M.C. 157; *The Queen* v. *Blathwayt* (1846), 15 L.J.M.C. 48; *Rex* v. *Postmaster-General* (1927), 96 L.J.K.B. 347. *Certiorari* is not taken away by words giving exclusive jurisdiction to another tribunal: see *Rex* v. *Plowright* (1686), 3 Mod. 94; *Rex* v. *Moreley; Rex* v. *Osborne; Rex* v. *Reeve; Rex* v. *Norris* (1760), 2 Burr. 1040; *Barnaby* v. *Gardiner* (1854), 2 N.S.R. 306; *Crawley* v. *Anderson* (1868), 7 N.S.R. 385; *Rex* v. *Jukes* (1800), 8 Term Rep. 542; *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, at pp. 162-3; *The Queen* v. *The Sailing Ship "Troop" Company* (1899), 29 S.C.R. 662, at p. 673. *Certiorari* can only be taken away by express negative words: see *Rex* v. *Hanson* (1821), 4 B. & Ald. 519. Even when taken away by express words, it will lie where the tribunal has acted without jurisdiction: see *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; *The Queen* v. *The Justices of St. Albans* (1853), 22 L.J.M.C. 142; *The King* v. *The Justices of Somersetshire* (1825), 6 Dowl. & Ry. 469; *Reg.* v. *Cheltenham Commissioners* (1841), 1 Q.B. 467. On where the Court has proceeded contrary to natural justice see *Re Sing Kee* (1901), 8 B.C. 20; *In re Berquist*

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(1925), 35 B.C. 368. The grounds on which the writ of *certiorari* is applied for involve the jurisdiction and conduct of the board of referees. The board consisted of four members and there is no provision authorizing less than the full membership to function. It is a statutory body and they must all sit: see *Board of Education* v. *Rice,* [1911] A.C. 179; *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72, at p. 79. The decision was made by three members of the board. The chairman of the board was also away when the hearing took place, but he did take part in making the decision. The facts are not in dispute.

Clearihue, K.C., for respondent: The Supreme Court of British Columbia has no power to issue a writ of *certiorari* to examine into the actions of the board of referees appointed under The Excess Profits Tax Act, 1940. Even if it has, it is taken away by section 66 of the Income War Tax Act. Under section 91 (3) of the British North America Act, 1867, exclusive power is given the Dominion Government for "raising money by any mode or system of taxation." Under section 101 of said Act the Dominion has power to set up its own Courts to administer its laws: see *The King* v. *Jerry Petite,* [1933] Ex. C.R. 186, at p. 188; *Farwell* v. *The Queen* (1894), 22 S.C.R. 553, at pp. 561-2; *Attorney-General* v. *Walker* (1877), 25 Gr. 233, at p. 237; *Bow, McLachlan & Co.* v. *Ship "Camosun,"* [1909] A.C. 597. Proceedings will not be removed by *certiorari* into a superior Court unless the questions concerned are capable of being determined in said superior Court: *Re Elliott* v. *McLennan* (1916), 36 O.L.R. 573; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 854, par. 1446; *Rex* v. *Army Council. Ex parte Ravenscroft,* [1917] 2 K.B. 504. That the Supreme Court of British Columbia has no power to determine matters referred to the board of referees see *Canadian National Ry. Co.* v. *Lewis et al.,* [1930] Ex. C.R. 145. If the proper method of questioning the board's action is by *certiorari,* the writ should be issued in the Exchequer Court: see section 36 of Exchequer Court Act; *William John Sykes* v. *The King,* [1939] Ex. C.R. 77, at p. 88. Ministerial action is not subject to inquiry in the Courts as to

precedent steps and to inquire into the action of the board of referees by *certiorari* is to inquire into the precedent steps of the action of the Minister of National Revenue: see *Theodore* v. *Duncan,* [1919] A.C. 696, at p. 706; *In re War Measures Act. Yasny* v. *Lapointe,* [1940] 2 W.W.R. 372, at p. 380; *Rex* v. *Halliday,* [1917] A.C. 260. The board had a preliminary inquiry at Vancouver and later held its meeting in Ottawa. Decision was given in Ottawa and the board has its headquarters in Ottawa. The sitting in Vancouver was for convenience only. The Supreme Court of British Columbia has no jurisdiction over a board set up by the Dominion and sitting outside the Province: see *Re Imperial Tobacco Co. et al. and McGregor,* [1939] O.R. 213 and 627; *Local Government Board* v. *Arlidge,* [1915] A.C. 120, at pp. 137 and 140. A writ of *certiorari* will not be granted by a superior Court to examine into the actions of an inferior Court when such Court is dealing with the civil as distinct from criminal relations of a subject and His Majesty, but only when dealing with the civil relations between subjects of the Crown: see *Re The Massey Manufacturing Co.* (1886), 11 Ont. 444, at p. 452; affirmed, 13 A.R. 446. The board of referees does not perform a judicial act, but is merely an administrative body advising the Minister of National Revenue. A writ of *certiorari* will not be granted under such conditions. Under the Act the board is to "advise and aid" the Minister. The findings of the board are not final and no obligations are incurred until the Minister or the Treasury Board has made his or their finding: see *Rex* v. *Electricity Commissioners* (1923), 93 L.J.K.B. 390; *Rex* v. *Hendon R.D.C. Ex parte Chorley,* [1933] 2 K.B. 696, at p. 702; *Errington* v. *Minister of Health,* [1935] 1 K.B. 249; *Reg.* v. *Manchester Justices,* [1899] 1 Q.B. 571; *Reg.* v. *Sharman. Ex parte Denton,* [1898] 1 Q.B. 578; *Boulter* v. *Kent Justices,* [1897] A.C. 556; *Ex parte Jacob* (1861), 10 N.B.R. 153. If the approval made by the Minister pursuant to section 5 (4) of The Excess Profits Tax Act, 1940, is "final and conclusive," then the decision cannot be disturbed by inquiring into the actions of the board by a writ of *certiorari.* It is conclusive on a point of fact and not on a point of law: see *Omar H. Patrick* v. *Minister of National Revenue,*

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[1936] Ex. C.R. 38; *Pioneer Laundry & Dry Cleaners Ltd.* v. *The Minister of National Revenue,* [1939] S.C.R. 1, at p. 8. *Certiorari* cannot be granted until all remedies are exhausted: see *In re Aaron Erb (No. 2)* (1908), 16 O.L.R. 597; *The King* v. *The Assessors of the Town of Woodstock, Ex parte The Bank of Nova Scotia* (1922), 49 N.B.R. 213. If a writ of *certiorari* is applicable, then it must be applied for without delay: see *Ex parte Forrest* (1889), 28 N.B.R. 429; *Rex* v. *Glamorgan Appeal Tribunal; Ex parte Fricker* (1917), 115 L.T. 930, at p. 932; *The King* v. *Holyoke; Ex parte McIntyre* (1913), 42 N.B.R. 135. The board's finding was approved by the Minister of National Revenue and the finding is final and conclusive and cannot be inquired into: see *Local Government Board* v. *Arlidge,* [1915] A.C. 120; *Board of Education* v. *Rice,* [1911] A.C. 179; see also *Errington* v. *Minister of Health,* [1935] 1 K.B. 249; *Offer* v. *Minister of Health* (1935), 51 T.L.R. 546; *Baildon Urban (Park Lane Areas) Confirmation Order, 1935. Baildon Urban Tong Park No. 1 Housing Confirmation Order, 1935* (1935), 52 T.L.R. 173; *Denby (William) & Sons, Ld.* v. *Minister of Health,* [1936] 1 K.B. 337; *Minister of National Defence for Naval Services* v. *Pantelidis* (1942), 58 B.C. 321; *St. John* v. *Fraser,* [1935] S.C.R. 441; *Wilson* v. *Esquimalt and Nanaimo Ry. Co.,* [1922] 1 A.C. 202; *The King* v. *Noxzema Chemical Co. of Canada Ltd,.* [1941] Ex. C.R. 155, at pp. 165-6. That counsel should be allowed to appear before the Minister before he gives his final approval see *The King* v. *Noxzema Chemical Co. of Canada Ltd.,* [1941] Ex. C.R. 155, at p. 166.

Cunliffe, replied.

Cur. adv. vult.

20th March, 1945.

SLOAN, C.J.B.C.: I am of the opinion that the Supreme Court of the Province has jurisdiction in proceedings by way of *certiorari* to determine if the board of referees has acted as Lord Parmoor expressed it in *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72, at p. 87,

in a judicial spirit, in accordance with the principles of substantial justice.

I have had the opportunity of reading the judgment of my

brother O'HALLORAN and am in substantial agreement with the reasons therein given supporting the conclusion that section 66 of the Income War Tax Act does not oust the jurisdiction of the Supreme Court to consider and determine that question.

I do not find it necessary to express any view as to whether or not the Parliament of Canada is competent to enact legislation effectuating that intention. It is sufficient to say that the legislation presently under review is not, in my opinion, designed to achieve that purpose.

I would, with deference, allow the appeal with all consequential directions.

O'HALLORAN, J.A.: This case revolves around two main questions: (1) Whether counsel for the appellant hotel company was given a fair hearing by the board of referees (a statutory tribunal) when he appeared before it in Vancouver to uphold the "standard profit" it claimed to be entitled to under The Excess Profits Tax Act, 1940; and (2) whether the *certiorari* jurisdiction of the Supreme Court of British Columbia to ascertain if that hearing was conducted fairly and judicially, has been ousted, and vested exclusively in the Exchequer Court of Canada. The latter question is one of far-reaching public importance. It is the right to *certiorari*, and not the right to appeal from the board of referees, which we have to consider. The two are vastly different things.

It is vital to the true decision of this appeal to avoid treating the exercise of supervisory jurisdiction by the Supreme Court through the medium of the high prerogative common-law remedy of *certiorari* as if it were a trial by the Supreme Court of an assessment or revenue matter or a decision thereon. Too much stress cannot be placed upon the distinction between the two things. For unless it is fully recognized *in limine* and kept in mind throughout, I see no escape from conclusions which must contain inherent fallacy. The learned judge of the Supreme Court from whom this appeal is taken, did not decide the first question, *viz.*, whether or not a fair hearing was had. The second question was presented to him in the form of a preliminary objection to his jurisdiction to hear the first question on the motion for *certiorari*. The learned judge held he had not juris-

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diction, and gave effect to the preliminary objection, thus deciding the second question by holding that his *certiorari* jurisdiction was ousted in favour of the Exchequer Court of Canada.

With respect, I must reach the conclusion that he had *certiorari* jurisdiction. In my opinion the motion for *certiorari* ought to be referred back to proceed before a judge of the Supreme Court. It may then be decided whether there did occur a "violation of an essential of justice" in the sense that term has been frequently interpreted in this Court, notably in *In re Low Hong Hing* (1926), 37 B.C. 295, at p. 302; *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at pp. 549, 551 and 555 and *Rex* v. *Lennox* (1940), 55 B.C. 491, which in turn were largely founded on *The King (Martin)* v. *Mahony,* [1910] 2 I.R. 695, which was approved in *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146. Such decisions as *Crawley* v. *Anderson* (1868), 7 N.S.R. 385; *In re Berquist* (1925), 35 B.C. 368, and *Rex* v. *Wandsworth Justices. Ex parte Read,* [1942] 1 K.B. 281, are also informative on this latter aspect.

I put the case as I have to make it clear that this Court, in the exercise of its appellate jurisdiction, is not concerned now as to whether or not there was a judicial hearing before the board of referees on the first question. That first question has not yet been determined by a judge of the Supreme Court in *certiorari* proceedings, and is not truly before us until it has been. Interjection of evidence and argument relating to it, and discussion of evidence and argument concerning the machinery of taxation and assessment under The Excess Profits Tax Act, 1940, or concerning appeals from the board of referees, in my judgment tends to obscure the real point upon which this appeal depends, and does not assist this Court in determining whether the learned judge was right or wrong in the opinion he formed regarding his jurisdiction to entertain the motion for *certiorari.*

The effective question before us for decision is whether or not the *certiorari* jurisdiction of the learned Supreme Court judge to entertain the first question was ousted as he held it was. The learned judge's reasoning is best expressed in his own language from which it appears his opinion is based wholly on section 66 of the Income War Tax Act. The learned judge said in material part [60 B.C. 558, at p. 560]:

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.

In my opinion, with respect, for reasons developed hereafter: (1) Section 66 of the Income War Tax Act does not take away *certiorari* from the Supreme Court of British Columbia; and (2) the British North America Act, 1867, does not empower the Parliament of Canada to do so.

Several prefatory observations ought to be made. The respondent board of referees appears as a statutory tribunal of inferior jurisdiction, and *cf.* the decisions referred to in *National Trust Company Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.* (1940), 55 B.C. 516, at pp. 529-30 and in *The King ex rel. Lee* v. *Workmen's Compensation Board* (1942), 57 B.C. 412, at pp. 429-30 and 438-41. As to the enlarged scope of *certiorari* see *Crawley* v. *Anderson, supra, The Security Export Co. v. Hetherington,* [1923] S.C.R. 539, Duff, J. at p. 555, and *The King ex rel. Lee* v. *Workmen's Compensation Board, supra,* at p. 431. It is also essential to have a clear apprehension of the nature of the jurisdiction exercised in *certiorari.* It is thus stated in *National Trust Company Ltd.* v. *The Christian Community of Universal Brotherhood Ltd., supra,* at p. 541 (and see also at p. 527 and pp. 540 and 542):

. . . such proceedings are not an appeal, and they are not a hearing *de novo;* they cannot go into the merits of the dispute between the parties. The only remedy the applicant may obtain, for (apart from any extension or abridgment of *certiorari* in a particular statute), the only jurisdiction the Supreme Court [of the Province] has in such proceedings, is a review of the proceedings in the inferior Court or tribunal, to ascertain if the inferior Court or tribunal has acted without jurisdiction, in excess or in abuse of its jurisdiction, or in violation of the essentials of justice.

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In this case, on *certiorari* the judge cannot review the correctness of any decision of the board of referees "in connection with" the appellant's assessment, which, the board would have power to make, if it did not violate an essential of justice, or exceed its jurisdiction. It is not a trial in connection with the correctness of the assessment. No question arises concerning the exclusive jurisdiction of the Exchequer Court of Canada to hear and determine "all questions that may arise in connection with" the appellant's assessment, provided the decision of the board of referees is made after a proper hearing in a matter and manner in which the board has jurisdiction. The appellant's complaint concerns another matter entirely, *viz.*, the manner in which the board of referees acted in arriving at a decision. The appellant complains that the board violated essentials of justice in the way it came to its decision.

The appellant's complaint is not against a wrong decision as such by the board, but it is a complaint that no proper hearing was held by the board to justify any decision, right or wrong. To put it as Lord Parmoor did in *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72, at p. 87, it is contended the board did not determine the assessment

in a judicial spirit, in accordance with the principles of substantial justice.

The appellant says in effect that it has been deprived of the imprescriptible civil right of a British subject (*cf.* Darling, J. with Avory and Salter, JJ. concurring in *Tyrrell* v. *Cole* (1918), 120 L.T. 156) to have a fair hearing in a matter which affects its property, and it seeks the aid of the inherent jurisdiction of the Supreme Court, to quash a decision which it alleges is a denial of justice according to law. And see also *Innes* v. *Wylie* (1844), 1 Car. & K. 257, Lord Denman, C.J. at p. 263 and *Russell* v. *Russell* (1880), 14 Ch. D. 471, Jessel, M.R. at p. 478.

Since the respondent asserts section 66 of the Income War Tax Act has deprived the Supreme Court of British Columbia of its supervisory jurisdiction on *certiorari* and the learned judge has so held, it is essential to understand what the jurisdiction of that Court is. The Supreme Court of this Province is a Superior Court of inherent, original, supervisory and general jurisdiction at common law, quite apart from any statutory

confirmation or restatement of that inherent and common-law jurisdiction, and also quite apart from any additional jurisdiction which has been conferred upon it by Dominion or Provincial statutes, *cf. Stephen et al.* v. *Stewart et al.* (1943), 59 B.C. 297, at pp. 301-2. The ancient rule in *Peacock* v. *Bell and Kendal* (1667), 1 Wms. Saund. 73; 85 E.R. 84, at pp. 87-8 applies to its general common-law jurisdiction, that nothing shall be intended to be out of its jurisdiction, "but that which specially appears to be so"; and *vide Beaton* v. *Sjolander* (1903), 9 B.C. 439 (Full Court) at pp. 441-2 and *Stephen et al.* v. *Stewart et al., supra,* at pp. 301-2. Within the Province it has "universal jurisdiction and superintendency" *per* Willes, J. in *Mayor and Aldermen of the City of London* v. *Cox* (1867), 36 L.J. Ex. 225.

Included in the Supreme Court's inherent jurisdiction is the exercise of supervisory jurisdiction through the medium of the high prerogative remedies of *habeas corpus, certiorari, mandamus* and prohibition, to prevent inferior tribunals acting without jurisdiction, in excess or in abuse of their jurisdiction, and in violation of the essentials of justice, *cf. National Trust Company Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.* (1940), 55 B.C. 516, at pp. 527-8, 541-2, and at p. 545; at the latter page it is made clear that such supervisory jurisdiction in no wise interferes with the jurisdiction conferred by Parliament upon special tribunals such as the board of referees in this case, but it does enable the Supreme Court to supervise the conduct and decisions of such tribunals should they act unjudicially and *cf.* also *The Queen* v. *Overseers of Walsall* (1878), 47 L.J.Q.B. 711, Cockburn, L.C.J. at p. 718, and *The King ex rel. Lee* v. *Workmen's Compensation Board* (1942), 57 B.C. 412, at pp. 429-32 and 439-41.

Coming now to the first branch of this appeal, that *certiorari* is not taken away by section 66 of the Income War Tax Act. It must first be said that the Supreme Court of this Province has the same inherent jurisdiction to issue *certiorari* as the King's Courts in England. It possesses that jurisdiction by virtue of its Imperial origin and descent through the Supreme Court of Vancouver Island and its judges. That Court was created and appointed directly under an Act of the Imperial Parliament,

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12 & 13, Vict. c. 48 (28th July, 1849), "An Act to provide for the Administration of Justice in Vancouver's Island," and that Act was passed before Vancouver Island became a colony properly so-called, *cf. The "Thrasher" Case* (1882), 1 B.C. (Pt. 1) 153, CREASE, J. at pp. 192-4 and 210; *S*—— v. *S*—— (1877), *ib.* 25, CREASE, J. at p. 44, and *Reynolds* v. *Vaughan* (1872), *ib.* 3, BEGBIE, C.J. at p. 4.

In due course, two separate colonies, Vancouver Island with its dependencies, and the Mainland of British Columbia, came into being, each with its own Supreme Court. The Supreme Court of Vancouver Island "was created direct from England" *per* CREASE, J. in *The "Thrasher" Case* at p. 193. When the two colonies eventually united in 1866, the two Colonial Courts were finally merged by the Courts Merger Ordinance, 1870 (Cap. 54, C.S.B.C. 1877), and *cf. S*—— v. *S*——, *supra; The "Thrasher" Case, supra; Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221, at p. 234, *Attorney-General* v. *Ludgate* (1904), 11 B.C. 258, at pp. 260 and 267; affirmed (1906), 75 L.J.P.C. 114 and *Sheppard* v. *Sheppard* (1908), 13 B.C. 486, at pp. 506-9.

When the colony of British Columbia became a Province of the Dominion of Canada on 20th July, 1871, it carried into Confederation its Supreme Court and its two Imperially appointed superior Court judges (BEGBIE, C.J. and CREASE, J.), with, not only the jurisdiction it had inherited from the Supreme Court of the original separate mainland colony of British Columbia, and the jurisdiction it had subsequently acquired, but also all the *status*, authority, and original, inherent (including *certiorari* jurisdiction), and any other jurisdiction it possessed by virtue of its Imperial origin and descent through the Supreme Court of Vancouver Island and its judges. Moreover the jurisdiction of the said Court and the faculties of its judges were recognized by section 129 of the British North America Act, 1867. It is later pointed out that section 101 of the British North America Act, 1867, does not empower the taking away of that Imperially descended inherent jurisdiction which the Court possessed when the Province entered Confederation.

Certiorari cannot be taken away in the absence of specific and unequivocal positive statutory language. It will be apparent that our decision upon this first branch of the appeal does not depend upon whether or not the Exchequer Court of Canada possesses concurrent *certiorari* jurisdiction. Even if the latter Court does possess concurrent *certiorari* jurisdiction that is not enough to divest the Supreme Court of its ancient jurisdiction in *certiorari*. The jurisdiction may be concurrent, but it cannot be taken away from the Supreme Court and vested exclusively in the Exchequer Court in the absence of specific and unequivocal positive statutory language. The decisions show *certiorari* cannot be taken away simply by conferring "exclusive jurisdiction" upon another Court as is done in section 66 of the Income War Tax Act. In fact, language which seemed expressly to take away *certiorari* has been held not to do so, perhaps reflecting judicial disapproval of parliamentary interference with those ancient judicial faculties of the King in person, which, by the custom of the land and the sanction of exercise since time immemorial, have come to be regarded as constitutionally vested in the King's judges and not in Parliament. In *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, the Judicial Committee, *per* Lord Sumner, at pp. 162-3, intimated that Parliament had long accepted these judicial interpretations.

In *The King v. Reeve, Morris, Osborne et al.* (1760), 1 W. Bl. 231; 96 E.R. 127, Lord Mansfield held that *certiorari* could not be taken away by general words, but only by express negative words. In that case objection had been taken to the issuance of *certiorari* because an appeal was provided by a statute which also enacted that such appeal should be final and that no other Court should interpose. The statute (Conventicles Act, 22 Car. 2, c. 1) provided in section 6 that

> . . . no other Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act, but they shall be finally determined in the Quarter-Sessions only.

That of course is much stronger than section 66 of the Income War Tax Act, but Lord Mansfield said:

> There is no colour, that these negative words should take away the jurisdiction of this Court, to issue writs of *certiorari*. They will perhaps take away the writ of error that has been mentioned. But this Court hath an inherent power to issue *certiorari*, in order to keep all inferior Courts

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within due bounds, unless expressly forbid so to do, by the words of the law. If the justices have done right below, you may shew it, and quash the *certiorari*. But if there be the least doubt, this Court will grant the writ.

That reasoning is followed throughout *cf. The King* v. *Plowright and Others* (1686), 3 Mod. 94; 87 E.R. 60; *Rex* v. *Moreley; Rex* v. *Osborne; Rex* v. *Reeve; Rex* v. *Norris* (1760), 2 Burr. 1040; 97 E.R. 696; *The King* v. *Jukes* (1800), 8 Term Rep. 542; *The Queen* v. *The Justices of St. Albans* (1853), 22 L.J.M.C. 142; *Crawley* v. *Anderson* (1868), 7 N.S.R. 385; *The Queen* v. *The Sailing Ship "Troop" Company* (1899), 29 S.C.R. 662, at p. 673; *Re Sing Kee* (1901), 8 B.C. 20 (MARTIN, J.); *The Colonial Bank of Australasia* v. *Willan* (1874), 43 L.J.P.C. 39, at p. 44, and *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J.P.C. 146, at pp. 162-3. In *The Queen* v. *The Cheltenham Commissioners* (1841), 1 Q.B. 467; 113 E.R. 1211, approved in *The Colonial Bank of Australasia* v. *Willan, supra,* the statute provided (p. 1212):

> That no order, verdict, rate, assessment, judgment, conviction, or other proceeding touching or concerning any of the matters aforesaid, or touching or concerning any offence against this Act, or any by-law or order to be made in pursuance thereof, shall be quashed or vacated for want of form only, or be removed or removable by *certiorari*, or any other writ or process whatsoever, into any of His Majesty's Courts of Record at Westminster; any law or statute to the contrary thereof in anywise notwithstanding.

But despite this expressive language (which does not appear in section 66 of the Income War Tax Act), Denman, L.C.J. quashed the order because three magistrates who were interested took part in the decision. In the case at Bar the appellant alleges that not only did the board refuse him a fair hearing but it was also improperly constituted. Lord Denman, C.J. said (p. 1214):

> . . . three magistrates who were interested took a part in the decision. It is enough to shew that this decision was followed by an order: and I will not enquire what the particular question was, nor how the majority was made up, nor what the result would have been if the magistrates who were interested had retired. The Court was improperly instituted; and that rendered the decision invalid: . . .

A statutory clause taking away *certiorari* must be understood to assume that an order has been made by the proper authority.

It cannot be said a proper authority has been exercised, if as alleged here, a fair hearing has been denied. A more recent example is *Samejima* v. *Regem*, [1932] S.C.R. 640. That was a *habeas-corpus* case, but in so far as this appeal is concerned its principle applies equally to *certiorari* and in this respect *cf. Rex*

v. *Commanding Officer of Morn Hill Camp* (1916), 86 L.J.K.B. 410, Viscount Reading, C.J. at p. 413, and *In re Low Hong Hing* (1926), 37 B.C. 295, at p. 302. The relevant section 23 of the Immigration Act, Cap. 93, R.S.C. 1927, reads:

> No Court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

Here one would think are express negative words of the kind Lord Mansfield referred to in *The King* v. *Reeve, Morris, Osborne et al., supra,* and special attention is directed to the words "upon any ground whatsoever."

Samejima was not a Canadian citizen and had not Canadian domicil. Upon arrest for being unlawfully in Canada, he was discharged on *habeas corpus* by FISHER, J. (1931), 44 B.C. 317. He was rearrested and MURPHY, J., on a second *habeas-corpus* application refused his release. An appeal to this Court (*In re Immigration Act and Munetaka Samejima* (1932), 45 B.C. 401) was dismissed upon an equal division of the Court. MACDONALD, C.J.B.C., and MCPHILLIPS, J.A. founded their judgments on the ground that section 23 quoted above, completely ousted the jurisdiction of the Supreme Court of this Province. An appeal to the Supreme Court of Canada was successful. It was there held that notwithstanding the apparent express exclusion of the jurisdiction of the Courts, and the presence of the words "upon any ground whatsoever" that what was done, had not been done under the authority and in accordance with the provisions of the Immigration Act.

In this case the statute does not prescribe the duties of the board of referees with the detail which the Immigration Act did in the *Samejima* case. The duties of the board are generally stated but that does not relieve it from the common-law duty of giving the appellant a fair hearing which is the inalienable right of every Canadian. If the board, as the uncontradicted affidavit of the appellant asserts, has in fact violated an essential of justice, then it has not acted under its statutory authority and in accordance with the common law in force in this Province since

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before Confederation, and *certiorari* is as readily available to the appellant as *habeas corpus* was to Samejima. In fact much more so because of the lack of express negative words which appeared in the *Samejima* case. And see also *Shin Shim* v. *Regem*, [1938] S.C.R. 378; [1938] 4 D.L.R. 88.

There is a recent decision which applies in principle although it did not concern *habeas corpus, certiorari, mandamus* or prohibition. It turned upon whether the jurisdiction of the Supreme Court of this Province as a Court of first instance had been taken away by a Dominion statute. The case is *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd. and Board of Review for B.C.*, [1941] S.C.R. 601, reversing the decision of this Court in (1940), 55 B.C. 516. After the Christian Community had invoked the Farmers' Creditors Arrangement Act, the National Trust Company Limited issued a writ against it out of the Supreme Court for a declaration that it was not a "farmer" within the meaning of the Act it had invoked, and obtained a declaratory judgment accordingly.

On appeal this Court held that Parliament had expressly devested the Supreme Court of all original, auxiliary, and ancillary jurisdiction in the premises by enacting in section 5 (1) of the Farmers' Creditors Arrangement Act, 1934 (see p. 534, 55 B.C.) that in matters to which the Farmers' Creditors Arrangement Act, 1934, related, the county court of the district in which the farmer lived "shall have exclusive jurisdiction subject to appeal." It is to be observed that the same language, "exclusive jurisdiction," appears in section 66 of the Income War Tax Act. In my opinion nothing in particular turns on the words "in connection with" in section 66 upon which the learned judge seems to have based his decision (see the quoted reasons above). I assume that the ordinary meaning conveyed by these words is fully comprised in the term "exclusive jurisdiction." This Court reasoned in the *National Trust* case that Parliament, by using the term "exclusive jurisdiction" had expressed its intendment that the Supreme Court's jurisdiction as a Court of first instance was ousted in favour of the county court, and so held.

It was pointed out in this Court, however, at pp. 527 and

540-2, 55 B.C., that this did not oust the Supreme Court's supervisory jurisdiction by way of *habeas corpus, certiorari, mandamus* or prohibition, and as I read the judgments in the Supreme Court of Canada this latter view was not questioned. But the Supreme Court of Canada did uphold the jurisdiction of the Supreme Court of this Province as a Court of first instance declaring that the language of the Farmers' Creditors Arrangement Act, 1934, conferring exclusive jurisdiction upon the county court did not go far enough to oust the jurisdiction of the provincially constituted Supreme Court as a Court of first instance notwithstanding *Barraclough* v. *Brown* (1897), 66 L.J.Q.B. 672 (H.L.) and similar decisions referred to in this Court at pp. 534-5 of 55 B.C.

The facts were that the assets of the Christian Community at the time it invoked the Farmers' Creditors Arrangement Act, 1934, were in the hands of a receiver appointed by an order of the Supreme Court of this Province. Sir Lyman Duff, C.J. (Davis and Hudson, JJ. concurring) said at p. 610 that "only the most precise language" would justify a conclusion that Parliament, in conferring exclusive jurisdiction upon the county court, intended to deprive the Supreme Court of jurisdiction in a case where a receiver had been appointed by the Supreme Court. It had appeared to this Court, that the giving of exclusive jurisdiction to the county court, in case of bankruptcy, would be clearly sufficient to create that jurisdiction immediately an act of bankruptcy occurred, and under the House of Lords' decision in *Barraclough* v. *Brown, supra,* and similar decisions, that it would be sufficient to deprive any other Court immediately and entirely of jurisdiction. But Sir Lyman Duff repeated at p. 610 that "only the very clearest language" could justify a conclusion the jurisdiction of the Supreme Court was ousted, and invoked *Stradling* v. *Morgan* (1560), 1 Plowd. 199; 75 E.R. 305, at pp. 311 and 315.

In my judgment the principle of statutory construction enunciated in *Stradling* v. *Morgan* and thus approved (it was also approved by Ritchie, C.J. in *Valin* v. *Langlois* (1879), 3 S.C.R. 1, at p. 27) is equally applicable to both branches of this appeal. It is expressed at p. 315 of 75 E.R. in these words:

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> From which cases it appears, that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.

The authorities are clear from Lord Mansfield's time onward that *certiorari* cannot be taken away in the absence of express and unequivocal statutory language. It is a venerable principle which has come down to us with the approval of generation after generation of judges and legislators. But there is not one word about *certiorari* in section 66 of the Income War Tax Act. It must be conceded also that there is nothing in the Exchequer Court Act, Cap. 34, R.S.C. 1927 and amending Acts which expressly gives that Court exclusive *certiorari* jurisdiction. In fact there is nothing in that statute which expressly gives the Exchequer Court even concurrent jurisdiction in *certiorari*.

But despite the lack of these two *indicia* of jurisdiction, it was argued that the Exchequer Court has exclusive *certiorari* jurisdiction in any matter affecting the revenue. I find difficulty in following the reasoning which seeks to support this submission. So far as I can grasp it, it is grounded first, upon the 1933 amendment to the Exchequer Court Act which confers jurisdiction in *certiorari* upon the Exchequer Court in respect to persons serving in the armed forces outside Canada, but in terms which implied that Court already had certain concurrent *certiorari* jurisdiction within Canada; and secondly, that the Canadian Court of Exchequer was endowed at its inception with the same jurisdiction as the English Court of Exchequer, and as it is argued the latter Court had exclusive jurisdiction in matters affecting the revenue, so also has the Canadian Court; and hence, it is reasoned the Canadian Court must have exclusive *certiorari* jurisdiction in matters arising out of disputes affecting the revenue.

The short answer to both grounds is that the 1933 amendment to the Exchequer Court Act, denies the existence of exclusive *certiorari* jurisdiction in the Exchequer Court, since it plainly concedes that whatever *certiorari* jurisdiction the Exchequer Court may possess is concurrent with the jurisdiction of the provincially constituted Courts. Section 19 (*j*) of the 1933 amendment confers *certiorari* jurisdiction upon the Exchequer Court in relation to persons in the armed forces outside of Canada

> to the same extent as and under similar circumstances in which jurisdiction now exists in the Exchequer Court of Canada or in the courts or judges of the several provinces in respect of similar matters within Canada.

To my mind that statutory language which plainly concedes concurrent *certiorari* jurisdiction in the Courts and judges of the several Provinces closes the door completely upon the contention of exclusive *certiorari* jurisdiction in the Exchequer Court.

While the Exchequer Court Act thus definitely rules out exclusive *certiorari* jurisdiction in that Court, it is in point also to note that even if it did not, the second ground fails to withstand critical analysis. When the references to the jurisdiction of the English Court of Exchequer are sifted down to the point where they may understandably have application to the Canadian Exchequer Court I am unable to find that second ground means in principle and effect any more than this, that because section 66 of the Income War Tax Act gave the Canadian Exchequer Court exclusive jurisdiction in matters of assessment it thereby carries with it exclusive *certiorari* jurisdiction in any matter arising out of a dispute affecting assessments. But that submission has already been dealt with in the foregoing pages where it is established, fortified by copious references to long accepted authorities, first, that language such as that used in the Income War Tax Act is not sufficient to take away *certiorari,* and, secondly, that the nature and scope of *certiorari* itself denies that its exercise may in anywise affect the Exchequer Court's exclusive jurisdiction in assessment matters.

There ought to be no need to say that *certiorari* is not an action or a suit. Its very nature makes inapplicable the proposition that the King has the privilege of suing in any Court he pleases. These *certiorari* proceedings are not a suit or action by or against

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the King. In *certiorari* "there is no *lis;* there is no action." Lord Bramwell (Lord Watson concurring) in *Cox* v. *Hakes* (1890), 60 L.J.Q.B. 89, at p. 98 used these words regarding *habeas corpus,* but they apply equally to *certiorari.*

To summarize briefly: (1) The guiding decisions in *certiorari* show that language of the kind used in section 66 of the Income War Tax Act is not sufficient to take away *certiorari* jurisdiction from the Supreme Court; (2) the Exchequer Court Act not only fails to confer exclusive *certiorari* jurisdiction upon the Exchequer Court, but by plain implication confers certain concurrent jurisdiction upon that Court; (3) the *ratio decidendi* of *Samejima* v. *Regem,* [1932] S.C.R. 640 and *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd. and Board of Review for B.C.,* [1941] S.C.R. 601 are conclusive against holding exclusive *certiorari* jurisdiction lies in the Exchequer Court. With respect, it follows as an inescapable conclusion, that section 66 of the Income War Tax Act does not attempt to take away *certiorari* from the Supreme Court of British Columbia.

The conclusion just reached on the first branch is sufficient in itself to require this appeal to be allowed. But it is worthy of note that it is re-enforced by a conclusion which in my judgment, emerges from a study of the second branch of the appeal, *viz.,* that the British North America Act, 1867, does not empower the Parliament of Canada to take away *certiorari* from the Supreme Court of British Columbia; or, to put it another way, the Exchequer Court Act does not attempt to do so, because the British North America Act, 1867, is not competent to give it that power. In this aspect it is essential to keep in mind the observations made at the outset of this judgment concerning the nature of the jurisdiction exercised in *certiorari,* and the character of the Supreme Court's inherent power to exercise that jurisdiction through its imperial origin and descent. In *Valin* v. *Langlois* (1879), 3 S.C.R. 1, it was said at p. 19 (affirmed 5 App. Cas. 115) that the Provincially constituted Courts (and *cf. In re Vancini* (1904), 34 S.C.R. 621)

> are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized.

Section 129 of the British North America Act, 1867 (see also section 10 of the Terms of Union), reads in relevant part:

> Except as otherwise provided by this Act, all laws in force . . . at the Union, and all Courts of civil and criminal jurisdiction, . . . , existing . . . at the Union, shall continue . . , as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain . . .) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, . . .

In my judgment, the true interpretation of the exception in that section, leads to the conclusion that the inherent *certiorari* jurisdiction of the Supreme Court of British Columbia, derived as it is from the Imperially created Supreme Court of Vancouver Island, is not subject to be "repealed, abolished or altered" by the Parliament of Canada.

It has been suggested that the exception in section 129 has been repealed by the Statute of Westminster, 1931. But that is denied in plain words by section 7 (1) thereof which reads:

> Nothing in this Act shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

The *Reference as to the Legislative Competence of the Parliament of Canada to enact Bill No. 9, entitled "An Act to Amend the Supreme Court Act,"* [1940] S.C.R. 49 related to the jurisdiction of the Canadian Parliament to abrogate the jurisdiction of the Judicial Committee to hear appeals from Canadian Courts. That reference was concerned with Parliament's extraterritorial jurisdiction and also its jurisdiction to subtract from His Majesty's prerogative as exercised by the Judicial Committee. *British Coal Corporation* v. *The King,* [1935] A.C. 500 concerned the constitutionality of prohibiting appeals in criminal matters to the Judicial Committee after the passing of the Statute of Westminster. That decision was expressly limited to the type of criminal appeal there under consideration. With respect, I cannot find that the *ratio decidendi* of either the decision or the reference excludes the proposition contained in the second branch of this appeal. I think it is also plain from its context that the observations at p. 74 in *Valin* v. *Langlois* (1879), 3 S.C.R. 1 were not directed to the case of a Court of Imperial origin and descent.

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The Supreme Court of Vancouver Island from which the Supreme Court descends, was, as CREASE, J. said in *The "Thrasher" Case* (1882), 1 B.C. (Pt. 1) at p. 193, "created direct from England." That Court was not constituted by the colony of Vancouver Island, nor was it constituted by a subordinate Province of a colony, and see *The "Thrasher" Case, supra,* at pp. 194 and 212, and *Reference as to the Legislative Competence of the Parliament of Canada to Enact, &c.,* [1940] S.C.R. 49, at pp. 103, 109, 111, 114 and 120. The introductory words of section 129 "except as otherwise provided by this Act" lead to sections 91, 92, and 101, of the British North America Act, 1867. We are concerned with the latter section whereunder Parliament is empowered to provide:

> . . . for the establishment of any additional Courts for the better administration of the laws of Canada.

The Exchequer Court of Canada was created under that authority. Its entire jurisdiction stems from those words in section 101. It is purely the creature of those statutory words. It has no inherent jurisdiction such as is possessed by the Supreme Court of British Columbia. In *Bow, McLachlan & Co.* v. *"Camosun" (Owners)* (1909), 79 L.J.P.C. 17, Lord Gorell at p. 20, said of the Exchequer Court of Canada that it "has no general common-law jurisdiction," and see also pp. 19 and 25.

Section 101 deserves examination for what it does not say, as well as for what it does say. It does not say these statutory "additional Courts" shall have inherent jurisdiction or a general common-law jurisdiction such as is possessed by Courts of common law, or that they shall have exclusive jurisdiction in administering the "laws of Canada." These important jurisdictional omissions must be regarded as vital when determining the jurisdiction of a statutory Court which can have no jurisdiction but what the British North America Act, 1867, is competent to give it. If section 101 is not competent to confer exclusive *certiorari* jurisdiction upon the Exchequer Court it must follow that Court cannot possess exclusive *certiorari* jurisdiction. If that is so, then the *certiorari* jurisdiction of the Supreme Court cannot be ousted, for to prove it is ousted, it must be shown affirmatively that the jurisdiction is vested exclusively in the Exchequer

Court, *vide* Lord Hardinge in *Derby (Earl of)* v. *Athol (Duke of)* (1749), 1 Ves. Sen. 202, at p. 204; 27 E.R. 982:

> Plea to the jurisdiction of a general court, [a superior court of general jurisdiction] must shew where the jurisdiction vests, as well as negatively, that it is not there,

and see also *Board* v. *Board* (1919), 88 L.J.P.C. 165, at p. 168.

Turning next to what section 101 does say. The power is to establish "additional Courts" for the better administration of the "laws of Canada." The expression "additional Courts" can only mean more Courts. There is not a hint that these Courts shall supplant existing Courts under section 129 which have Imperial origin, or oust their jurisdiction in any respect. They are "additional Courts" in no wise interfering with the existing Courts under section 129 which have Imperial origin. They must be "a means to some end competent to the latter" as it was put in The Board of Commerce case, *infra*. One would think the expression "laws of Canada" in its context of section 101 must mean just what it says, *viz.*, laws of that Federal entity known as Canada organized by the British North America Act, 1867 (section 3), as distinguished from the laws of the several Provinces. No one has suggested that the "laws of Canada" include any *"lex non scripta."* Compare *Consolidated Distilleries Ltd.* v. *Consolidated Exporters Corp. Ltd.*, [1930] S.C.R. 531.

Counsel for the respondent relied on *Grand Trunk Railway* v. *Attorney-General for Canada* (1906), 76 L.J.P.C. 23, but apart from other distinctive considerations it did not concern section 101. In *Attorney-General of Canada* v. *Attorney-General of Alberta and Others* (1921), 91 L.J.P.C. 40 (The Board of Commerce case) the Judicial Committee (*per* Viscount Haldane) at p. 47 said section 101

> . . . cannot be read as enabling that Parliament [Dominion] to trench on provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

The foregoing is made to apply equally to "The administration of justice in the Province" under section 92 (14). I do not conceive that anyone will question that denial of a fair hearing

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in the Province, to a property owner in the Province, in matters relating to his property in the Province, is a denial of a civil right in the Province within section 92 (13). It is a plain denial of justice in the Province contrary to the law of the Province. As I view it, it is as much the duty of Dominion officials to observe the Provincial law requiring a fair hearing, as it is their duty to obey the Provincial or municipal traffic laws. Compare *Workmen's Compensation Board* v. *Canadian Pacific Railway* (1919), 88 L.J.P.C. 169, at p. 172. It is a cardinal principle of the common law of England which forms part of the law of this Province, that a tribunal shall hear the whole case and allow a full answer with full opportunity therefor, and that any departures therefrom may be corrected promptly by the efficacious remedies afforded by the appropriate high prerogative writs in which are included *certiorari* and *mandamus*.

"Property and civil rights" in section 92 (13) "are plainly used in their largest sense" as said in *Citizens Insurance Co.* v. *Parsons* (1881), 51 L.J.P.C. 11, at p. 18 and in *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398, at p. 416. The remedy of *certiorari* to prevent a violation of an essential of justice is in its essence a civil right. For regarded in its true character, *certiorari,* as was said of *mandamus* in *The Mayor of Rochester* v. *The Queen* (1858), El. Bl. & El. 1024; 120 E.R. 791, at p. 794 (*per* Pollock, C.B. and Martin, B.) is a great constitutional remedy for error and misgovernment and it is the duty of the Court to be vigilant to apply it in every case, to which, by any reasonable construction it may be made applicable.

As one of the high prerogative writs including *habeas corpus, mandamus* and prohibition, *certiorari* is not a part of the original proceedings before the statutory tribunal. That is to say it is not part of the assessment proceedings before the board of referees. It is in the nature of a new proceeding brought by the subject to enforce a civil right (in this case a fair hearing) of which he claims to have been deprived. The same principle governs in this respect as was applied in *habeas corpus* in *Ex parte Tom Tong* (1883), 108 U.S. 556; *Kurtz* v. *Moffitt* (1885), 115 U.S.

487; *Ex parte Fong, Ex parte You, Ex parte Chalifaux,* [1929] 1 D.L.R. 223; and *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541 applied in *State of New York* v. *Wilby* (1944), 60 B.C. 370, at p. 374.

In *Farnsworth* v. *Montana* (1889), 129 U.S. 104, at p. 113 it was held the same principle applied in prohibition as in *habeas corpus*. In *Rex* v. *Electricity Commissioners* (1923), 93 L.J.K.B. 390, Atkin, L.J. at p. 406 said there was no difference in principle between *certiorari* and prohibition. *The Queen* v. *The Justices of Surrey* (1870), 39 L.J.M.C. 145 was cited by Lord Blackburn in *Julius* v. *The Bishop of Oxford* (1880), 49 L.J.Q.B. 577, at p. 591, as a *certiorari* case applicable to *mandamus* and prohibition. The House of Lords in *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72 applied the same principles to *certiorari* as it had applied to *mandamus* in *Board of Education* v. *Rice* (1911), 80 L.J.K.B. 796. The principle of *habeas corpus* was applied to *mandamus* in *The King* v. *Junior Judge of the County Court of Nanaimo and McLean* (1941), 57 B.C. 52, at pp. 58-9, *per* SLOAN, C.J.B.C., then J.A., with whom MCQUARRIE, J.A. agreed in legal substance. In both *Rex* v. *Commanding Officer of Morn Hill Camp* (1916), 86 L.J.K.B. 410, Viscount Reading, C.J. at p. 413 and *In re Low Hong Hing* (1926), 37 B.C. 295, MARTIN, J.A. at p. 302 applied the principle of *habeas corpus* to *certiorari*.

It is true that *habeas corpus* involves personal liberty and thus no doubt stands at the right hand of all the high prerogative writs. But it is intimately related to *certiorari, cf.* Holdsworth's History of English Law, Vol. 9, p. 109. For if a person is detained or penalized it is generally grounded on some order, statute or written authority which, as the cause of detention or punishment, must first be quashed on removal of the proceedings from the inferior tribunal to a Superior Court of general common-law jurisdiction. If a person may be penalized if he disregards a decision reached at an unfair hearing, his remedy is by *certiorari* to quash the decision which is the occasion for his punishment, and see *The King ex rel. Lee* v. *Workmen's Compensation Board* (1942), 57 B.C. 412, at p. 441.

To summarize briefly the reasoning which supports the con-

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clusion on the second branch of the appeal. The inherent common-law *certiorari* jurisdiction of the Supreme Court of British Columbia (1) is inherited from the Supreme Court of Vancouver Island created by an Act of the Parliament of Great Britain within the meaning of section 129 of the British North America Act, 1867; (2) it was not taken away by the British North America Act, 1867, and section 101 of the British North America Act, 1867, did not confer power on Parliament to do so; (3) alternatively, it is not taken away (a) since section 101 does not expressly and unequivocally provide for the taking away of *certiorari* as is found to be indispensably required under the authorities referred to in the first branch of the appeal, and (b) *certiorari* jurisdiction must be first shown to exist in the Exchequer Court of Canada which *Bow, McLachlan & Co.* v. *"Camsoun" (Owners), supra,* denies; and (4) because the right to *certiorari* is a civil right of the same general character as the right to *habeas corpus* which is a vested jurisdiction of the Supreme Court of this Province and forms no part of the "laws of Canada" as that term is used in section 101; and (5) the right to a fair hearing is a civil right in the Province under section 92 (13), the protection of which is within the vested jurisdiction of the Provincially constituted Supreme Court and which for reasons stated in paragraphs 1 to 4 just above, the British North America Act, 1867, does not permit to be taken away from a Court of Imperial origin.

I am accordingly of opinion that the learned judge's jurisdiction was not ousted, and that this opinion may be supported on either branch of the appeal. Other grounds, as contained in his *factum,* were urged by counsel for the respondent to the effect that *certiorari,* even if the Supreme Court's jurisdiction were not ousted, is nevertheless not an available or a proper remedy in the circumstances of this case. Some of those grounds are answered by what is contained in the decisions to which I have referred on the two branches of the appeal, and see for example *Dumont* v. *Commissioner of Provincial Police* (1940), 55 B.C. 298, affirmed generally [1941] S.C.R. 317.

But there is one submission of counsel for the respondent that ought not to be passed without comment. It is thus stated in the factum:

that the King cannot be forced by the subject to sit in his own Court and bring up on *certiorari* to be tried by himself a claim of the subject against the Crown which he has sent to an inferior Court to be decided and this without the issue by the Crown of any *fiat*. This with respect betrays a misconception of what the remedy of *certiorari* really is. I need not repeat here what was said in *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at pp. 549-50. Nor is there properly viewed, any claim here by the subject against the Crown in *certiorari* proceedings. No doubt such a claim exists in the assessment proceedings, but with that the Court is not concerned in *certiorari* proceedings as I have sought to explain elsewhere in this judgment. This aspect was also considered in the *mandamus* case of *The King ex rel. Lee* v. *Workmen's Compensation Board* (1942), 57 B.C. 412, at pp. 434-39, and decisions there examined and discussed, and see also *Dumont* v. *Commissioner of Provincial Police* (1940), 55 B.C. 298, SLOAN, C.J.B.C., then J.A., at pp. 302-3. *Certiorari,* properly understood is not an alternative remedy to an appeal, nor is it a procedural step in the original proceedings.

The subject here is not attempting to command the Crown or to command a servant of the Crown against the Crown. Quite the contrary. The subject is acting under the Crown, and seeks from the Crown through its judges to obtain *certiorari* to compel respect to the Crown by obedience to the common law in force in this Province. The Crown has deposited in the judges of the Supreme Court of this Province its faculties in that respect. If a Crown servant or an agent of Parliament refuses or neglects to obey the Crown it is the function of the Courts to compel his obedience. It is the function of the Courts to interpret the laws and enforce them. In a proper case the Crown will assist its subject by grant of *certiorari* or other appropriate high prerogative writ, if he shows that he has been deprived of his common-law rights by the illegal action of any statutory board, and *cf. The King ex rel. Lee* v. *Workmen's Compensation Board, supra,* at pp. 435-6.

Upon no ground advanced in this appeal do I consider that *certiorari* may be properly refused, if the learned judge of the Supreme Court before whom the matter shall be heard, is satisfied that a violation of an essential of justice did actually occur.

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I would allow the appeal and remit the case to the Supreme Court to enable the motion for *certiorari* to be heard.

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ROBERTSON, J.A.: This is an appeal by the Nanaimo Community Hotel Company Limited from the judgment of MACFARLANE, J. dismissing its motion for a writ of *certiorari* directed to the board of referees, next to be mentioned, then sitting in Vancouver, B.C. Section 13 of The Excess Profits Tax Act, 1940, empowers the Minister to appoint a board of referees to advise and aid him in exercising his powers under the Act, and authorizes the board to exercise its powers conferred under the Act. Pursuant to this section the Minister, on 1st November, 1940, appointed three members of the board. An order in council dated 16th November, 1940—after referring to the appointment —assigned to the board, *inter alia,* the power and duty

> to determine within the provisions of the said Act the standard profits of any taxpayer or group of taxpayers that may be referred to it for consideration by the Minister of National Revenue.

Section 5 of the Act permits a taxpayer who is convinced that his standard profits are so low that it would not be just to determine his liability to tax under the Act by reference thereto because his business was of a class which during the standard period was depressed . . . to compute his standard profits at such greater amount as he may think just, but not exceeding a certain amount, with the proviso that if the Minister is not satisfied that the business of the taxpayer was depressed or that the standard profits as computed by the taxpayer are fair and reasonable he may direct that the standard profits be ascertained by the board; whereupon the board, in its sole discretion, is bound to ascertain the standard profits at such an amount as the board thinks just, subject to certain limitations; or the Minister may, instead of referring the matter to the board, assess the taxpayer in accordance with the provisions of the Act. The company, taking the position that the standard profits were so low during the standard period fixed by section 2 of the Act that it would not be just to determine its liability to tax under the Act by reference thereto, made a return in which it computed its profits at a figure which was unsatisfactory to the Minister who, pursuant to section 5, *supra,* referred the matter to the board, which

by then consisted of four members. Subsection (4) of section 5 of the Act provides that the decision of a board shall not be operative until approved by the Minister whereupon the decision shall be "final and conclusive."

The company was notified that a hearing would be held in Vancouver on 27th April, 1943. On that date only two members of the board were present. The company appeared by counsel. It alleges that a partial hearing took place and then adjournment was had to enable the company to supply further evidence, but before it could do so the board on 15th May, 1943, gave its decision, which is contained in a letter dated 15th May, 1943, signed by the chairman of the board and the two members who sat in Vancouver. The board's decision which was against the company's contention, was approved by the Minister on or before the 26th of May, 1943. The company was advised by the Commissioner of Income Tax by letter dated 9th June, 1943, to "appeal against an assessment based on the board's decision as provided by the relevant sections of the Act," and a further letter of 8th July, 1943, reiterated this advice. On 13th September, 1943, purporting to act under section 12, an assessment was made against the company on the basis of the board's decision. On October 4th, 1943, the company appealed, the grounds being (1) that the board was not properly constituted, as only two members sat; and (2) that the board had decided without hearing all the evidence.

On 27th May, 1944, the company were notified that since the board's decision had been approved of by the Minister its

only recourse is the Exchequer Court on Appeal . . . and the claim could only be reviewed by the board on the direction of the Court.

Notwithstanding its appeal, the company on 3rd June, 1944, filed a notice of motion in the Supreme Court of British Columbia for a writ of *certiorari* to remove the board's decision into that Court so that it might be quashed. The sole question for decision is whether or not the Supreme Court's jurisdiction in the circumstances of this case has been taken away. Counsel for the board takes the position that the Exchequer Court has exclusive jurisdiction in the matter. Section 14 of the Act reads:

14. Without limiting any of the provisions contained in this Act, sections forty to eighty-seven, both inclusive, of the Income War Tax Act, excepting

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section seventy-six A thereof, shall, *mutatis mutandis*, apply to matters arising under the provisions of this Act to the same extent and as fully and effectively as they apply under the provisions of the Income War Tax Act.

Section 66 of the Income War Tax Act, later referred to as the Income 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 learned judge below held that section 66 ousted the jurisdiction of the Supreme Court and accordingly dismissed the motion. The appellant submits that the appeal section 58 *et seq.* have no application to a decision of the board, approved of by the Minister, because the statute declares its decision to be final and conclusive; and that there would be no purpose in taking an appeal because the appeal in the first instance under section 58 is to the Minister himself, he having already approved the board's decision. I see no difficulty however as to this, because if an appeal is taken section 59 provides that the Minister is to duly consider the appeal and to affirm or amend the assessment. He might upon reconsideration amend the assessment. If he did not feel disposed to do so, then his duty under section 59 would be to notify the appellant of his decision, whereupon, if the appellant was dissatisfied therewith he might, pursuant to section 60, mail to the Minister a notice of dissatisfaction, with the result that the matter would come up finally for trial in the Exchequer Court. Further than this, the board's decision, although approved by the Minister, would not be final and conclusive if the board was not properly constituted—see *Murphy* v. *Rex*, [1911] A.C. 401—or, if the board didn't

fairly listen to both sides, for that is a duty lying upon every one who decides anything:

see *Board of Education* v. *Rice*, *ib.* 179, at p. 182. In either of these circumstances the decision would be null and void. Further, I cannot understand how a decision can be said to be final and conclusive if there is an appeal from it.

In *Corporation of District of Oak Bay* v. *Corporation of City of Victoria* (1941), 56 B.C. 345 it appeared that an appeal had been taken from a decision of the Commission to the Lieutenant-Governor in Council under section 105 of the Public Utilities

Act, which provides for appeals "upon any question of fact"; and under section 106 of the same Act the Lieutenant-Governor in Council had referred the appeal to the Court of Appeal.

The appeal had to do with whether or not a certain rate was unjust or unreasonable. Under an amendment made in 1939 to section 8 of the Act it was provided that it should be a question of fact

of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable.

It was argued that this was intended to repeal sections 105 and 106 as to appeals on questions of fact. McDONALD, J.A., afterwards C.J.B.C., said at p. 369 that he had a strong view that nothing of the kind was intended and that the language in the amendment

makes the Commission the sole judge of that fact, but as a judge of first instance only.

In other words, he said the decision of the Commission on that question was final and binding upon all the world, saving only this, that the right of appeal provided by sections 105 and 106 was not interfered with. He pointed out that section 73, providing, shortly, that "The finding or determination of the Commission upon any question of fact within its jurisdiction, . . . , shall be binding and conclusive upon all persons and in all Courts" was

just as vigorous and forcible in regard to the finality and conclusiveness of the Commission's findings of fact as are those of the addition to section 8, and yet these provisions were followed by sections 105 and 106 in the original Act.

MACDONALD, C.J.B.C. and MCQUARRIE, J.A. agreed with McDONALD, J.A.

I think, therefore, that an appeal would lie notwithstanding the language that the decision of the board is to be final and conclusive. Then it is submitted that section 66, *supra*, only applies to the assessment itself or matters subsequent to its being made, and does not apply to any questions arising before the assessment is made. To my mind the language "in connection with any assessment" clearly covers all the preceding steps leading up to the assessment being made; and this view is confirmed by section 67 of the Income Act which says:

An assessment shall not be varied or disallowed because of any irregularity, informality, omission or error on the part of any person in the

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observation of any directory provision up to the date of the issuing of the notice of assessment.

It may be noted in passing that this view agrees with that of the Commissioner of Income Tax as shown by his letters of the 9th of June, 1943, and the 8th of July, 1943, *supra*.

Then it is said that section 66 cannot affect the power of the Supreme Court of British Columbia to issue a writ of *certiorari* because the Exchequer Court, being a statutory Court, has no common-law powers. Section 19 of the Exchequer Court Act as amended by section 1 of Cap. 13 of 23 & 24 Geo. 5 provides, in part, that that Court shall have exclusive original jurisdiction in, *inter alia,*

> 19. (*j*) Every application for a writ of *habeas corpus ad subjiciendum* or a writ of *certiorari* or a writ of prohibition, or a writ of *mandamus*, in relation to any officer or man of any Canadian Naval, Military or Air Forces serving outside of Canada, or in relation to any proceedings, or to any act or omission respecting any such officer or man, to the same extent as and under similar circumstances in which jurisdiction now exists in the Exchequer Court of Canada or in the courts or judges of the several provinces in respect of similar matters within Canada.

This implies that the power to issue a *certiorari* does exist in the Exchequer Court. I think the power existed at all times, as I shall now endeavour to show:

British Columbia entered into Confederation in 1871. Section 129 of the British North America Act, 1867, provided that all laws in force and all Courts of civil and criminal jurisdiction were continued subject, except as to Imperial Acts, to be repealed, abolished or altered by the Parliament of Canada or the Legislature of British Columbia according to the authority of the Parliament or of the Legislature under the Act. English civil and criminal laws so far as the same were not from local circumstances inapplicable as they existed on the 9th of November, 1858, and except as altered or repealed by competent authority, were then in force in British Columbia. There was only one Court, namely, the Supreme Court of British Columbia, which, generally speaking, possessed and exercised all the powers which the separate Courts of Queen's Bench, Common Pleas and Exchequer had in England. See MARTIN, J.'s dissenting judgment in *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221, at p. 231, especially at p. 235 as to the history of the Supreme Court and the powers of the Exchequer Court possessed

by it. The English Court of Exchequer was then a common-law Court as well as a Court of revenue. It had also enjoyed equitable jurisdiction, but this had been taken from it. See section 1 of Cap. 5 of 5 Vict. It had exclusive jurisdiction as to matters of revenue, and had the right by *certiorari* to remove proceedings from an inferior tribunal "into the office of Pleas," or "by a kind of injunction" to remove matters affecting the revenue from the cognizance of other superior Courts.

In Tidd's Practice of the Courts of King's Bench and Common Pleas and Modern Decisions in the Exchequer of Pleas, 1828, 9th Ed., at p. 38, after pointing out the respective jurisdictions of the King's Bench and Common Pleas, it is said as to the jurisdiction of Exchequer of Pleas:

> The court of Pleas, in the Exchequer, is holden before the barons; and has jurisdiction of all causes which concern the king's profit or revenue, as of debts or duties to the king; . . .

And at p. 397:

> Suits commenced in inferior courts of record may, it seems, be removed by *certiorari* into the Exchequer, by the plaintiff or defendant: And this Court, having an original and in many cases an exclusive jurisdiction in fiscal matters, will not permit questions in the decision of which the king's revenue is interested, to be discussed before any other tribunal. On such occasions, the Court interposes upon motion, by ordering the proceedings to be removed into the office of pleas. The usual order, in cases of this nature, is that the action be removed out of the King's Bench or Common Pleas, or other court in which it is depending, into the office of pleas in the Exchequer; and that it shall be there in the same forwardness as in the court out of which the action is removed. This order, however, does not operate as a *certiorari* to remove the proceedings, but as a personal order on the party, to stay them there, . . .

In *Farwell* v. *The Queen* (1894), 22 S.C.R. 553 the facts were that an information of intrusion had been exhibited by the Attorney-General for Canada in the Exchequer Court of Canada to compel Farwell to execute a surrender or conveyance of certain lands for which a Crown grant had been issued to him by the Province of British Columbia to the Crown in right of Canada. Objection was taken that the Parliament of Canada could not give concurrent original jurisdiction to the Exchequer Court in actions and suits of a civil nature at common law or in equity. King, J., with whom the Chief Justice, Fournier, J. and, I think, Gwynne, J. agreed, said at p. 562:

> " . . . the King has the undoubted privilege of suing in any court he

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pleases." . . . And where the matter in suit in another court concerns the revenue, or touches the profit of the King, he has the right to remove the suit into the Exchequer.

He then referred to *Cawthorne* v. *Campbell* (1790), 1 Anst. 205 n., in which Eyre, C.B. gave the Court's judgment, showing the numerous cases in which the Court of Exchequer had issued what amounted to an injunction against other Courts to prevent the proceedings with reference to matters of revenue being continued in those Courts.

This case was followed in *Anonymous* (1793), 1 Anst. 205. In that case an action had been brought in the Court of Common Pleas against a revenue officer for an alleged assault in the performance of his official duties. The Court of Exchequer removed the cause into the "Office of Pleas of this Court."

In Vol. 1 of Holdsworth's History of English Law at pp. 238-9 it is said:

> A good instance of this peculiar union of legal and equitable procedure used in the Exchequer, sitting as a court of revenue, is furnished by the power possessed by it of removing matters affecting the revenue or the property of the crown from the cognizance of other courts. Eyre, C.B., described it as a kind of injunction to stay proceedings in another court qualified by the liberty given to sue in the Exchequer. He speaks of it as being of a piece with the anomalous jurisdiction of the court of revenue in the Exchequer, which has here adopted an equitable, rather than a legal procedure.

At p. 874 of Halsbury's Laws of England, 2nd Ed., Vol. 9, appears the following relating to *certiorari*:

> At an early period the Court of Exchequer acquired power to issue the writ in cases relating to the revenue (see *Churton* v. *Wilkin*, [1884] W.N. 62). But as late as 1828 it could not issue the writ for any other purpose (Tidd's Practice (1828), p. 397). A little later, however, it obtained the same jurisdiction in *certiorari* as the Court of Common Pleas (see Archbold's Practice (1847), p. 452).

In *Re Kingsman* v. *Hird* (1814), 1 Price 206 proceedings in trespass in the Court of Great Sessions for the County of Anglesey were removed into the Exchequer Court by *certiorari*.

So that it seems clear that in 1875 the Court of Exchequer in England had exclusive jurisdiction with reference to matters of revenue, and could proceed by *certiorari* to remove proceedings from an inferior tribunal into it or by a "kind of an injunction" remove matters affecting revenue of the Crown from the cognizance of the Queen's Bench or Common Pleas. The Supreme Court of British Columbia, generally speaking, enjoys today

and enjoyed in 1871 all the powers of the Court of Exchequer in England and all the machinery necessary for the exercise thereof. See *Attorney-General* v. *E. & N. Ry. Co., supra,* at p. 235. As there was only one Supreme Court of original jurisdiction in British Columbia, no question of "a kind of an injunction" could arise.

Although the English Judicature Act was passed in 1873 it did not come into force until the 1st of November, 1875, up to which time the Exchequer Court in England was a separate Court of revenue as well as of common law. See Judicature Act, 1873, 36 & 37 Vict., Cap. 66, Sec. 16 (4).

This was the position of affairs at the time of Confederation. It is submitted that the words "exclusive jurisdiction" in section 66, *supra,* are not sufficient to deprive the Supreme Court of the right to issue a *certiorari.* No doubt there must be found in the legislation under consideration precise words to take away from the Supreme Court of British Columbia the jurisdiction to issue a writ of *certiorari,* if that is the purpose. The Supreme and Exchequer Court Act, Cap. 11, Can. Stats. 1875, was assented to on the 8th of April, 1875, and therefore passed while the Court of Exchequer in England was a separate Court.

Section 58 of that Act provided in part that the Exchequer Court was to have concurrent original jurisdiction in Canada in all cases in which it was sought

to enforce any law of the Dominion of Canada relating to the revenue,

and exclusive original jurisdiction in all cases in which a demand should be made or relief sought in respect of any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown or any officer of the Crown.

Section 59 gave the Court concurrent original jurisdiction with the Courts of the several Provinces in all other suits of a similar nature at common law and equity in which the Crown in the interest of Canada might be plaintiff or petitioner.

And section 61 provided the procedure in suits and actions within the jurisdiction of the Exchequer Court should, unless otherwise provided, be regulated by the practice and procedure of Her Majesty's Court of Exchequer at Westminster on its revenue side.

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The Act now in force is Cap. 34 of R.S.C. 1927. Sections 18, 19 and 20 provide that the Exchequer Court is to have exclusive original jurisdiction in a number of cases consisting, generally, of suits against the Crown.

Sections 22, 25 and 27 give the Court jurisdiction in cases of patents, copyrights and trade marks, interpleader and railway debts.

Section 30 gives the Court concurrent original jurisdiction in Canada, *inter alia,*

> (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, . . . (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

These correspond in substance to the provisions of sections 58 and 59, *supra,* except that the Court, which formerly had exclusive jurisdiction with regard to (*c*), has it no longer.

Section 36 provides the practice and procedure in suits and actions in the Court shall, so far as applicable . . . be regulated by the practice and procedure in similar suits, actions and matters in the High Court of Justice on the 1st of October, 1887, the date when the Canadian Exchequer Court Act of that year came into force.

In *National Trust Co. Ltd.* v. *The Christian Community of Universal Brotherhood Ltd. and Board of Review for B.C.,* [1941] S.C.R. 601, the Supreme Court of Canada held, under the special circumstances of that case, that a section of the Farmers' Creditors Arrangement Act, 1934, declaring that in the case of a petition under that Act the county court should have exclusive jurisdiction in bankruptcy did not exclude the right of the appellant to maintain an action in the Supreme Court of British Columbia for a declaration that the applicant was not a farmer within the meaning of the Act. As I understand this decision, the Court did not find it necessary to decide the broad question as to the respective jurisdictions of the Supreme Court and county court. See Duff, C.J. at p. 609 and Rinfret, J., now C.J.C., at pp. 629-30.

In view of the history of the Exchequer Court of England and, its exclusive jurisdiction in matters of revenue, and, the

legislation in Canada to which I have referred, I am of the opinion that the intention was to give to the Exchequer Court of Canada the same jurisdiction as the English Court of Exchequer has enjoyed, and to oust the jurisdiction of all other Courts where exclusive jurisdiction is conferred; and that to carry out this purpose the words in section 66 conferring exclusive jurisdiction are clear and express. Unless this meaning is given to these words, I can see no object in giving exclusive jurisdiction to the Exchequer Court in the matters specified.

It is further submitted that the Supreme Court of British Columbia enjoys its powers by reason of Imperial legislation and that therefore there is no right in the Parliament of Canada to pass legislation under section 101 of the British North America Act, 1867, taking away from the Supreme Court the right of *certiorari* in any matter whatsoever because of the exception in section 129 of the said Act.

I would point out that section 129 commences: "Except as otherwise provided by this Act," which takes us to a consideration of section 101. That section provides:

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada.

So that the powers under section 101 may be exercised notwithstanding section 129 or section 92, so long as Parliament does not, under the guise of legislating under section 101, make laws which are exclusively within the jurisdiction of the Province; although in legislating competently under section 101 or any of the heads of section 91 it may affect property and civil rights in the Province. See *Proprietary Articles Trade Association* v. *Attorney-General for Canada,* [1931] A.C. 310, at pp. 326-7.

The legislation in question comes within section 101 and clause 3 of section 91 of the British North America Act, 1867. In view of this and the *non obstante* clause in section 101 it seems to me the Dominion power is plenary. The Supreme Court of Canada considered section 101 so far as it affected the right of the Dominion Parliament to enact legislation under it, to abrogate appeals to the Privy Council in *Reference Re Privy Council Appeals,* [1940] 1 D.L.R. 289. I am of the opinion

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that the views of the learned justices upon the question under consideration in that case are equally applicable to the case at Bar. It is to be observed that the limitations in section 129 of the British North America Act, 1867, as to the right to repeal, abolish or alter Imperial Acts are, as Sir Lyman Duff, C.J. says at p. 292 of *Reference Re Privy Council Appeals, supra,* "no longer in force." See also *British Coal Corporation* v. *The King,* [1935] A.C. 500, at p. 520, where Viscount Sankey, L.C. says, speaking of the limitations in section 129 as affected by the Statute of Westminster:

> But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself.

Sir Lyman Duff said at p. 299 of *Reference Re Privy Council Appeals, supra,* that the phrase "laws of Canada" embraces any law

> "in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion,"

referring to *Consolidated Distilleries Ld.* v. *The King,* [1933] A.C. 508, at p. 522. At p. 301 he says, referring to section 101, that

> Since the legislative authority may be executed in Canada "notwithstanding anything in this Act," you cannot imply any restriction of power because of anything in section 92.

that

> Whatever is granted by the words of the section, read and applied as *prima facie* intended to endow Parliament with power to effect high political objects concerning the self government of the Dominion (s. 3 of the B.N.A. Act) in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely.

And, further, that

> Since, in virtue of the words of s. 101, Parliament may legislate for objects within the ambit of s. 101 regardless of any powers the Provinces may possess, to affect appeals to the Judicial Committee, it follows that the general power of Parliament to make provision for the peace, order and good Government of Canada in relation to such objects is in no way limited by the exception of "local matters," assigned exclusively by the introductory words of s. 91 to the Legislatures of the Provinces; and, consequently, no existing judicial authority competent to affect the course of judicature in Canada can be an obstacle precluding the Parliament of Canada from making its legislation relating to these objects effective.

At p. 302 he said:

> The primacy of Parliament under s. 101 is just as absolute as under the enumerated clauses of s. 91.

And finally, at p. 306 he said:

I venture to suggest as regards s. 101, that "notwithstanding anything in this Act" includes within its purview every part of s. 129 as well as all other sections of the Act.

This was, I presume, based on his statement at p. 292 that since the Statute of Westminster the limitation in section 129 as to repealing, abolishing or altering Imperial legislation was no longer in force. Rinfret, J., as he then was, now Chief Justice of Canada, speaking of section 101, said at p. 310:

The legislative authority conferred on the Dominion by that section is exclusive, paramount and plenary.

Kerwin, J. said at p. 350:

. . . This *non obstante* clause places the Dominion power on the same footing as those conferred by the specially enumerated heads of s. 91.

Taschereau, J. in *Valin* v. *Langlois* (1879), 3 S.C.R. 1, at p. 74, refers to the argument advanced that the Dominion Parliament could not in any way increase or decrease, give or take away from, or in any manner interfere with the jurisdiction of the Provincial Courts as a radically and entirely false and erroneous interpretation of section 92, No. 14. Speaking of the criminal law he says (p. 75):

Cannot Parliament, in virtue of section 101 of the Act, create new courts of criminal jurisdiction, and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy.

And later on he says (p. 76):

I also think it clear, that Parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be certainly interfering with the jurisdiction of the Provincial Courts. But, I hold it has the power to do so *quoad* all matters within its authority.

Clement, J. at pp. 537-8 of his work on the Canadian Constitution, 3rd Ed., says:

No question, of course, can arise as to the power to confer concurrent jurisdiction. To that extent the scope and policy of section 101 is obvious. The moot point is as to the right to confer an exclusive jurisdiction; and upon that point, it is conceived, the view of Mr. Justice Taschereau is more in consonance with the scheme and policy of the Act than is that of Chief Justice Wilson.

In this view, the Dominion parliament may take from provincial Courts the cognizance of those matters within Dominion competence which it may think fit to assign to Courts of its own creation, or it may take them from one provincial Court and assign them to another.

For the above reasons I think the Court of Exchequer has exclusive jurisdiction to deal with the matter in question.

The appeal must be dismissed.

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SIDNEY SMITH, J.A.: This is an appeal from an order of the Supreme Court of British Columbia, made on the 26th of July, 1944, dismissing a motion for a writ of *certiorari*.

The appellants are a company engaged in the business of operating an hotel at Nanaimo, B.C. The present litigation was initiated in consequence of alleged misconduct in the proceedings of a board of referees set up under the terms of The Excess Profits Tax Act, 1940, Cap. 32, Can. Stats. 1940. The intention of this Act is that a further tax should be assessed upon excess profits and that in the assessment thereof the Minister shoud have the assistance of a special board to decide upon certain matters preliminary to the computation of the assessment. It may be helpful to briefly mention the relevant sections of the Act together with one or two sections of the Income War Tax Act which are incorporated therein by reference.

The expression "standard period" of the former Act is defined as comprising the calendar years 1936 to 1939 inclusive and the expression "standard profits" as the average yearly profits during the standard period. Section 3 of the Act authorizes the imposition of a tax on excess profits, namely, that portion of the profits of a taxpayer in excess of the standard profits. Section 5, subsection (1) provides that if a taxpayer is convinced that owing to his business being depressed, his standard profits were so low during the standard period that it would not be just to determine his liability with reference thereto, he may compute his standard profits at such greater amount as he thinks just; and provides further that in that event the Minister, if not satisfied either that the business was depressed or that the computed profits are fair and reasonable, may direct that the standard profits be ascertained by a board of referees and that the board shall thereupon in its sole discretion ascertain the standard profits at such amount as the board thinks just, subject to certain limitations which are not material to the matters at issue. Section 5, subsection (4) provides that the decisions of the board of referees shall not be operative until approved by the Minister, whereupon "the said decision shall be final and conclusive"; and provides further that if a decision is not approved by the Minister it shall be submitted to the Treasury Board who shall thereupon deter-

mine the standard profits and "the decision of the Treasury Board shall be final and conclusive."

The board of referees to which reference has been made is authorized under section 13

> to advise and aid [the Minister] in exercising the powers conferred upon him under this Act.

(This board was duly appointed and at the material dates consisted of four members under the chairmanship of Mr. Justice Harrison of the Supreme Court of New Brunswick.) Section 14 is the incorporating section and states that:

> Without limiting any of the provisions contained in this Act, sections forty to eighty-seven, both inclusive, of the Income War Tax Act, . . . , shall, *mutatis mutandis*, apply to matters arising under the provisions of this Act.

It will be sufficient for our present purpose to note that these incorporated sections provide that an appeal may be brought by "any person who objects to the amount at which he is assessed" and that this appeal is in the first place to the Minister (section 58) and thence, if the appellant is dissatisfied with the Minister's decision, to the Exchequer Court of Canada. Section 66 expressly provides that:

> 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 appellants, considering their business depressed within the meaning of section 5, subsection (1), took advantage of these provisions and computed their standard profits at the sum of $10,378.32 and the Minister, not being satisfied, directed that the standard profits be determined by the board of referees. The appellants were notified that their standard profits claim would be heard at Vancouver, B.C. on 27th April, 1943, and were requested to have a representative of the company appear before the board at that time. Mr. *Cunliffe* duly appeared for the company. The appellant complains of the constitution and conduct of the board upon this hearing. Mr. *Cunliffe* filed an affidavit stating that the board was composed of two members only instead of four, that the hearing was adjourned on the understanding that there would be a further hearing after Mr. *Cunliffe* had secured and sent to the board certain further particulars of the company's business; that one of the members

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told him (Mr. *Cunliffe*) that when the board had made its decision Mr. *Cunliffe*, if he so desired, could make further submissions to the Minister before he (the Minister) formally approved thereof; that contrary to this understanding, not only was there no further hearing, but the board's decision, approved by the Minister, was handed down before the board received the further particulars to which reference has been made.

The board's view of these allegations was not disclosed. The position taken by its counsel on the hearing before us was set out in his factum as follows:

> There is no evidence before the Court as to whether the board of referees accepts this version of what happened and whether the understanding of the members of the board was the same as that of Mr. *Cunliffe*. This would have been disclosed in the return made to the writ of *certiorari* had the issue of the same been ordered.

And further on as follows:

> The actual procedure usually adopted by the board of referees was not disclosed in the material before the trial judge, as it would have been in the return which would have been made had a writ issued.

The motion for the writ of *certiorari* came before MACFARLANE, J. and the question of jurisdiction was raised as a preliminary objection. The learned judge decided against the appellant on that issue. As I have reached the same conclusion the lack of evidence on the board's position becomes immaterial.

But before leaving this aspect of the matter it may be useful to observe that these statutory advisory boards should not be regarded as Courts, and subject to strict Court procedure. As it happens I have presided over three such boards in recent years. We have always considered ourselves free to follow the methods of procedure best adapted to the work in hand, provided that all parties had an opportunity of being fully heard or of otherwise stating their case and their view; this being a duty "lying upon anyone who decides anything." These would appear to be the principles enunciated in such cases as *Board of Education* v. *Rice*, [1911] A.C. 179, at p. 182; *Local Government Board* v. *Arlidge*, [1915] A.C. 120; *Re Imperial Tobacco Co. et al. and McGregor*, [1939] O.R. 213; *The King* v. *Noxzema Chemical Co. of Canada Ltd.*, [1941] Ex. C.R. 155, at pp. 165 and 166. I think the usefulness and efficacy of such boards would be greatly curbed if they were to be fettered by procedure of a less elastic nature.

The board handed down its decision dated at Ottawa the 15th of May, 1943. It was signed by the chairman and two members of the board, and was subsequently duly approved by the Minister. The company's standard profits were determined at the sum of $7,500. On this basis an assessment was made for the years 1941 and 1942 and received by the company. The company appealed to the Minister from this assessment under section 58. This appeal was pending during the currency of the proceedings before MACFARLANE, J. It was dismissed by the Minister on 5th October, 1944, after the dismissal of the motion for *certiorari*.

In my opinion the sole question before us is whether the Supreme Court of British Columbia had jurisdiction to direct the issue of a writ of *certiorari* in the circumstances of this case. The answer turns upon the interpretation of section 66 of the Income War Tax Act, which, as already noted, states that

> 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

(*i.e.*, The Excess Profits Tax Act, 1940). It was submitted that, notwithstanding this section, the Exchequer Court had no jurisdiction to review the proceedings of the board of referees because section 5, subsection (4) provided that the decisions of the board, after approval by the Minister, "shall be final and conclusive"; and that while the Exchequer Court might have jurisdiction concerning any other question that might arise in connection with the assessment it had none over questions which had been determined by the board.

I am unable to accept this view. Section 5, subsection (4) and section 66 must be read so that they may live together and not so that one may destroy the other. Looking at them thus, I have no doubt that the words "final and conclusive" are referable only to proceedings before the board after their approval by the Minister. So far as the board and the Minister are concerned they are then "final and conclusive." But I do not think they are intended to be final and conclusive as regards the provisions dealing with appeals which are to be found, and to be found only, in the incorporated sections. (Compare *Corporation of District*

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of Oak Bay v. *Corporation of City of Victoria* (1941), 56 B.C. 345.

It was then submitted that even if the Exchequer Court had jurisdiction in this regard it was by way of appeal only and that this did not displace the inherent common-law jurisdiction of the Supreme Court of British Columbia to direct such proceedings to be brought before it for review by means of the remedial writ of *certiorari*. But neither am I able to accept this view. I have had the benefit of reading the judgment of my brother ROBERTSON and I was impressed by the force of his conclusion that, in the circumstances now before us, the Exchequer Court has concurrent jurisdiction to examine the board's proceedings by way of *certiorari*. But even if this were not so, I think section 66, by its very words, gives the Exchequer Court jurisdiction to review the board's findings either by way of appeal or by any way of summary application that may be open to it under section 36 of the Exchequer Court Act, R.S.C. 1927, Cap. 34.

I agree with MACFARLANE, J. that the words of section 66

include matters occurring prior to, as well as subsequent to, or consequent upon, so long as they are related to

the assessment. It seems to me not open to argument that the lawful determination by the board of the amount of the standard profits is one of the fundamental elements in the computation of the assessment. And therefore it would seem that this question, like all other questions, is given over to the "exclusive jurisdiction" of the Exchequer Court.

There can be no doubt that Courts should scrutinize most carefully any statute which purports to take away the common-law right of *certiorari* and that such right should not be held taken away unless the language is imperative. We were referred to an abundance of authorities to that effect. But these authorities for the most part dealt with legislation of a unitary system of government. None of them touches the exact case before us, where we have a federal system of government and where the manifest intention of the Federal Government is to give exclusive jurisdiction to a Federal Court set up for the primary purpose of dealing with matters of revenue and other matters in which the Crown is concerned. (*Bow, McLachlan & Co.* v.

Ship "Camosun," [1909] A.C. 597; *Farwell* v. *The Queen* (1894), 22 S.C.R. 553; *The King* v. *McCarthy* (1919), 18 Ex. C.R. 410; 46 D.L.R. 456 (affirmed by the Supreme Court of Canada, 11th October, 1921, Morse Ex. Ct. Dig. 15).

I agree with my brother ROBERTSON that under the authority of the *Reference Re Privy Council Appeals,* [1940] 1 D.L.R. 289 there can now be no doubt that the Federal Parliament has jurisdiction to create such Court and to confer upon it such jurisdiction.

For these reasons I think the appeal should be dismissed.

BIRD, J.A.: I would dismiss this appeal for the reasons given by my brother ROBERTSON, in which I concur.

Appeal dismissed, Sloan, C.J.B.C. and O'Halloran, J.A. dissenting.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *J. B. Clearihue.*

A. E. TRITES, S. B. TRITES AND MACDOUGALL v. JOHNSON *ET AL.*

S. C.
1945
May 3, 5.

Probate—Practice—Costs—Rule 251.

The plaintiffs sued to revoke a grant of probate of a will and for a declaration that the will was invalid alleging undue influence and lack of testamentary capacity. The defence counterclaimed for a decree that the will was valid and should be proved in solemn form. During the proceedings two of the three plaintiffs were allowed to withdraw from the action upon payment of two-thirds of the costs up to the time of the application. At the trial the third plaintiff asked for an adjournment because he had had no discovery and could not go on without it, but as he had shown lack of attention, adjournment was refused. Counsel then asked to withdraw plaintiff's claim. Defendant objected, desiring to prove the will in solemn form. The Court directed the action to proceed. The plaintiff submitted no evidence and the defendant by evidence established the testamentary capacity of testator and due execution of the will. The plaintiff had been a beneficiary in the testator's wills up to 1940, but had been left out of the final will.

Held, that the plaintiffs' action be dismissed and that the will be declared valid and proved in solemn form.

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Held, further, as to costs, that this is not a case falling under rule 251. The general rule is that costs after a trial of this character should follow the event unless there be adequate reason for an order of a different character. Where an unsuccessful party has pleaded undue influence, it must be shown that he had reasonable and sufficient ground for so doing or he will be condemned in costs of the other side. There is nothing to show that he had any reasonable ground upon which to support a plea of undue influence or want of testamentary capacity. Mere disappointment that the testator had changed his attitude toward him does not justify departure from the rules. The remainder of the costs of the defendants shall be paid by the continuing plaintiff.

ACTION to revoke a grant of probate of the will of A. B. Trites, deceased, and for a declaration that the will was invalid alleging undue influence and lack of testamentary capacity. The facts are set out in the reasons for judgment. Tried by MACFARLANE, J. at Vancouver on the 3rd of May, 1945.

Farris, K.C., for plaintiffs.
Locke, K.C., for defendants.

Cur. adv. vult.

5th May, 1945.

MACFARLANE, J.: This action was one in which the plaintiffs sued to revoke a grant of probate of the will of the late A. B. Trites in common form and for a declaration that the will was invalid, alleging both undue influence and lack of testamentary capacity. The defendants, in addition to their defence counterclaimed for a decree that the will was valid and that it should be proved in solemn form of law.

The two first named plaintiffs, during the course of the proceedings had applied for leave to withdraw from the action, and such leave had been granted upon the condition that they should pay two-thirds of the costs up to the time of the application. The third and continuing plaintiff on the opening of the trial applied for an adjournment on the ground that he had had no discovery and could not go on without it, but as he had shown no proper attention to the action and had been dilatory throughout, I refused the adjournment, whereupon counsel for this plaintiff applied for leave on behalf of this plaintiff to withdraw the plaintiff's claim. The defendants objected and desired to proceed to prove the will in solemn form, having by the action been

put to such proof and so as to secure for the executors some certainty as to their position. I directed the action to proceed, reserving disposition of the application for leave to withdraw, and consideration of the question of costs until I had heard the evidence. The plaintiff submitted no evidence.

The evidence produced for the defendants established the testamentary capacity of the testator and the due execution of the will in my opinion beyond peradventure. Counsel for the continuing plaintiff cross-examined the witnesses, directing his cross-examination largely to eliciting the reason for the exclusion of the plaintiff from the final will, when he had been a beneficiary under the wills up to December, 1940. In addition to a number of wills before December, 1940, there were three or four revisions after that date, in all of which the wills followed the model previously arranged by the testator, the revisions after that date varying the former wills only in the alteration of the amounts of the bequests under clause (b) which by clause (c) also determined the proportions in which the legatees under clause (b) should share in the residue. At the conclusion of the hearing I dismissed the plaintiff's action, decreed for the validity of the will and for proof of the will in solemn form of law, whereupon counsel for the plaintiff asked that costs be paid out of the estate.

In a case of this kind where the validity of a will has once been called in question I think it is the duty of the executors to prove the will in solemn form of law, and the practice is that they ask for this in the action by way of counterclaim. I think therefore that even though the plaintiff in the action at the trial wishes to withdraw, the executors should be allowed to proceed to establish the validity of the will notwithstanding the application to withdraw.

As to costs, this is not a case falling under rule 251. The general rule as to costs is that costs after a trial of this character should follow the event unless, according to the principles which are now well defined there should be adequate reason for an order of a different character. The cases in which the rule is departed from are indicated in *Twist* v. *Tye,* [1902] P. 92, at p. 94, where Gorell Barnes, J. said:

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Speaking generally, there are in this Division two classes of cases in which there should be, and generally is, a departure from the ordinary rule: the first is where the litigation has been brought about through the conduct of the testator or testatrix; and the second is where the parties who have failed have reasonably been led into the litigation by a *bona fide* belief in their case, and have, therefore, felt it desirable to inquire into the testamentary dispositions of the testator or testatrix.

In order to determine this question of costs, the Court must look at the facts and view them as they were presented to the unsuccessful parties.

It is also well settled that where an unsuccessful party has pleaded undue influence it must be shown that he had reasonable and sufficient ground for so doing, or he will be condemned in the costs of the other side (*Spiers* v. *English,* [1907] P. 122, at p. 124). The only thing that emerges here is that the plaintiff had been a beneficiary under the wills existing previous to December, 1940, and that he had been an object of the bounty of the testator before that time. There is nothing to lead me to believe that he had any reasonable ground upon which to support a plea of undue influence or want of testamentary capacity. Mere disappointment at the fact that the testator had changed his attitude toward him, or even failure to understand why he did so is not in my opinion sufficient to justify a departure from the rules which have been laid down for many years in actions of this kind.

As I have said during the course of the action, two of the plaintiffs obtained leave to withdraw on payment of two-thirds of the costs up to that date. The costs will be taxed and there will be an order for payment of the remainder of the costs of the defendants as between party and party by the continuing plaintiff.

Order accordingly.

IN RE ESTATE OF CHARLES MINOR, DECEASED.

S. C.
In Chambers
1944
Dec. 11.
1945
April 26.

Administration—Intestate estate—Five children of deceased brother alive—Sixth child died leaving three children alive—Distribution—R.S.B.C. 1936, Cap. 5, Secs. 116, 117 and 118.

Charles Minor died intestate leaving no widow, issue, father, mother, brother or sister surviving him. A brother of deceased predeceased him leaving five children alive at the time of his death. A sixth child of said brother died in the lifetime of deceased intestate and left three children living. On originating summons for an order determining certain questions arising in administration of the estate the following question was submitted: 5. Should distribution of the estate of the deceased who died intestate be made to the children of any deceased brother or sister, nephews and nieces of the deceased to the exclusion of any issue of deceased nephew or niece who predeceased the deceased?

Held, that the question should be answered in the affirmative.

ORIGINATING summons by the official administrator for the county of Victoria, administrator of the estate of Charles Minor, deceased, who died intestate, for an order determining certain questions arising in the administration of the said estate. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. in Chambers at Victoria on the 11th of December, 1944.

Moresby, K.C., for official administrator.
Maunsell, for next of kin.

Cur. adv. vult.

26th April, 1945.

MACFARLANE, J.: These proceedings are brought by way of originating summons by the official administrator for the county of Victoria, administrator of the estate of Charles Minor, deceased, intestate, for an order determining certain questions arising in the administration of the said estate. Questions 1, 2, 3 and 4 have to do with the disposition of numerous articles found on the premises of the deceased, who for many years prior to his decease carried on the business of a watchmaker in the city of Victoria, some of which articles are untagged, and some tagged, notices having been duly given by advertisement and where an address or information was obtained by the administrator by

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letter directed to such address. No replies have been received by the administrator or his solicitor in respect of these articles. In view of the small amounts involved, I think all reasonable steps have been taken to discover the owners and that the official administrator should sell these articles, and apply the proceeds in due course of administration.

With reference to the claims referred to in the second schedule to the affidavit of Rupert Leslie Cox, in respect of articles not found by the administrator, only one claimant appeared on the hearing, and it appeared from his statement that the grandfather's clock claimed by him had been left with the deceased ten or more years before his death. No action has been commenced with respect to any of the claims made although over two years have elapsed since the death and I would declare all these claims barred by the provisions of section 71, subsection (3) (*b*) of the Administration Act, R.S.B.C. 1936, Cap. 5.

The fifth question submitted for determination was as follows:

5. Should distribution of the estate of the deceased who died intestate be made to the children of any deceased brother or sister, nephews and nieces of the deceased to the exclusion of any issue of deceased nephew or niece who predeceased the deceased?

The deceased died intestate on the 21st of October, 1942, leaving no widow, issue, father, mother, brother or sister surviving him. A brother of the deceased predeceased him leaving five children alive at the date of the death of the deceased, namely, Allan James Minor, Herbert Arthur Minor, Ralph Everett Minor, Carrie Louisa Miller and Hannah Jane Miller. A sixth child of the said brother, namely, Alberta Candice Reid died in the lifetime of the deceased intestate but left three children now living.

This question is as to whether the estate is divisible into five shares, one share to each of the above nephews and nieces, or whether the estate is divisible into six shares, five to the said nephews and nieces and one to the children of Alberta Candice Reid, the niece who predeceased the intestate. It calls for consideration of sections 116, 117, and 118 of the Administration Act, R.S.B.C. 1936, Cap. 5. This Part of the Administration Act was recast in 1925. The sections as they stand read as follows:

116. If an intestate dies leaving no widow or issue or father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister is dead the children of the deceased brother or sister shall take the share their parent would have taken, if living: Provided that where the only persons entitled are children of deceased brothers and sisters, they shall take *per capita*.

117. If an intestate dies leaving no widow, issue, father, mother, brother, or sister and no children of any deceased brother or sister, his estate shall go to his next of kin.

118. In every case where the estate goes to the next of kin, it shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate and those who legally represent them; but in no case shall representation be admitted among collaterals after brothers' and sisters' children.

These sections have been considered by respected judges of this Court. In *In re Estate of David McKay, Deceased* (1927), 39 B.C. 51, the late Chief Justice HUNTER, on the personal application of the official administrator for the county of Vancouver is reported, without reasons, as deciding that a grand-nephew of a deceased intestate should take a share that would have been taken by his parent, a nephew of a deceased intestate who predeceased the intestate. In *Carter* v. *Patrick* (1935), 49 B.C. 411, at p. 412, the late Chief Justice MCDONALD, sitting in this Court followed that decision and with reference to it said:

> I think that the learned Chief Justice having considered those sections [116 and 118] decided that the proviso at the end of section 118 applied to that section only and did not apply to section 116 under which latter section the present estate falls.

If that is what is decided by those cases, and if that is all that is so decided, then I do not think they necessarily govern the case here.

In both those cases, there were brothers and sisters of the deceased living at the date of his death while in this case there were neither brothers nor sisters of the deceased living at the date of the death of the deceased. In the decisions mentioned the first part of section 116 was under consideration and an attempt was made to apply the prohibition at the end of section 118 to the facts of those cases. The proviso to section 116 had obviously no application. Section 116 confers a right of representation on the children of a deceased brother or sister. It is clear, I think, that children in this connection means "imme-

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diate" descendants. *Vide* Vickers, V.-C., in *Re Ross's Trusts* (1871), 41 L.J. Ch. 130, at p. 133. Assuming that the prohibition at the end of section 118 does not apply to section 116 as those cases decide, I think it makes no difference. The statute does not confer any right to take by representation on others than the children of a deceased brother or sister. It may be, apart from other internal evidence, correct to interpret the word "any" as meaning "all" "for in containing each singular number, it has the sense of the plural," yet in the section it is specifically provided that if the only persons entitled are children of deceased brothers and sisters, they shall take *per capita*. I think, therefore, that the section means that where there are brothers or sisters of the deceased living at the date of death and children of a deceased brother or sister or of both then the children take but that it does not confer any right of representation beyond that. In that event it is not necessary to apply to section 116 the prohibition in section 118.

I cannot fail to see that the result is the same whether that prohibition is applied or whether the law as it was applied in the cases decided under the Statute of Distributions, 22 & 23 Car. II., Cap. 10 is followed. But on the facts here, the proviso to section 116 specifically applies and in the two cited cases it did not. The cases therefore are not precisely in point here.

In passing, I might say, that in *In re Gall Estate,* [1937] 3 W.W.R. 266, Ives, J. in Alberta refused to follow *In re Estate of David McKay, Deceased, supra,* and *Carter* v. *Patrick, supra.* In Manitoba, the Court of Appeal, in a considered decision (*In re Budd Estate. Harmon* v. *Furber,* [1934] 2 W.W.R. 182), in the case of an intestate who died unmarried leaving him surviving several brothers and sisters and a nephew and grand-nephew, applied a proviso in terms the same as the proviso to section 118 to exclude the grand-nephew.

In *In re Cromarty Estate* (1936), 51 B.C. 531, at pp. 532-3, the same learned judge who decided *Carter* v. *Patrick, supra,* in refusing to extend the right of representation to the children of next of kin other than or more remote than brothers and sisters, in that case, uncles and aunts, followed the cases decided on the Statute of Distributions, 22 & 23 Car. II., Cap. 10, which is in this connection very similar to our own; and *In re Kroesing Estate,* [1928]

1 W.W.R. 224, decided on The Intestate Succession Act of Alberta, R.S.A. 1922, Cap. 143, which is also in this connection very similar to our own. FISHER, J., in *In re Robinson Estate. Moore* v. *Kirk,* [1941] 2 W.W.R. 86, took a similar course, following as well the decision in *Canada Permanent Trust Co. (Hind Estate)* v. *McKim,* [1938] 3 W.W.R. 391, and 657, with a notation of the explanation—I might almost say correction—of the expressions found in some of the judgments in that case as set out in *In re Cran Estate. Western Trust Co. v. Forrest and Cran,* [1941] 1 W.W.R. 209. To this latter case I would refer as it provides an easily accessible collection of the relevant authorities and as well makes it clear that except in the case of the intestate's own descendants the privilege of taking by representation was extended by law only to one other class of the deceased's kindred, that other class being his nephews and nieces, the children of a deceased brother or sister to one degree only, that is to their immediate descendants, and no further (*Carter* v. *Crawley* (1683), T. Raym. 496; 83 E.R. 259). Save in this one case representation among collaterals was unknown.

As I see it, no right of representation is conferred by statute here except upon children of a deceased brother or sister. It is not necessary therefore to seek to apply the prohibition at the end of section 118, in order to exclude the grand-nephews. Neither before the statute of 1925, nor under it do they take. The nephews and nieces, being the only persons entitled, take *per capita* under the proviso to section 116. I would therefore answer question 5 in the affirmative.

Costs of all parties will be taxed and paid out of the estate.

Question answered in the affirmative.

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Feb. 26; *March* 21.

CHIN CHUN *ET AL.* v. YUE SHAN SOCIETY.

Landlord and tenant — Order for possession—Tenants ejected—Appeal—Order set aside—Action by tenants for possession or damages—Wartime Leasehold Regulations.

In August, 1943, the defendant, by proceedings under the summary provisions of the Landlord and Tenant Act, obtained an order for possession of the premises in question and the plaintiffs, who were the tenants, were ejected therefrom. An appeal from the order was allowed and the order was struck out. The plaintiffs then brought this action for possession or alternatively for damages, also for the return of certain goods and for special damages.

Held, that the plaintiffs were tenants of the premises and their tenancy was a monthly tenancy. Under the circumstances here this is a case where specific performance should not be ordered. The demised premises here are "housing accommodation," as defined by the Wartime Leasehold Regulations and a six-months' notice of termination is required and even if it were "commercial accommodation," the enjoyment of possession, if restored to the plaintiffs, would be uncertain and indefinite. The plaintiffs should be left to their common-law remedy for damages referred to the registrar for assessment. Damages for trespass and ejectment and for trespass as to goods can be taken into consideration in assessing the damages in lieu of possession and need not be assessed separately. The claim for special damages is referred to the registrar, but the claim included therein for improvements made by the plaintiffs should be considered, not on the basis of their cost, but on that of their value to the plaintiffs on the termination of the tenancy. The claim for goods alleged to have been wrongfully taken possession of by the defendant is also referred to the registrar and even if the notice given by the defendant were sufficient, it does not relieve the defendant from accounting for the goods. The evidence falls far short of establishing the counterclaim for waste and it is dismissed. The plaintiffs are entitled to the costs of both claim and counterclaim.

ACTION for possession of premises from which the plaintiffs were wrongfully ejected or alternatively for damages for the return of certain goods and for special damages. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 26th of February, 1945.

Locke, K.C., for plaintiffs.
Hurley, for defendant.

Cur. adv. vult.

21st March, 1945.

COADY, J.: I have come to the conclusion that the plaintiffs herein were tenants of the premises referred to in the pleadings and that their tenancy was a monthly tenancy. A brief reference to the manner in which they were deprived of possession by the landlord, the defendant herein, is necessary.

On or about the 9th of August, 1943, the defendants by proceedings under the summary provisions of the Landlord and Tenant Act, R.S.B.C. 1936, Cap. 143, and in disregard of the Wartime Leasehold Regulations, obtained an order from BOYD, Co. J. for possession of the demised premises. Pursuant to this order a writ of possession was issued, and on the 11th of August, 1943, the plaintiffs, or such of them as were then residing on the premises, were ejected therefrom. On appeal from the order of BOYD, Co. J. the appeal was allowed and the order struck out (*Yue Shan Society* v. *Chinese Workers' Protective Association (No. 2)*, [1944] 3 W.W.R. 497).

This action is now brought for possession, or, alternatively (pursuant to an amendment made at the trial) for damages, and also for the return of certain goods, and for special damages as set out in the statement of claim. Counsel agreed that if the plaintiffs were found entitled to damages the matter of assessment of these damages should be referred to the district registrar.

The defendant, while denying that the plaintiffs herein were the tenants, contends that in any event the tenancy was a tenancy at will, and not a monthly tenancy, and was properly determined, and no action lies. I cannot agree with this submission.

Having come to this conclusion that the tenancy was not legally determined, the question then arises whether the plaintiffs should be restored to possession or left to their relief in damages. By claiming possession the plaintiffs ask in effect specific performance of the contract of tenancy between the parties. While the jurisdiction to grant specific performance is discretionary yet it is a discretion that must not be exercised arbitrarily or capriciously. I am of the opinion under the circumstances here that this is a case where specific performance should not be ordered. The tenancy would ordinarily be determinable on a month's notice. By reason of the Wartime Leasehold Regula-

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tions, however, the tenancy could only be terminated by compliance therewith, and so long as the regulations remain in force, and in their present form, they do not permit a termination on a 30-day notice. The demised premises here are, in my opinion, "housing accommodation" as defined by the regulations, and with respect to such, a six-months' notice of termination is required. Counsel for the plaintiffs submits, as I understand, that it is "commercial accommodation" as defined by the regulations, and that being so, he states the tenancy cannot be terminated during the period of the war. I do not agree that it is "commercial accommodation" but even if it were, the period during which the plaintiffs would be entitled to the enjoyment of the premises, if possession is restored to them would still be uncertain and indefinite. It seems to me that to put the plaintiffs back into possession and force the defendant to take proceedings for the termination of the tenancy in accordance with the regulations would not be a proper disposition of the matter. It would be different if the lease were for some definite period of time of substantial duration. Rather, I think the plaintiffs should be left to their common-law remedy for damages which will be referred to the registrar for assessment. The legal principles on which damages should be calculated are well defined by the authorities, and there should be no difficulty in making the calculations. If further directions in this regard are necessary they can be inserted in the order directing the reference.

The damages claimed under headings (b) and (c) of the prayer of the statement of claim, namely, damages for trespass and ejectment, and damages for trespass and to goods, are elements that can be taken into consideration in assessing the damages in lieu of possession, and need not be assessed separately.

The plaintiffs' claim for special damages amounting to the sum of $585 is likewise referred to the district registrar. The items making up this claim are all proper items to be assessed, the amount to depend upon the evidence. I should point out, however, that the claim for $365 included therein and claimed with respect to improvements made upon the premises by the plaintiffs must be considered, it seems to me, not on the basis set out in the statement of claim, namely, the cost to the plaintiffs

in making these improvements but, rather, on the value of these improvements to the plaintiffs on the termination of their tenancy

The claim for $764.20 set out in the statement of claim for goods which it is alleged the defendants have wrongfully taken possession of and have failed to return to the plaintiffs will likewise be referred to the district registrar. With respect to this claim it should be noted that following the execution of the writ of possession on the 11th of August, 1943, the defendant gave notice to the solicitor for the plaintiffs, requiring them to remove the goods left on the premises on or before the 14th of August, 1943, failing which the goods would be moved and stored at the risk of the plaintiffs. I do not think this was sufficient notice under the circumstances, or even if sufficient, that it relieves the defendant from accounting for the goods in question. The defendant must return the goods, and pay such damages for retention as may be found, or, alternatively pay damages for whatever may be found to be the value of the goods at the time when possession was taken by the defendant.

The defendant counterclaimed against the plaintiffs for waste alleged to have been committed by the plaintiffs on the demised premises, the amount of this counterclaim being based upon the cost to the defendant of remedying a condition caused by the alleged waste committed. The evidence, it seems to me, falls far short of establishing the counterclaim. This must be dismissed. The plaintiffs are entitled to their costs of both claim and counterclaim.

On the trial the plaintiffs abandoned their claim under paragraphs 11 and 13 of the statement of claim, reserving their right to take such further proceedings as they might see fit in respect to these, and an order was accordingly made. The question of costs respecting this portion of the plaintiffs' claim so abandoned was reserved. Upon further consideration I do not think that the costs of the action were in any way increased by the inclusion of these claims in the plaintiffs' statement of claim. There will therefore be no costs to the defendant in regard to these.

Judgment accordingly.

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March 12;
May 4.

GLADYSZ v. GROSS.

Animals—Cattle entering another's land—Land within pound district—Damage to crops—Liability—R.S.B.C. 1936, Cap. 220, Secs. 7 and 10, R.S.B.C. 1936, Cap. 290, Sec. 14 (1).

Section 7 of the Pound District Act reads in part: "No animal shall be permitted to run at large within any Pound District," etc. Section 10 of said Act reads: "The person in charge of any animal within a pound district shall be liable for any damage caused by such animal under his charge as though such animal were his own property." Section 14 (1) of the Trespass Act reads: "In the event of cattle straying into lands unprotected by a lawful fence so defined to be lawful as aforesaid, no trespass shall be deemed to have been committed, and no action for trespass shall be maintainable therefor, any law to the contrary notwithstanding."

The plaintiff's lands situate within a pound district were enclosed by a fence which was not a lawful fence as defined by the Trespass Act. The defendant owner of adjacent lands, who was owner and in charge of a herd of cattle, allowed the cattle to stray upon the plaintiff's lands, causing damage to growing crops. The plaintiff's action to recover damages for the loss sustained was dismissed on motion for non-suit on the ground that the action was not maintainable in view of the above section 14 (1) of the Trespass Act.

Held, on appeal, reversing the decision of WOODBURN, Co. J., that it is a cardinal principle in the interpretation of statutes that if there be two inconsistent enactments, it must be seen if one cannot be read in qualification of the other. Applying this principle, section 14 (1) of the Trespass Act read with section 7 of the Pound District Act is to be interpreted as relating to lands other than lands lying within a pound district. Here the cattle which the defendant had in charge strayed upon the plaintiff's lands lying within a pound district and caused damages. In these circumstances the provisions of sections 7 and 10 of the Pound District Act apply and an action to recover damages for the loss sustained is maintainable notwithstanding section 14 (1) of the Trespass Act.

Bishop v. *Liden* (1929), 40 B.C. 556, applied.

APPEAL by plaintiff from the decision of WOODBURN, Co. J. of the 16th of October, 1944, in an action for damages resulting from the defendant allowing his cattle to trespass on the plaintiff's lands, while under cultivation, said cattle having trampled and laid waste 25 acres of growing crops. Said lands are within a pound district near Charlie Lake in British Columbia.

The appeal was argued at Vancouver on the 12th of March, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

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Bull, K.C., for appellant: The action was dismissed, the learned judge having found that section 14 (1) of the Trespass Act was a complete answer to the case. The plaintiff's land was fenced in, but it was not a lawful fence. We submit section 14 (1) of said Act does not apply here. The defendant is liable under section 10 of the Pound Act. This is a pound district. The reasoning in the judgment of MARTIN, J.A. in *Bishop* v. *Liden* (1929), 40 B.C. 556, at p. 559 applies to this case. These animals were in charge of the defendant. The plaintiff claims $350 in damages.

Tuck, for respondent: The name of the Trespass Act is a misnomer. The Fence Act of 1888 was consolidated with the Trespass Act in 1911. The Fence Act was a special Act that applies particularly to fences. The plaintiff's land was fenced, but it was not a legal fence: see *Jukes* v. *Miskelly,* [1923] 1 W.W.R. 1057; *McKay* v. *Loucks,* [1920] 2 W.W.R. 1007.

Bull, in reply: This is not a case where a new trial should be ordered. This Court can fix the damages.

Cur. adv. vult.

4th May, 1945.

O'HALLORAN, J.A.: The appellant (plaintiff) sued the defendant (respondent) for damage done by the latter's cattle. At the close of the plaintiff's case the learned trial judge, upon the defendant's motion, gave judgment dismissing the action.

I would allow the appeal for the reasons given by my brother BIRD. The defendant (respondent) elected at the trial to stand on what he regarded was a failure on the part of the plaintiff to make out a case against him, and he was then successful. No ground has been shown why we should exercise our discretion in favour of a new trial, *cf. Cudworth* v. *Eddy* (1926), 37 B.C. 407, unless perhaps it were restricted to assessment of the damages.

But counsel for the respondent has expressed himself willing that this Court should assess the damages. The record establishes the appellant at the trial proved damages for at least $350, and his counsel has now stated he would be satisfied with that amount. In allowing the appeal with costs in this Court and below, we assess the appellant's damages at the sum of $350,

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and *cf. Galt* v. *Frank Waterhouse & Company of Canada Ltd.* (1944), 60 B.C. 81, at pp. 105 and 113, and direct that judgment be entered accordingly.

SIDNEY SMITH, J.A.: I would allow this appeal for the reasons given by the other members of the Court.

BIRD, J.A.: The defendant was the owner of and had in his charge a herd of cattle then running at large upon defendant's lands, which were adjacent to lands occupied by the plaintiff and then under cultivation. The plaintiff's lands lay within a pound district so constituted under the Pound District Act, R.S.B.C. 1936, Cap. 220, and were enclosed by a fence which was not a lawful fence as defined by the Trespass Act, R.S.B.C. 1936, Cap. 290.

On several occasions the defendant's cattle, to his knowledge, strayed upon the plaintiff's lands and caused damage to growing crops. The plaintiff's action to recover damages for the loss so sustained was dismissed by the learned judge for the county of Cariboo upon motion for a non-suit, without reasons. The reason for dismissal appears to have been that the action was not maintainable in view of section 14 of the Trespass Act, *supra*.

Determination of the question raised upon this appeal depends upon the interpretation of certain sections of the two statutes of the British Columbia Legislature before mentioned, namely, the Pound District Act and the Trespass Act.

Sections 7 and 10 of the Pound District Act and section 14 of the Trespass Act read in part as follows:

7. No animal shall be permitted to run at large within any pound district, . . .

10. The person in charge of any animal within a pound district shall be liable for any damage caused by such animal under his charge as though such animal were his own property.

14. (1.) In the event of cattle straying into lands unprotected by a lawful fence so defined to be lawful as aforesaid, no trespass shall be deemed to have been committed, and no action for trespass shall be maintainable therefor, any law to the contrary notwithstanding.

Cattle, such as the defendant's animals, are included within the term "animal" and "cattle" respectively as defined in the two Provincial statutes under review.

In my opinion the decision of this Court in *Bishop* v. *Liden*

(1929), 40 B.C. 556, applies to this case by a parity of reasoning.

The Pound District Act provided for the creation of protected areas within which animals are not permitted to run at large; and further fixed with responsibility for damage done by such cattle a person in charge of any cattle found running at large within a pound district.

This legislation, at first blush, appears to be repugnant to the provisions of section 14 of the Trespass Act, but in my opinion on a proper construction of the two statutes there is no conflict between them. I take it to be a cardinal principle in the interpretation of a statute that if there be two inconsistent enactments it must be seen if one cannot be read as a qualification of the other—Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 481; *Ebbs* v. *Boulnois* (1875), 10 Chy. App. 479, at p. 484. Applying that principle, I think that section 14 of the Trespass Act, read with section 7 of the Pound District Act, is to be interpreted as relating to lands other than lands lying within a pound district as defined by the Pound District Act. Here cattle which the defendant had in charge, strayed upon the plaintiff's lands lying within a pound district and caused damages. In those circumstances I consider that the provisions of sections 7 and 10 of the Pound District Act apply and an action to recover damages for the loss sustained is maintainable notwithstanding section 14 of the Trespass Act—*Bishop* v. *Liden, supra.*

The Trespass Act, being a general statute, as was said by MACDONALD, C.J.A. in the *Bishop* case, "must yield to the special Act," in this case the Pound District Act.

Counsel for respondent sought to distinguish the *Bishop* case upon the basis that section 14 of the Trespass Act applies to a trespass by cattle straying over the boundary of a pound district if the pound district be not surrounded by a lawful fence. If this had been the intention of the Legislature, one might have expected to find some such provision in the Pound District Act. The absence of any such provision I think compels the conclusion that no such limitation was intended or contemplated.

I would allow the appeal with costs here and below and direct that judgment be entered for the plaintiff for damages to be

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assessed. I concur with the disposition made by my brother O'HALLORAN of the assessment of damages for the reasons given by him.

Appeal allowed.

Solicitor for appellant: *M. A. van Roggen.*
Solicitor for respondent: *R. R. Earle.*

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Jan. 31; *April* 13.

E. A. TOWNS LIMITED v. HARVEY, RUCK AND MOORE, EXECUTORS OF THE ESTATE OF S. C. RUCK, DECEASED.

Contract—Operation of plant—Agreement to advance money for cost of operation—Chattel mortgages to secure advances—Covenants for payment—Whether joint and several.

By agreement of January 28th, 1939, between S., T. (old company) and R., T. (old company) agreed to advance to S. such sums of money as required to meet the cost of operation of its plant up to $10,000 in any one year and R., being owner of the plant used by S. held under a lease by S. from R. agreed to secure said advances by executing a chattel mortgage on said plant in favour of T. (old company), in which S. joined as a party, the agreement to be in force until January 1st, 1942. By agreement of December 30th, 1939, between the said parties with T. (new company and plaintiff), T. (new company) assumed the obligations of the old company under the agreement of January 28th, 1939, and the parties agreed to be bound thereby. By further agreement the duration of the agreement of January 28th, 1939, was extended to July 1st, 1943. On December 31st, 1941, a further chattel mortgage was made between R. as grantor and T. (plaintiff) as grantee with S. as the third party joining in the covenant for payment, being in the same terms as in the first chattel mortgage as follows: "and S. and R. do and each of them doth hereby covenant, promise and agree to and with the grantee that they S. and R. or one of them shall and will well and truly pay or cause to be paid unto the grantee the said sums of money in the above proviso mentioned." R. died on December 21st, 1942. During his lifetime he was managing director of S. and was actively engaged in carrying on its business and dealt directly with T. the plaintiff. He was succeeded in the management of S. by one of his executors Ruck. T. continued after the death of R. to make advances to S. pursuant to its contract until July 1st, 1943. It is alleged that on July 1st, 1943, the indebtedness to the plaintiff was $9,109.43. For this sum this action was brought against the executors of R.'s estate.

Held, that the inclusion of the words "and each of them" in the covenant makes it a joint and several covenant and in this the defence fails. In the circumstances, the executors of the estate cannot be heard to say that the alleged deviation from the contract whether before or after the death of R. provides a ground for equitable relief on the claim made by the plaintiff. On the claim that no advances should have been made following R.'s death, the plaintiff was under an obligation to continue to extend credit pursuant to the terms of the contract with S. until July 1st, 1943, and notice of R.'s death did not affect its position and did not terminate the guarantee.

ACTION against the executors of the estate of Sidney Charles Ruck, deceased, to recover the sum of $9,109.45, owing by Shingle Bay Packing Co. Ltd. to the plaintiff and guaranteed by S. C. Ruck, deceased. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 31st of January, 1945.

Symes, for plaintiff.
Whittaker, K.C., and *R. O. D. Harvey*, for defendants.

Cur. adv. vult.

13th April, 1945.

COADY, J.: By an agreement dated the 28th of January, 1939, and made between Shingle Bay Packing Co. Ltd. of the first part (hereinafter called Shingle) and a company bearing the same name as the plaintiff of the second part (hereinafter called the old company), and Sydney Charles Ruck of the third part, the old company agreed to advance to Shingle such sums of money as it might require to meet the cost of the operation of its plant up to the sum of $10,000 in any one year, on the terms and conditions therein set out; and the party of the third part, being the owner of the plant then used by Shingle in the manufacture of its product and then held under a lease by Shingle from the party of the third part, agreed to secure the said advances by executing a chattel mortgage on the said plant in favour of the old company. The agreement was to remain in force up to the 1st of January, 1942. The chattel mortgage in which Shingle joined as party was duly executed on the 30th of January, 1939.

By an agreement dated the 30th of December, 1939, made between Shingle of the first part and Ruck of the second part

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the old company of the third part and the plaintiff herein of the fourth part, the plaintiff assumed the obligations of the old company under agreement of the 29th of January, 1939, and Shingle and the said Ruck agreed to be bound thereby in every way as if the plaintiff had been a party thereto instead of the old company.

By a further agreement dated the 31st of December, 1941, made between the plaintiff and Shingle and the said Ruck, the duration of the agreement of the 28th of January, 1939, was extended until the 1st of July, 1943. A further chattel mortgage was then taken dated the 31st of December, 1941, and made between the said Ruck as grantor, the plaintiff herein as grantee, with Shingle of the third part joining therein. The covenant for payment therein appearing is in effect in the same terms as in the first chattel mortgage, and is as follows:

> And Shingle and Ruck do and each of them doth hereby covenant promise and agree to and with the grantee that they Shingle and Ruck or one of them shall and will well and truly pay or cause to be paid unto the grantee the said sums of money in the above proviso mentioned.

Ruck died on or about the 21st of December, 1942. During his lifetime he was managing director of Shingle, and actively engaged in carrying on the business of Shingle, and dealt directly with the plaintiff in all matters relating to the carrying out of the contract of January 28th, 1939, and it must be assumed had full knowledge of all the transactions between the plaintiff and Shingle. He was succeeded in the management of that company by George Sharon Turner Ruck, one of the executors of his estate and one of the defendants named herein.

The plaintiff continued after the death of Ruck to handle the product of Shingle and to make advances to Shingle pursuant to its contract up to the 1st of July, 1943, in the same manner as it had done during the lifetime of the said Ruck. The indebtedness to the plaintiff on the 1st of July, 1943, after giving credit for all merchandise dealt with pursuant to the contract was, it is alleged, the sum of $9,109.43. It is for that sum that this action is now brought against the executors of the estate of Ruck.

Several defences are raised to the plaintiff's claim. The first is that the covenant for payment is a joint covenant only, made by Ruck and Shingle in favour of the plaintiff, and that being so, no claim arises against the executors of the Ruck estate

thereon. If the covenant is joint only, that defence is, of course, a complete answer to the plaintiff's claim. That covenant has already been set out above and need not be repeated. In passing, it may be noted that the chattel mortgage in which the covenant appears does not contain the usual clause binding the heirs, executors, administrators and assigns of the parties. However, the contract pursuant to which this chattel mortgage, now sued on, was given and which is the foundation on which it rests does contain such usual clause. The authorities show that the question of whether the promise of two or more persons is a joint promise or a joint and several promise is a matter of construction. It seems clear here that if the words "and each of them" were not included in the covenant this would be a joint covenant only and not a joint and several covenant. On that I need only mention what is perhaps the leading case, *White* v. *Tyndall* (1888), 13 App. Cas. 263. It seems to me, however, that the inclusion of these words, "and each of them" makes this a joint and several covenant. It is a covenant by them jointly and by each of them severally that they or one of them will pay; that is, in addition to the joint covenant each one covenants separtely that they or one or other of them will pay. The language appears to me clear and unambiguous. In 1 Sm. L.C., 13th Ed., 456-7, it is stated:

> Thus a promise by A and B that they will do a thing is but one promise, namely a joint promise by both. Again, a promise by A and B that they or one of them will do a thing is but one promise; for the words of severance attach only to the thing to be done and not to the promise which is still joint. But a promise by A and B and each of them that they will do a thing is not one promise, for the words of severalty attach to the promise, and there are in truth three promises, a joint promise by both and a several promise by each: see *Robinson* v. *Walker*, [(1703)] 1 Salk. 393, . . . ; *King* v. *Hoare* [(1844)], 13 M. & W., at p. 505, . . . ; *White* v. *Tyndall* [(1888)], 13 App. Cas. at p. 269, . . .

There being therefore, as I see it, no ambiguity in the covenant here it is unnecessary to have recourse to a consideration of the interests of the parties under the contract which the authorities show can be had when ambiguity prevails. This first defence therefore must fail.

The second ground of defence urged is that while under the chattel mortgage Ruck is a primary debtor, nevertheless he was

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to the knowledge of the plaintiff a surety only for the indebtedness of Shingle and was so accepted by the plaintiff, and therefore the executors of his estate can avail themselves of all equitable defences available to a surety. It is submitted that the dealings between the plaintiff and Shingle were contrary to and in violation of the terms of the contract between them, and therefore Ruck's estate is discharged from any liability under the contract. The defendants submit and led evidence in an effort to establish that the contract between Shingle and the plaintiff was not carried out on the basis provided for in the agreement between the parties. It is submitted by the defendants that this was an agency contract only, but that the dealings beween Shingle and the plaintiff were not carried on on the basis of principal and agent, as they ought to have been, but on the basis of vendor and purchaser, and this being so, the surety is discharged. The plaintiff submits, however, that the contract (Exhibit 2, the agreement of the 28th of January, 1939) while in general referring to the relationship as that of principal and agent, does provide for a business relationship on the basis of vendor and purchaser, that is, sales by Shingle to the plaintiff of its products instead of sales by the plaintiff as agent of Shingle. I think that is so, but under the circumstances here the plaintiff need not rely solely on this, for it is apparent from the evidence that the practice which prevailed with respect to the handling of the products of Shingle by the plaintiff from almost the very inception of the contract was on the basis of vendor and purchaser. The deceased Ruck was the managing director of Shingle from the time the first chattel moragage was given up to the time of his death in December, 1943. He therefore had full knowledge of the deviation from the contract, if there was a deviation, and he acquiesced in and consented to the business relationship that grew up between the plaintiff and Shingle with respect to the handling of its products. With this knowledge of the manner in which the business had been carried on he acknowledged the indebtedness of Shingle to the plaintiff as of December 31st, 1941, when he executed the second chattel mortgage. Certainly it seems to me, under the circumstances, he could not, during his lifetime, have successfully resisted a claim

against him by the plaintiff based upon the submission that he was a surety only and that the contract, on the basis of which he had become surety, had been deviated from.

Subsequently to his death the business relationship between Shingle and the plaintiff was carried on, on what would appear to have been the same basis as had existed during the lifetime of Ruck. During this period George Sharon Turner Ruck, one of the executors, a defendant herein, acted as managing director of Shingle, with full knowledge of and acquiescence in all the dealings. I do not think that under the circumstances the executors of the estate can now be heard to say that this alleged deviation from the contract, whether before or after the death of Ruck provides a ground for any equitable relief on the claim now made by the plaintiff.

The third ground of defence is that no advances ought to have been made by the plaintiff to Shingle, following the death of Ruck in December, 1942, and that, had no further advances been made, and had all credits then available and thereafter accruing from the products of Shingle been credited on the account, the indebtedness would have been paid in full. I do not think that, assuming Ruck's liability to be that of surety and not primary debtor, this defence prevails under the particular circumstances here. The plaintiff was under an obligation to continue to extend credit pursuant to the terms of its contract with Shingle up to the 1st of July, 1943. This was not a contract that could have been terminated by Ruck during his lifetime, and the plaintiff was justified in continuing this line of credit and in fact was under obligation to do so up to that date. Notice of Ruck's death which the plaintiff, unquestionably, had in December, 1942, did not affect its position and did not terminate the guarantee.

And where the guarantee is from its nature not revocable by the surety and there is no express stipulation that it may be revoked, notice of the surety's death will not terminate the guarantee:

Halsbury's Laws of England, 2nd Ed., Vol. 16, p. 168.

Finally the defendants submit that if the defences hereinbefore dealt with fail, there should be a reference to the district registrar to take the accounts between the parties. I do not think

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that is necessary. The evidence clearly establishes an indebtedness in the amount sued for.

There will be judgment for $9,109.43 and costs.

Judgment for plaintiff.

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1945
Mar. 27, 28; *May* 3.

REX v. RICHMOND.

Criminal law—Indecent assault—Evidence of girl eight years old—Corroboration—Statement by accused—Whether voluntary—Criminal Code, Secs. 1003, Subsec. 2 and 1014, Subsec. 2—R.S.C. 1927, Cap. 59, Sec. 16, Subsec. 2.

Appellant was convicted of indecently assaulting a girl eight years of age. When about to be arrested the policeman informed accused that the complainant had laid an information against him of indecently assaulting his daughter and that he held a warrant for his arrest. The policeman read the warrant to him and gave him a copy of it. After accused had read it, the policeman asked him if he understood it and he said he did. The policeman then gave him the usual warning concerning anything he might say, to which accused replied: "I guess it may be right according to the way you take it. Truth is truth. I don't think I hurt the little girl. Is there any way we can settle it? If we see Mr. McNiven is there any way we can settle it?"

Held, on appeal, affirming the conviction by MACFARLANE, J., that the statement constituted corroboration in all the circumstances of this case. It was additional evidence rendering it probable that the little girl's testimony was true and not only "tended to connect" but actually did "connect" the accused with the crime.

APPEAL by accused from the conviction by MACFARLANE, J. and the verdict of a jury at the Fall Assize at Victoria on the 28th of November, 1944, for indecently assaulting a girl eight years of age. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Vancouver on the 27th and 28th of March, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

H. W. R. Moore, for appellant: The statement of accused is not sufficient to satisfy the requirements of corroboration in some material particular implicating accused: see *Rex* v. *Silverstone*

(1934), 61 Can. C.C. 258; *Rex* v. *Baskerville,* [1916] 2 K.B. 658. On the judge's charge see Tremeear's Criminal Code, 5th Ed., 343; *Rex* v. *Norcott,* [1917] 1 K.B. 347; *Shorten* v. *Regem* (1918), 57 S.C.R. 118, at p. 119.

Gordon A. Cameron, for the Crown: On what occurred leading up to accused's statement see *Rex* v. *Barron* (1905), 9 Can. C.C. 196; *Rex* v. *Osborne,* [1905] 1 K.B. 551, at p. 556; *Rex* v. *McGivney* (1914), 19 B.C. 22; *Rex* v. *Jimmy Spuzzum* (1906), 12 B.C. 291. That there was sufficient corroboration see *Rex* v. *Tolhurst,* [1939] 3 W.W.R. 559; *Rex* v. *Gray* (1904), 68 J.P. 327; *Hubin* v. *Regem,* [1927] S.C.R. 442. He substantially admitted the act by his statement: see *Rex* v. *Bellos* (1927), 48 Can. C.C. 126; *Prosko* v. *Regem* (1922), 37 Can. C.C. 199. Section 1014, subsection 2 of the Criminal Code applies.

Moore, in reply, referred to *Rex v. Gregg* (1932), 24 Cr. App. R. 13.

Cur. adv. vult.

3rd May, 1945.

O'HALLORAN, J.A.: The appellant was convicted at the last Victoria Assize of indecently assaulting an eight year old girl, and was sentenced to 18 months' imprisonment. As the little girl was not sworn, corroboration was essential under Code section 1003, subsection 2 to support a conviction, and the jury were so instructed.

The attack upon the learned judge's summing-up to the jury centred upon his instruction that the little girl's testimony was corroborated

by some other material evidence in support thereof implicating the accused

(Code section 1003, subsection 2). The prosecution adduced important evidence contained in an inculpatory statement made by the appellant, which, after a "trial within a trial," the learned judge found to be voluntary in character and admitted it in evidence. The learned judge charged the jury that statement was corroborative of the little girl's evidence of the indecent assault.

The appellant made the statement under the following circumstances; the Oak Bay chief of police informed the appellant that the complainant had laid an information against him of

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indecently assaulting his daughter and that he held a warrant for his arrest. The chief of police read the warrant to the appellant and gave him a copy of it. The latter put on his glasses and read it. The chief of police then asked him if he understood it and he said he did. The chief of police then gave the appellant the usual warning concerning anything he might say, to which he replied:

> I guess it may be right according to the way you take it. Truth is truth. I don't think I hurt the little girl. Is there any way we can settle it? If we see Mr. McNiven, is there any way we can settle it?

I am fully satisfied that statement constituted corroboration in all the circumstances of this case. It was additional evidence rendering it probable that the little girl's testimony was true, and not only "tended to connect," but actually did "connect" the appellant with the crime, and *cf. Rex* v. *Baskerville* (1916), 86 L.J.K.B. 28, at pp. 33-4, *Rex* v. *Hartley* (1940), 28 Cr. App. R. 15, at p. 19, and also the recent decision of this Court in *Rex* v. *James* [*ante*, p. 161]; [1945] 1 W.W.R. 586, and decisions there cited. The expression found in Code section 1003, subsection 2 is "implicate" and not "incriminate." In the *Baskerville* case the learned recorder, in charging the jury, used the word "'affecting" the accused, instead of "implicating" the accused, but the Court of Criminal Appeal held (p. 32) that direction gave no cause of complaint to the appellant.

It was said in the *Baskerville* case (p. 34) that the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. Examination of the facts upon which frequently-quoted decisions are founded, reveals that rigid lines are seldom drawn in determining what evidence may be corroborative of the testimony of a complainant or an accomplice provided of course it is independent evidence in the sense that the expression "independent" is used in the *Baskerville* and *Hubin* decisions. In *Rex* v. *Daun* (1906), 12 O.L.R. 227, cited in *Magdall* v. *Regem* (1920), 61 S.C.R. 88, the fact that the accused and the girl had their photographs taken together one month before the seduction was accepted as corroborative of her evidence that he had promised to marry her. In the *Baskerville* case itself, evidence of police witnesses (pp. 29 and 32) that the accused admitted that the two boys did come to his

flat and that "we used to sit and talk together," was accepted as corroborative despite the argument of counsel for the appellant that such evidence was equally consistent with his innocence.

In *Rex* v. *Steele* (1923), 33 B.C. 197, affirmed by the Supreme Court of Canada [1924] 4 D.L.R. 175, corroboration of the girl's story was found in the evidence of a witness who saw the girl and the accused dance together at a dance-hall, leave the hall separately, then meet outside and walk toward a public park. This witness did not see them enter the park where the girl testified the assault took place. In the *Steele* case there was also evidence that the accused threatened this witness a week later. As I read the judgments of this Court and the Supreme Court of Canada, the evidence to which I have referred was held to be corroborative quite apart from the threat. In *Hubin* v. *Regem,* [1927] S.C.R. 442 the Supreme Court of Canada set aside the conviction because the evidence described as corroborative in the Courts below emerged solely from the girl's own testimony. However, the Court granted a new trial on the ground that the conduct of the accused in making two inconsistent statements to the police was evidence of corroboration, but had not been so found by the trial judge.

In *Rex* v. *Canning* (1937), 52 B.C. 93, affirmed [1937] S.C.R. 421, a police agent testified he saw the appellant and the accomplice Furumoto together in a conversation which he did not overhear. This evidence was held to be sufficient corroboration to support a conviction for conspiracy to distribute morphine. The Supreme Court of Canada affirmed the judgment and evidently did not consider that the evidence came within Lord Reading, C.J.'s observation in *Burbury* v. *Jackson,* [1917] 1 K.B. 16 (cited by Kerwin, J. dissenting) that opportunity by itself is not sufficient. The authority of *Rex* v. *Feigenbaum* (1919), 14 Cr. App. R. 1 (cited in *Hubin* v. *Regem, supra,* and also in *Lucyk* v. *Clark* (1945), 83 Can. C.C. 192) was doubted in *Rex* v. *Keeling* (1942), 28 Cr. App. R. 121, but I take it that may be attributed to its own distinguishing facts which have no parallel here.

Counsel for the appellant submitted further that the appellant's inculpatory statement was not corroborative, because it

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was prompted by a charge relating to the 16th of May, whereas the appellant was tried and convicted on a charge relating to 15th May. In effect that was a submission, that at the time he made the statement the appellant was referring to something which happened on 16th May, the date of the offence in the warrant handed him. But that is not supported by the evidence. The appellant testified he had pushed the little girl away from the saw in his workshop, and sought to explain his statement as referring to that incident. In cross-examination he said that incident occurred on the 15th and not on the 16th of May. His inculpatory statement could therefore have referred only to an incident occurring on 15th May, and that was the date of the offence for which he was tried and convicted.

I must conclude the inculpatory statement was properly admitted in evidence, and that in the charge of the learned judge the case for the defence was placed adequately before the jury, and also that the learned judge was right in instructing the jury that corroboration of the little girl's testimony might be found in the appellant's statement. The learned judge told the jury further that on the evidence before them, corroboration might also be found in the presence of a certain substance on the little girl's body, and also in her detailed description of the furniture in the rooms of the appellant's house when considered and contrasted with the appellant's denial that he had shown her those rooms and the furniture therein.

Counsel for the appellant also submitted that none of this last-mentioned evidence was corroborative, but in view of all the circumstances in this case, I am of the same opinion as the learned trial judge. It is true that evidence standing alone or related to different circumstances, might not be corroborative. I do not enlarge upon it, for even if I did not share the learned judge's view in that respect I would be driven to conclude that the corroborative nature of the appellant's own inculpatory statement when first arrested could not fail to have exerted such an overwhelming influence upon the minds of the jury, that no substantial wrong or miscarriage of justice could reasonably be said to have actually occurred by virtue of the learned judge's directions concerning the corroborative character of other evi-

dence. When the appeal book is examined it is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant upon the little girl's testimony when corroborated in the way it was by his inculpatory statement, *cf.* *Rex* v. *Haddy* (1944), 29 Cr. App. R. 182; *Rex* v. *Dillabough* (1944), 60 B.C. 534, and *Stirland* v. *Director of Public Prosecutions* (1944), 30 Cr. App. R. 40 (H.L.) Viscount Simon, L.C. at pp. 46-7.

The little eight year old girl withstood a searching cross-examination. It would be a departure from reality to expect her testimony to be perfect in all details. It carries conviction in essentials. I do not find it necessary to discuss other points taken in argument. This case, in my judgment, is more conclusive than *Rex* v. *Schiff* (1920), 15 Cr. App. R. 63, which also concerned the testimony of an eight year old girl and I adopt Lord Reading's observation therein (p. 64) as equally applicable here:

> . . . , it is difficult to see how the evidence in the present case, if it was believed by the jury, does not tend to implicate the accused man. It is hardly possible that the child could have invented the details of the story which she told in the witness box, and the Court considers that there was sufficient corroborative evidence in the case.

I would dismiss the appeal.

ROBERTSON, J.A.: The appellant appeals from a conviction for indecently assaulting an eight year old girl on the 15th of May, 1944. As her evidence was not given upon oath no conviction could take place unless her evidence was corroborated by some other material evidence in support thereof implicating the accused—see subsection 2 of section 1003 of the Criminal Code.

In my opinion the evidence shows that the statement made by the accused, at the time of his arrest, can only refer to what took place on the evening of the 15th of May and is corroboration within the section.

I think the appeal should be dismissed.

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

Appeal dismissed.

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1945
Jan. 24, 25, 26; May 18.

CLELLAND v. CLELLAND OR McNABB.

Trusts and trustees—Mistake of fact—Transfer of property by man to woman believing they were legally married—Presumption of advancement—Consideration—Action for declaration of trust—Appeal.

The plaintiff (husband) and defendant were married in Mexico in 1934. Both had been previously married. The husband had obtained a divorce in Mexico, his domicil at the time having been in California. The wife had obtained a divorce in the State of Washington, the domicil of her husband at the time being in the Province of Alberta. When they were married both thought they had been properly divorced. They lived together until February, 1940, when the plaintiff went overseas. The defendant followed him to England in May, 1940, but at his suggestion to ensure her safety she returned to Canada in July, 1940. During their cohabitation the plaintiff transferred to the joint names of himself and the defendant or solely to the defendant all his property and assets. The plaintiff avers that on his return from England in February, 1942, he first learned from the defendant that she was not his lawful wife as her divorce from her former husband was invalid and their marriage in Mexico was therefore invalid. She demanded a division of the property and when he declined, she advised him that she was through. In an action for a declaration that the defendant holds her interest in the property transferred to her as trustee for the plaintiff and for ancillary relief, the plaintiff averred that his intention at all times material to the execution of these transfers into the joint names of himself and the defendant, whom he thought was his wife, was to provide for her in the event of his prior decease and were not made for the purpose of vesting in her an immediate beneficial interest. On the trial the plaintiff's evidence was accepted that there was no intention of vesting the immediate beneficial interest in the properties in the defendant and judgment was given for the plaintiff for the relief asked for.

Held, on appeal, affirming the decision of MACFARLANE, J., that no evidence had been produced to support the defendant's contention of a gift. On the contrary, the plaintiff's evidence establishes there was no intention of making a gift as the learned judge has found. Moreover, the conduct of the defendant in relation to dealings by each of them with various assets then held jointly or by the defendant alone fails to indicate her belief that gifts to her were intended; rather does that conduct serve to confirm the plaintiff's explanation of the transactions and the appeal was dismissed.

Held, further, varying the judgment below that the order that a motor-car, a vessel named "Sinbad the First" and a refrigerator were held in trust for the plaintiff was wrong, as they were sold by the defendant prior to the action. The statement of claim should be amended by adding a claim for damages for conversion of the same and an order be made referring the matter to the registrar to ascertain the damages.

APPEAL by defendant from the decision of MACFARLANE, J. of the 5th of August, 1944 (reported, *ante,* p. 19), declaring that the defendant holds in trust for the plaintiff certain property which the plaintiff had transferred to her during their so-called married life, in two cases the whole interest and in the remainder an undivided one-half interest by joint tenancy, in what the plaintiff claims to have been the mistaken belief that the defendant was his wife and also directing that the plaintiff recover against the defendant the sum of $6,081.51 in cash and giving the plaintiff certain ancillary relief. The plaintiff (an Englishman) settled in California in 1921 and became domiciled there until 1937. He married Mary A. Parks in California in 1924. In 1930 they separated and in June, 1934, a Mexican court purported to grant him a divorce. In April, 1934, he became engaged to the defendant who had been previously married and she believed she had been legally divorced. She had in fact been married to one Gordon McNabb who at all times material was domiciled in the Province of Alberta. In 1929 she obtained a divorce from McNabb in the State of Washington, U.S.A. On July 3rd, 1934, plaintiff and defendant went through a ceremony of marriage at Agua Caliente, Mexico. In November, 1937, plaintiff moved to British Columbia and became domiciled there, which domicil he has retained ever since. In September, 1939, he joined the Canadian Army and in February, 1940, was transferred to London, Ontario, where the defendant joined him. In May, 1940, he was transferred to England where the defendant followed him. Between October, 1934, and July, 1940, transfers of property were made by the plaintiff to the defendant. In July, 1940, the defendant returned to British Columbia. In 1942 the plaintiff obtained a transfer back to Canada. He came to Vancouver, found that the defendant had left his home and later she refused to return to him. In the early part of 1942 he commenced divorce proceedings, but in June, 1942, when the action came on for trial he had the action dismissed on his own motion on the ground that his Mexican divorce was illegal. In September, 1942, he commenced a divorce action against Mary A. Parks in New Westminster, B.C., and in June, 1943, the action came on for trial

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by BIRD, J., who granted the decree. From 1934 to 1938 three different cars were purchased by the plaintiff and registered in the defendant's name and in 1935 a motor-vessel "Sinbad" purchased by the plaintiff was registered in the defendant's name. Between 1934 and 1940 shares of various companies and certain properties were registered in the joint names of plaintiff and defendant. At the commencement of this action, the following properties were held in the names of the plaintiff and defendant as joint tenants: 8,404 common shares American Security and Fidelity Corporation; 615 preferred shares of West Canadian Hydro-Electric Corporation Limited; 100 shares of Book Match Manufacturers Ltd. (in street form); lots 20 and 21 (Secretary Islands), Cowichan District; lot 8 of section 80, Victoria District, plan 1457 (the house and lot at Langford).

The appeal was argued at Victoria on the 24th, 25th and 26th of January, 1945, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Guild (*G. Bruce Duncan,* with him), for appellant: As to the plaintiff's intention in making transfers, nowhere does he allege that there was anything in the nature of an express trust of the property in favour of himself, nor did he ever say so at the trial. His intention is fully explained by his statements at the time he made the transfers and by his letters. The plaintiff said his purpose was to be sure, if anything happened to him, the defendant would get the property by survivorship. What he did do was to give the defendant an immediate joint beneficial interest with himself. If he thought otherwise, that was a mistake of law: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 131; *Powell* v. *Smith* (1872), L.R. 14 Eq. 85; *Hart* v. *Hart* (1881), 18 Ch. D. 670. The Statute of Limitations applies as it runs from the date of the transfers: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 164, par. 239; *Baker* v. *Courage & Co.*, [1910] 1 K.B. 56; *Re Croyden. Hincks* v. *Roberts* (1911), 55 Sol. Jo. 632. As to the plaintiff's claim to recover the gifts, they were all voluntarily handed to defendant or registered in the joint names of both as joint tenants: see Halsbury's Laws of England, 2nd Ed., Vol. 15, p. 721, par. 1255; *Villiers* v. *Beaumont* (1682), 1 Vern. 100; *Ogilvie* v. *Littleboy* (1897),

13 T.L.R. 399. The plaintiff admits a bigamous marriage: see *The Trial of Earl Russell,* [1901] A.C. 446. In face of that he alleges in his claim that the defendant misrepresented herself to him as a single woman for the purpose of inducing him to marry her and thereby procured their marriage. One cannot complain of a mistake if one would have followed the same course, mistake or no mistake: see Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 145, par. 203; *Holt* v. *Markham,* [1923] 1 K.B. 504, at p. 515; *Home and Colonial Insurance Company, Limited* v. *London Guarantee and Accident Company, Limited* (1928), 45 T.L.R. 134. And that is so even if it is merely doubtful whether one would have followed a different course had one not been mistaken: *Robert A. Munro & Co.* v. *Meyer,* [1930] 2 K.B. 312. Evidence of what he did in 1942 is material: see *Blake* v. *Albion Life Assurance Society* (1878), 4 C.P.D. 94, at p. 102. One cannot recover on the ground of mistake if the mistake was not a mistake as to a fundamental or basic fact. The learned judge refers to *Norwich Union Fire Ins. Soc. Ltd.* v. *Wm. Price, Ltd.,* [1934] 3 W.W.R. 53, at p. 58 and says, "The mistake here was, as I see it, fundamental or basic." But see rule laid down in *Aiken* v. *Short* (1856), 25 L.J. Ex. 321, at p. 324, a rule that has always been followed: see also *Morgan* v. *Ashcroft,* [1938] 1 K.B. 49. The claim is a claim in equity and does not come into Court with clean hands: see *Parkinson* v. *College of Ambulance, Ld., and Harrison,* [1925] 2 K.B. 1. The mistake is a mistake of law and not of fact: see *Fowke* v. *Fowke,* [1938] Ch. 774. No claim of fraud is made and relief can be claimed by the plaintiff only on ground of innocent misrepresentation. By reason of his defective Mexican divorce, he suffered no damage or detriment because of the defendant's representations, if any, as to her own *status.*

McAlpine, K.C. (*Dawe,* with him), for respondent: The plaintiff lived in California until 1937. After being overseas and coming back to Ottawa the defendant met him and for the first time she told him there was something wrong with their marriage. She then refused to stay with him because she wanted all his property and he would not give it to her. Up to that time he believed his divorce in Mexico was legal. Later he got a

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divorce in New Westminster from BIRD, J. He has been very badly treated. The defendant had nothing herself except about $150 worth of furniture which she kept in her sister's house. Secretary Islands were bought from joint funds, but it was all his money, and a large sum was spent in improvements on the islands. The marriage does not raise a presumption of advancement: see *Soar* v. *Foster* (1858), 4 K. & J. 152, at p. 161. That there was no presumption of advancement see *Forrest* v. *Forrest* (1865), 34 L.J. Ch. 428, at p. 431; *Smith* v. *Warde*. *Duckett* v. *Warde* (1845), 15 Sim. 55; *Dumper* v. *Dumper* (1862), 3 Giff. 583, at p. 586; *Cole* v. *Cole* (1943), 59 B.C. 372, at p. 377; *Harrington* v. *Harrington,* [1925] 2 D.L.R. 849. The manner in which the plaintiff, with defendant's consent, dealt with the property shows that there was no intention to give an immediate beneficial interest to her. The fact that at the time the transfers were made the plaintiff believed the defendant to be his wife is immaterial. As to the contention that he believed at the time of the transfers that defendant was his wife and therefore there is a presumption of advancement: first, there is no such presumption and secondly, even if there is such a presumption, the presumption has been rebutted by the evidence of the plaintiff, which was accepted by the trial judge: see Lewin on Trusts, 14th Ed., 156; Godefroi on Trusts and Trustees, 5th Ed., 137. There was clearly no intention to benefit. He was making provision for his wife; she is not his wife and this was a mistake of fact: see *Norwich Union Fire Ins. Soc. Ltd.* v. *Wm. Price, Ltd.,* [1934] 3 W.W.R. 53, at p. 58. That the property was put there in trust see *Elford* v. *Elford* (1922), 64 S.C.R. 125, at p. 129.

Guild, replied.

Cur. adv. vult.

18th May, 1945.

ROBERTSON, J.A. (*per curiam*): In this appeal two questions arise for decision: Did the plaintiff make a gift of the shares, lands and other things in question to the defendant; and, alternatively, if he did, did he do so under a mistake, such as to enable him to set aside the transaction?

As, in my opinion, there was no gift, it is not necessary to

consider the second point. It is my view that no presumption of advancement or of a gift in favour of the defendant arose by reason of her going through the form of marriage with the plaintiff.

The facts in *Soar* v. *Foster* (1858), 4 K. & J. 152; 70 E.R. 64 were that a man had gone through a form of marriage with his deceased wife's sister. This was against the law of England and therefore the marriage was void. At p. 66 it is stated:

> It was contended, on the part of the defendants, that the question was independent of legal relationship, or legal obligation to provide for the party in whose name the purchase is made; and that, in the absence of any such relationship or obligation, if there were merely a moral obligation—or such facts as led up to the conclusion that the purchaser had a moral duty incumbent upon him—to provide for the party in question, that circumstance alone would be sufficient to raise a presumption that the purchase was intended as a provision, and would throw upon the plaintiffs the *onus* of rebutting that presumption.

And at the bottom of p. 67 the following appears:

> Knowing that, he contracts a marriage with the defendant who was his deceased wife's sister, and afterwards purchases this stock in their joint names. Then how does the inference arise that the purchase was intended as a provision for the defendant? Not upon the ground of his being under a moral obligation to provide for the defendant, for that argument would be equally applicable, if, instead of an invalid marriage of this description, the case had been one of bigamy by a person representing himself to be unmarried. In such a case there would be a clear moral duty incumbent upon the person supposed to provide for a woman whom he had so grossly deceived. The same argument would apply to a case of mere cohabitation without any form of marriage whatever. Any moralist would say that a man was bound to make provision for the woman with whom he had so cohabited. But it would be impossible for this Court to hold, if in either of the cases supposed an investment had been made by the man in the names of himself and the woman, that, upon the mere ground of his being under such moral obligation, the purchase could be presumed to have been intended by him as a provision of advancement.

In *Bennet* v. *Bennet* (1879), 10 Ch. D. 474 Jessel, M.R. said the presumption of the gift arose from the moral obligation. As appears, however, from the citation from *Soar* v. *Foster, supra,* no moral obligation recognized by the Court would arise even in the case of an innocent woman being married to a man who was already married.

The position then is that, in law, the parties were strangers to each other and the presumption is that a resulting trust arose in favour of the plaintiff of all the assets in their joint names,

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or transferred by respondent to the name of the appellant, subject to its being rebutted by clear evidence. *Re Mailman,* [1941] 3 D.L.R. 449, at p. 454 and Story on Equity, 3rd Ed., 508. The defendant did not give evidence. She relied entirely upon the plaintiff's evidence to show that there was a gift to her. The plaintiff said that in every case where he bought securities or property he told the defendant what he was doing and he told her that he put them in their joint names so that if anything happened to him there was no doubt in his mind "that she intended to get them by right of survivorship as my wife."

He also says the same thing in respect to moneys in the bank.

The question is "What was his intention at the time of the transactions?" See *Robertson* v. *Batchelor and Hanes* (1936), 53 B.C. 261; *Freeman & Wootton* v. *Johnston,* [1942] 1 D.L.R. 502. Upon this point his evidence is admissible. See *Devoy* v. *Devoy* (1857), 3 Sm. & G. 403. He says that he never intended to give her any present beneficial interest at all.

In *Forrest* v. *Forrest* (1865), 34 L.J. Ch. 428 the facts were that Forrest purchased a number of shares in the name of his brother, but had the certificates delivered to himself and they were in his possession at the time of his death. Forrest's executrix sued to obtain a declaration that the brother was a trustee for her of the shares. The brother swore that after the purchase Forrest had given him the shares and that the certificates and the remaining shares (some of the shares having been delivered to him) had been left in Forrest's possession for safe keeping. Stuart, V.-C. said at p. 430:

> A purchase, in the name of another, in order to be an advancement, must be made with the intention that the property and beneficial interest should pass at the time of the purchase to the person in whose name the purchase was made. Without that intention it could be no advancement. . . .

The plaintiff swore that he had no intention of giving her any present beneficial interest. His idea was that she should have everything in the event of his death and nothing before; and that to put the property, shares and other assets in their joint names, and in some instances in appellant's name alone, was a convenient method of vesting the assets absolutely in her in the event of his predeceasing her. His counsel refers to the fact that various transfers were made by him from time to time, apparently with

her consent, of the property in their joint names, and in some cases the proceeds were invested in their joint names and in other cases shares were bought in his name. Undoubtedly the intention was that he was to have the dividends during his life-time. It was submitted that it would be most unlikely that he would give her a joint interest which she might at any time dispose of.

The defendant relies on the case of *Standing* v. *Bowring* (1885), 31 Ch. D. 282 in which the facts were that a widow in the year 1880 caused £6,000 consols to be transferred into the joint names of herself and the defendant, who was her godson. She did so with the express intention that the defendant, in the event of his surviving her, should have the consols for his own benefit, but that she should have the dividends during her life. She had been previously warned that if she made the transfer she could not revoke it. Upon the evidence the Court held that both the beneficial and the legal interest in these consols passed to the defendant and therefore no question of trust could arise. As Lindley, L.J. said at p. 289, the evidence conclusively showed that the plaintiff never intended to create any trust of the kind. I think Lord Halsbury, L.C. in this case at pp. 285-6, puts the point which had to be decided very shortly. He says:

> The facts which I have assumed to be proved seemed upon the argument to have disposed of every question but one, and that one is whether the intended gift was complete, in which case it would not be revocable at the option of the donor, or whether the gift was not complete, but rested only in intention, although the subject-matter of the gift did not remain within the control of the donor.

It seems to me that the gift in this case was not complete but rested only in intention, as the plaintiff swore, and, as the learned judge has found, although the alleged gifts did not remain within the plaintiff's sole control.

In my view no evidence has been produced to support the defendant's contention of a gift. On the contrary, the plaintiff's evidence establishes there was no intention of making a gift. Moreover, the conduct of the appellant in relation to dealings by each of them with various assets, then held jointly or by the appellant alone, fails to indicate her belief that gifts to her were intended; rather does that conduct serve to confirm the respondent's explanation of the transactions.

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In this regard I refer particularly to appellant's surreptitious withdrawal of substantial balances from the joint bank accounts and her subsequent promise to him—never fulfilled—to restore the sums withdrawn; to appellant's acquiescence in respondent's dealing in shares then registered in the joint names and in his transfer to a friend of a motor-car then registered in appellant's name.

This disposes of the main appeal.

It appears that the Cadillac motor-car, the vessel "Sinbad the First" and the refrigerator had been sold prior to the trial of the action. Paragraphs 1 and 2 of the judgment declare that the defendant holds the motor-car and the vessel in trust for the plaintiff. With deference, I thing the judgment in this respect is wrong.

The latter part of paragraph 7 of the judgment declares that the plaintiff is the owner of the refrigerator which had also been sold prior to the trial of the action; and ordered the defendant to deliver it to the plaintiff or to pay the value thereof. With respect, I do not see how the defendant could be declared to be the owner of something which she had sold and be ordered to deliver the same. I am of the opinion that paragraphs 1 and 2 and the last part of paragraph 7 of the judgment should be struck out; that leave be given to amend the statement of claim by adding a claim for damages for conversion of the motor-car, vessel and refrigerator; and that an order be made referring this matter to the registrar to ascertain the damages for the conversion and that the defendant do pay the plaintiff the ascertained damages.

The appeal is dismissed, the judgment to be varied as mentioned.

The appellant has been successful only in respect of the issue relating to the motor-car, vessel and refrigerator. She is entitled to the costs of this issue. I would give the appellant one-tenth of her taxed costs, and, the respondent nine-tenths of his taxed costs, of the appeal. There will be a set-off as to costs.

Appeal dismissed; judgment varied.

Solicitors for appellant: *Campney, Owen & Murphy.*
Solicitor for respondent: *A. P. Dawe.*

GILL BROTHERS v. MISSION SAWMILLS LIMITED.

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Contract — Construction — Duration — Notice terminating the contract— Sufficiency—Damages—Reference.

The defendant operated a sawmill at Mission, B.C., and the plaintiffs, who were fuel-wood dealers, entered into a verbal contract with the defendant on the 24th of April, 1942, to pay for all wood fuel from the latter's sawmill at $1.50 a cord for fir and nothing for cedar and hemlock and $1.50 per unit for fir sawdust and nothing for the other sawdust, on condition that the plaintiffs would keep the mill-wood bunker "clean," *viz.*, remove from the bunker the "waste" wood collecting there during mill operations. There was no stipulation as to the duration of the contract. The plaintiffs were obliged to keep the bunker from filling up as a full bunker would stop the operation of the mill. From time to time the terms of the agreement were varied: (1) By the defendant taking from the plaintiffs the rights and obligations relating to sawdust; (2) by demanding payment for the hemlock and cedar at 75 cents per cord; (3) by increasing the price for fir fuel wood from $1.50 to $2 per cord. These changes were accepted by the plaintiffs. On the 24th of June, 1943, the defendant notified the plaintiffs that no more wood would be supplied to them after June 30th, 1943. In an action for specific performance of the contract or in the alternative, damages for wrongful termination of the contract, it was held that in April, 1942, a contract was concluded between the parties, that the six-days' notice of termination given on June 24th, 1943, was unreasonable and the contract was wrongfully terminated on June 30th, 1943. A reference was ordered to the registrar to determine the *quantum* of damages.

Held, on appeal, affirming the decision of BIRD, J. (SIDNEY SMITH, J.A. dissenting), that mutual recognition of enforceable reciprocal obligations is not only clearly manifested in the language the parties used, but is collected as well from the efforts made by the defendant to persuade the plaintiffs to enter into the contract, the nature of the relations between the parties and the importance to the defendant of the bunker being kept clear and the wood therefrom removed from its own premises. The proper inference from all the facts is that by words and conduct a contract in the terms found in the Court below was concluded between the parties in April, 1942.

APPEAL by defendant from the decision of BIRD, J. of the 30th of June, 1944, in an action by the plaintiffs claiming specific performance of a contract between the plaintiffs and defendant whereby the defendant agreed to sell the plaintiffs the fuel wood produced by the defendant in the operation of its sawmill at the village of Mission. In April, 1942, the parties entered into a verbal agreement whereby it was agreed that the

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defendant would sell the plaintiff all fuel wood and sawdust produced at the defendant's mill at Mission at the price of $1.50 per cord for fir wood and $1.50 per unit for fir sawdust, no charge for cedar and hemlock wood or other sawdust and take delivery at the defendant's mill of all such wood products and remove the same, including cedar and hemlock and further that the plaintiffs would keep clear the wood bunker at the mill. At the inception of said agreement, hemlock and cedar were not marketable, but later the defendant demanded 75 cents a cord for cedar and hemlock, which was agreed to by the plaintiffs as they had become marketable. From time to time the agreement was varied in three respects: (1) The defendant took from the plaintiffs the rights and obligations relating to sawdust; (2) by demanding payment for hemlock and cedar as above stated; (3) by increasing the price of fir fuel wood from $1.50 per cord to $2 per cord. These changes were reluctantly agreed to by the plaintiffs. The parties operated under the agreement until June 24th, 1943, when the defendant gave the plaintiffs notice that no more wood would be supplied the plaintiffs after June 30th, 1943.

The appeal was argued at Vancouver on the 13th and 14th of March, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Bull, K.C. (*Carmichael,* with him), for appellant: The respondents failed as to the alleged subsequent contract that the respondents for valuable consideration were entitled to purchase the fuel wood as long as the appellant carried on its business and are confined to the allegation that there was a verbal agreement between the parties that the plaintiffs would purchase from the defendant all fuel wood consisting of fir, cedar and hemlock at the defendant's mill at certain prices. No period of time for the duration of the agreement was mentioned. The facts do not allege a contract, but merely a continuing offer by appellant to respondents subject to revocation at any time by appellant and was revoked on June 24th, 1942: see Halsbury's Laws of England, 2nd Ed., Vol. 7, pp. 84-6; *Cooke* v. *Oxley* (1790), 3 Term Rep. 653; *Stevenson* v. *McLean* (1880), 5 Q.B.D. 346, at p. 350; *Routledge* v. *Grant* (1828), 4 Bing. 653; *Head* v. *Diggon*

(1828), 3 Man. & Ry. 97; *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463; *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616; *Offord* v. *Davies* (1862), 12 C.B. (N.S.) 748; *In re Crace. Balfour* v. *Crace,* [1902] 1 Ch. 733, at p. 737; *Great Northern Railway Co.* v. *Witham* (1873), L.R. 9 C.P. 16. There was error in holding that the evidence imposed on the respondents any obligations as stated. The respondents could have refused at any time to take delivery. The alleged contract was *nudum pactum.* The condition that the respondents should keep the bunkers clean involved no obligation on the respondents. In fact, the original offer was revoked several times and a new offer substituted.

Hamilton Read, for respondents: The original contract was the sale of all the wood coming from the mill at $1.50 a cord for fir and the cedar and hemlock free on condition that they keep the bunkers clean. Later as the respondents were making 50 cents a unit for the fir sawdust the appellant took the sawdust away from them notwithstanding the fact that the respondents still had to keep the bunkers clear. Two or three months after the April, 1942, contract the appellant charged them 75 cents a cord for the cedar and hemlock which they were previously getting for nothing. This was owing to cedar and hemlock later becoming marketable. The respondents reluctantly found they had to agree to this. In March, 1943, they increased the cost of fir from $1.50 to $2, to which the respondents unwillingly assented. It is submitted the contract could not be construed as a daily offer open to acceptance. There were mutual promises and obligations, and the respondents had to go to great expense to carry out the contract in purchasing trucks and setting up a business organization to store and sell wood and clearing the bunkers. The interviews between the parties contemplated a contract that would be a continuing one. Where a contract *de futuro* extending over a period of time is indefinite and unlimited, the burden of proving it is not perpetual is on the party so alleging: see *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.* (1875), L.R. 7 H.L. 550; *Crediton Gas Co.* v. *Crediton Urban Council,* [1928] Ch. 447.

Bull, replied.

Cur. adv. vult.

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23rd May, 1945.

O'HALLORAN, J.A.: The learned trial judge has found that in April, 1942, the plaintiffs-respondents, Gill Brothers, at present consisting of Sardara Singh Gill, Indar Singh Gill and Ganga Singh Gill, entered into a verbal contract with the defendant appellant Mission Sawmills Limited through its managing director Naranjan Singh Grewall, to pay for all wood fuel from the latter's sawmill at $1.50 a cord for fir and the cedar and hemlock free (varied in March, 1943, to $2 for fir and $1 for hemlock and cedar), on condition that they (the respondents) would keep the mill-wood bunker "clean," *viz.*, remove from the bunker the "waste" wood collecting there during mill operation.

The contract contained no stipulation as to its duration. The learned judge held that the six-day notice of termination given by the appellant on 24th June, 1943, was unreasonable, and found accordingly that the contract was wrongfully determined on 30th June, 1943. The Court having also found that, notwithstanding that notice, the respondents had endeavoured to fulfil their obligations under the contract but had been prevented from doing so by the appellant, then directed a reference to the registrar to ascertain the damages. Other issues were agitated at some length in the trial Court, but the case on appeal, as presented by counsel for the appellant, does not require us to do more than determine whether or not the learned trial judge was right in concluding that the discussions between the parties resulted in the above contract.

Counsel for the appellant confined himself to the submission that no contract had ever existed. He grounded his argument on two closely related points: (a) that what occurred was nothing more than a revocable offer by the appellant to sell wood, or a "continuing offer" as he described it; and (b) that there was no reciprocity of obligation. In answer to my request during the argument, counsel for the appellant after deliberation, amplified the foregoing submission in this way:

The transaction was nothing more than an intimation by the appellant, that it would supply fuel and sawdust at the prices mentioned. It was a continuing offer to be accepted from time to time by an act on the part of the respondents, *viz.*, taking delivery from the mill bunker. That during the time the offer was unrevoked the respondents must take deliveries at such time as would insure the bunker was kept clear. But there never was

any obligation on the part of the respondents to take delivery of the wood or clear the bunker.

In my judgment the kernel of this case lies in whether or not there was reciprocity of obligation. For without it there could not be a contract. After an examination of the testimony, I am left in no doubt that the evidence given by both sides conclusively supports the existence of the contract as found by the learned trial judge. I doubt if it is put better anywhere than it appears in the evidence of the main appellant witness Naranjan Singh Grewall, which confirms what the respondents' witnesses said. He testified in chief:

Now what was the arrangement then that you made with Sardara Singh with regard to fuel from the defendant company? What was the arrangement? I made the arrangement with him that he would have the wood and the sawdust from the Mission Sawmills at $1.50 a cord fir wood; $1.50 per unit for sawdust, and hemlock and cedar would be free as long as he kept the bunkers clean.

As long as he kept the bunkers clean? Yes.

And he testified also in cross-examination:

I understand Sardara Singh came to you and said, "I understand you are buying the Jap mill," and that is now known as the Riverside Lumber Company Limited and it is now Mission Sawmills? Yes.

And he came to you and said, "I understand you are buying it"? Yes.

And you were then negotiating with the Japanese at that time? Yes, I was.

And you then promised you would let them have the wood contract? That is right.

And you then told him the price would be $1.50 for fir; and nothing for cedar and hemlock, is that right? That is right.

And $1.50 for fir sawdust and nothing for the other sawdust? That is right.

And you said, "You will have to keep the mill clean"? That is right.

Now keeping the mill clean has a meaning in the lumber business, has it not? Yes.

It means keeping the bunker clean? In other words, as the bunker becomes full, the bunker is emptied by opening and dumping into a truck underneath? Yes.

In his reasons for judgment the learned judge referred to the foregoing contract as "common ground." The record of the proceedings at the trial bears that out. There were several hundred pages of testimony, it is true, but not a great deal of it related to this issue. The main issue to which the evidence was directed, was not the existence of a contract to remove the wood and keep the bunker clear, but rather, the duration of that contract and

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consequential damages for its breach. The latter issues arose because the respondents alleged they had subscribed for shares in the appellant company in June, 1942 (after the wood contract was in existence), in consideration of the life of the wood contract lasting as long as the appellant company operated the mill. The learned judge found against the respondents on that issue and the respondents have not appealed, and we are not concerned with it.

Turning back to examine the quoted evidence of Naranjan Singh Grewall it must be clear that there was an obligation upon the respondents to keep the bunker clear. His testimony discloses a complete contract, *viz.*, that in consideration of Gill Brothers agreeing to keep the bunker clear, Mission Sawmills Limited gave them an exclusive right to purchase all wood and sawdust from the mill at stated rates. That was a contract founded on reciprocal obligations enabling either party to sue the other on breach. Keeping the bunker clear was of first importance to the appellant. For if it were not kept clear, the sawmill would have to close down until it was cleared, or "cleaned" as more commonly expressed. The appellant called several witnesses to prove that when the bunker was full, the mill must close down until it was cleared. Naranjan Singh Grewall testified, supported by several witnesses, that if the mill attempted to operate while the bunker was full, it caused the conveyor chain to break with consequent delay and necessity for repairs.

This particular bunker had a capacity of two and a half cords, and with the mill in operation it would be filled many times each day. The mill company could have hired men to clear the bunker and take the wood out of the way, but that would add expense to its operation and perhaps compel it to go into the woodselling business. To avoid that expense it made an agreement with the respondents whereby they could have the wood in the bunker at stated prices provided they kept the bunker clear. I am satisfied by the evidence that the real purpose of the appellant's contract with the respondents, was not the sale of its waste wood, but the clearing the bunker and the removal of the wood, to save the appellant company the trouble and expense of keep-

ing the bunker clear and disposing of the wood removed therefrom. Naranjan Singh Grewall virtually said so:

> . . . there were a few times that my bunker was full and I complained about it and I told them [the respondents] they should not neglect to clean up my mill because that was the agreement; they were to keep the bunker clean.

With its own main witness so testifying in confirmation of what is submitted on behalf of the respondents, I fail to appreciate how the appellant can now adopt an opposite approach, or be successful if it does so. The course of the trial cannot be ignored by an appellate Court, *cf. Scott* v. *Fernie* (1904), 11 B.C. 91, and *Spencer* v. *Field,* [1939] S.C.R. 36. This is emphasized by appellant's counsel's answer to the Court at the trial:

> . . . I think you will agree my cross-examination was limited to the question of the bunkers—keeping the bunkers clean, which was admittedly a term of the contract.

In Taylor on Evidence, 12th Ed., Vol. 1, p. 492, sec. 783, citing *Stracy* v. *Blake* (1836), 1 M. & W. 168; 150 E.R. 392, the learned authors say:

> Where counsel on both sides so conduct a cause as to lead to an inference that a certain fact is admitted between them, the Court or the jury may treat it as proved, and, though the counsel do so with respect to some fact which goes to support one issue only, that fact, it seems, may be taken for granted for all purposes and as to the whole case.

That principle was applied in *Ecclestone* v. *Union Mining and Milling Co. Ltd.* (1932), 45 B.C. 297, at p. 300.

In my judgment, the argument for the appellant is rested upon a principle which the evidence in this case renders inapplicable. If the appellant had advertised in a newspaper that it would sell the wood from its bunker at $1.50 per cord to anyone who would come there and take delivery, we would have a general offer by the appellant which on its acceptance by any person taking delivery and making payment would be a concluded contract. Such a general offer might be revoked at any time before acceptance, *cf. Cooke* v. *Oxley* (1790), 3 Term Rep. 653; 100 E.R. 785. Again the appellant might have made an offer to the three members of Gill Brothers that it would sell them wood in its mill bunker at $1.50 per cord if they took delivery before the bunker was filled up and had to be cleared by the appellant. On taking of each delivery and payment there would be an accept-

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ance of the offer and a concluded contract. Such a continuing offer could of course be revoked at any time before its acceptance, *cf. Cooke* v. *Oxley, supra,* and *Routledge* v. *Grant* (1828), 4 Bing. 653.

In these two examples the offeree could accept only by performing the conditions contained in the offer. The contract, which could not come into existence until the acceptance of the offer would in itself be performed and completed by the acceptance required, *cf. Carlill* v. *Carbolic Smoke Ball Co.* (1892), 62 L.J.K.B. 257, and *Shipton* v. *Cardiff Corporation* (1917), 87 L.J.K.B. 51. But in the case at Bar quite distinctive considerations apply. Here the respondents' simultaneous counter-promise to clear the bunker was the consideration demanded by the appellant, and that counter-promise was so given by the respondents and so accepted by the appellant in return for the latter's promise to let the former have the wood in the bunker at stated prices.

In the case at Bar, the consideration for the appellant's promise was executory as it consisted in the acceptance of the counter-promise by the respondents, whereas in the two previous examples and to which appellant's argument is necessarily confined, the consideration was executed, since it consisted in the actual performance of the contract itself. In the case at Bar the parties made an express contract by simultaneously declaring their consent to each doing specified acts for the use of the other. The appellant consented to let the respondents have the wood from its bunker at stated prices on condition the respondents gave a simultaneous consent to keep the bunker clear. The transaction was founded on mutual recognition of enforceable reciprocal obligations. The parties' simultaneous declaration of mutual consents took place by their concurrence in a spoken form of words expressing their common intention.

Mutual recognition of enforceable reciprocal obligations is not only clearly manifested in the language the parties used, but is collected as well from the efforts made by the appellant to persuade the respondents to enter into the contract, the nature of the relations between the parties, and the importance to the appellant of the bunker being kept clear and the wood therefrom

removed from its own premises. The conduct of the parties over a period of 14 months is inexplicable on any other ground than that of an actual mutual consent to a contract upon the terms found by the learned trial judge: *cf. Brogden* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 666. In my judgment the proper inference from all the facts is, that by words and conduct a contract in the terms found in the Court below was concluded between the parties in April, 1942, and *cf. Richmond Wineries Western Ltd.* v. *Simpson et al.*, [1940] S.C.R. 1.

The appellant's submission that "keeping the bunker clean" had no special significance and was only descriptive of the method of taking delivery, finds not the slightest support in the evidence. It receives firm denial in the testimony of the appellant's main witness Naranjan Singh Grewall already quoted, wherein he told the respondents they must clear the bunker "because that was the agreement." Some point was made also of the fact that the appellant raised the prices of the wood. But the respondents agreed to those increases even if they did so reluctantly. If they had not done so, the appellant was at liberty to have given reasonable notice determining the contract, which at that time seems to have been quite profitable for the respondents.

The appellant also argued by analogy, that if the respondents had refused to keep the bunker clear, the appellant could not have sued them for damages. That is based entirely upon the premise that there was no contract between the parties. But as I must conclude for reasons above given, that there was a contract between the parties, that argument is lost in the collapse of its premise.

I would dismiss the appeal.

ROBERTSON, J.A.: In my opinion there is ample evidence to support the learned trial judge's finding as to the contract between the parties, under which they assumed mutual obligations. Shortly, the contract was that the defendant was to sell to the plaintiffs all the fuel wood coming from its mill at certain prices; and the plaintiffs were to take it and at all times to keep the bunkers clean and to pay for it monthly.

The contract did not fix a time as to its duration. Conse-

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quently it might not be a terminable agreement. See *Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.* (1875), L.R. 7 H.L. 550 and see *Crediton Gas Co.* v. *Crediton Urban Council,* [1928] Ch. 447.

No appeal, however, was taken against the judgment, holding that the defendant was entitled to terminate the contract upon reasonable notice and therefore it is not necessary to express any opinion upon this question.

With deference, I think the learned trial judge reached the right conclusion. The appeal is dismissed.

SIDNEY SMITH, J.A.: This appeal relates to an action in which the respondents sued the appellant for damages arising from failure to deliver wood fuel under an alleged contract between the parties. The respondents, Gill Brothers, are a firm of wood merchants; the appellant, Mission Sawmills Limited, operates a sawmill; all parties concerned in the dispute are Hindus; and the respondents are shareholders in the appellant company.

I am satisfied that the respondents proceeded to trial, and obtained judgment, on a contract which was not appropriately raised in their statement of claim until after the amendment thereof, presently to be mentioned. This is a matter for proper consideration, because where, as here, the negotiations are all verbal, the conduct of the parties sometimes speaks more clearly than their words; especially where, as here also, the words are very lacking in explicitness. I think the case is much elucidated by the subsequent conduct of the parties and by consideration of the complete transformation of one of the main issues in the Court below. Paragraph 4 of the respondents' statement of claim states that in April, 1942, it was verbally agreed between the parties that the respondents would purchase, and the appellant would sell, all fuel wood consisting of fir, cedar and hemlock made by the appellant; and goes on to say that no period of time for the duration of the agreement was agreed upon. In paragraph 5 it was alleged that a subsequent agreement was entered into in June, 1942, whereby, in consideration of the respondents purchasing shares in the appellant company, the agreement entered into in April, 1942, should continue so long as the appellant company carried on its operations. Damages

were claimed for breach of the agreement pleaded in paragraph 5 and no claim was made in respect of the agreement pleaded in paragraph 4. The alleged agreement of June, 1942, found no favour with the learned trial judge, who in his reasons for judgment decided against the respondents on that issue. The respondents thus originally advanced, as consideration for the obligation on the appellant to sell them the fuel wood, a contention which they were unable to sustain, and which they did not attempt to sustain on the hearing before this Court.

After trial and argument judgment was reserved. Before it was handed down the learned trial judge, on application by the respondents, and after further argument on the point, allowed an amendment to the statement of claim. This amendment set up a claim, in the alternative, based on the alleged agreement of April, 1942, pleaded in paragraph 4. In his reasons the learned judge found that this agreement of April, 1942, was a concluded contract between the parties, but that no time had been fixed for its duration; that the appellant by letter dated 24th June, 1943, gave the respondents notice that the agreement would be terminated on 30th June, 1943; that the respondents were entitled to reasonable notice of termination; that a notice of six days was not reasonable; that therefore the respondents were entitled to damages, and he directed a reference to the registrar to assess the amount thereof.

A great part of the evidence at the trial concerned the alleged contract of June, 1942, upon which the finding was adverse to the respondents. The only question argued on the appeal before us was that of "contract or no contract"—whether, as contended by the appellant, the agreement of April, 1942, was nothing more than a continuing offer to sell on the part of the appellant, which could be revoked by it at any time; or whether, as submitted by the respondents, and as found by the learned trial judge, this agreement amounted to a binding contract then concluded between the parties.

The respondents in their factum say that the agreement is clearly set forth by Grewall, the managing director of the appellant, Mission Sawmills Limited, in these terms:

> And you then promised you would let them have the wood contract? That is right.

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And you told him that the price would be $1.50 for fir; and nothing for cedar and hemlock, is that right? That is right.
And $1.50 for fir sawdust and nothing for the other sawdust? That is right.
And you said "You will have to keep the mill clean"? That is right.
Now keeping the mill clean has a meaning in the lumber business, has it not? Yes.
It means keeping the bunker clean? In other words, as the bunker becomes full, the bunker is emptied by opening and dumping into a truck underneath? Yes.

Under this arrangement the respondents were to obtain the fir wood for $1.50 a cord and the cedar and hemlock free; they were to obtain $1.50 per unit for fir sawdust and the cedar and hemlock sawdust free. The respondents had also to keep the bunker clean, *i.e.*, take the wood away as the bunker became filled up. The appellant submits that the subsequent conduct of the parties shows that this was no binding contract. He points out that in June, 1942, the right of the respondents to take the fir sawdust was revoked and given to someone else; and, at the same time, a charge was made of 75 cents a cord for the cedar and hemlock wood which previously had been free; later that this charge was increased to $1 per cord. Later again, in March, 1943, the fir fuel wood was raised from $1.50 to $2 per cord. The respondents say that they "unwillingly assented" to these increases; and that the increases must be regarded merely as variations of the original contract. But I think the implications are quite the reverse. I think this assent, unwilling or otherwise, points to knowledge on the part of the respondents that they could purchase the fuel wood only so long as the appellant chose to sell it to them, and no longer.

The appellant submits further that nowhere in the record is there any evidence that the respondents agreed to purchase the fuel, and that accordingly the agreement was *"nudum pactum"* —that it was unilateral merely, and so binding on neither party. I am unable to resist the force of this contention. I can find nowhere in the evidence any obligation on the respondents to take the fuel or any part of it. There is an offer to sell and there is nothing further. If therefore the respondents had determined not to take the fuel, the appellant would have had no recourse against them. This, I think, concludes the appeal in appellant's favour.

Upon the hearing before us the respondents argued that, as consideration for the sale to them of the aforesaid fuel wood, they were to "keep the bunker clean." But it seems to me that this was nothing more than descriptive of the method of taking delivery—in other words, the respondents were required to take delivery in accordance with the normal mechanics of the sawmill operation. In this respect it is important to observe that the respondents themselves would seem to have regarded the matter in the same light; for I can find no reference to any such obligation on their part in their statement of claim, or in any amendment thereto, or in any particulars they gave thereof. It was set up by the appellant by way of an alternative defence, but nowhere does it form any part of the pleadings of the respondents. I can only regard it as a new and artificially produced consideration, seized upon by the respondents in an attempt to prop up the appellant's offer of April, 1942, and raise it to the *status* of a binding contract.

The relevant principles of law are well known and are to be found conveniently in Anson on Contract, 18th Ed., 28-29. But principles may be simple while their application is most difficult. In this case, however, for the reasons I have given, I think that there was no binding contract, but merely a continuing offer on the part of the appellant which could be and, in the event, was in fact revoked. It is, perhaps, unnecessary to state that no question of credibility arises in this appeal. Had such been the case, my conclusions might well have been very different. But the questions at issue depend for their solution upon the inferences to be drawn from, and the legal interpretation to be given to, the words and conduct of those concerned in the dispute. That being so, I have felt myself free, with great respect, to arrive at conclusions other than those reached by the learned trial judge. I would allow the appeal.

Appeal dismissed, Sidney Smith, J.A. dissenting.

Solicitor for appellant: *C. Carmichael.*
Solicitors for respondents: *Hamilton Read & Paterson.*

C. A.
1945
May 31.

BREWSTER v. BREWSTER.

Husband and wife—Petition for divorce—Domicil—Jurisdiction—Declaration of intention—Sufficiency.

The parties were married in the Province of Alberta in August, 1939, where they lived together until May, 1941, when the husband, who was a musician, left his wife and went to Vancouver where some time later he took a course in electric welding and secured employment in the shipyards. While in Vancouver he made certain admissions indicating his intention to make his home in British Columbia. The wife came to Vancouver in January, 1942, but she did not live with her husband there. On the hearing of a petition for divorce it was held that although taking a course to qualify in another line of work is some indication to continue in that line and an intention to make his permanent home in British Columbia, it must not be overlooked that it is war work, and insufficient to establish, even by inference, a domicil of choice. The submission that admissions made by the husband indicate an intention to make his home in British Columbia or at least a preference for this Province, is not sufficient to establish domicil.

Held, on appeal, affirming the decision of COADY, J., that the learned judge must be held to have reached a right conclusion, particularly in view of the decision of this Court in *Henderson* v. *Muncey* (1943), 59 B.C. 312.

APPEAL by petitioner from the decision of COADY, J. of the 11th of April, 1944, on a petition for dissolution of marriage.

The appeal was argued at Vancouver on the 31st of May, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Branca, for appellant.
No one, for respondent.

O'HALLORAN, J.A. (*per curiam*): The learned trial judge dismissed the petition for dissolution of marriage on the ground of lack of jurisdiction arising from the failure of the petitioner to establish domicil in this Province. He supported that conclusion with the following reasons, which incorporate the relevant facts, namely:

The parties were married in Calgary, Alberta, on August 11th, 1939, and continued to live there until May, 1941, when the respondent deserted the petitioner. The petitioner came to Vancouver in January, 1942, and found the respondent living here. The parties have not lived together in British Columbia. The respondent was formerly a musician. Sometime after coming to Vancouver he took a course in electric welding and secured employment in the shipyards. It is urged that his taking this course to qualify

for another line of work in which he has since been engaged is some indication of an intention to continue in that line, and since employment in this industry is not available to him in Alberta, an intention to make his permanent home in British Columbia is a reasonable inference. I cannot overlook the fact, however, that the respondent is engaged in what may be termed war work, and while the preliminary course taken by him to fit himself for a particular branch of that work may be some evidence of an intention to continue in that line, it is obviously insufficient to establish even by inference a domicil of choice.

But the petitioner relies in addition on admissions made by the respondent, which admissions, if accepted, would seem to indicate an intention on the part of the respondent to make his home in British Columbia, or at least a preference for this Province as a place of residence rather than Alberta. But as stated by Lord Buckmaster in *Ross* v. *Ross,* [1930] A.C. 1, at pp. 6 and 7:

"Declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared intention."

The declaration of intention here, judged by that rule, would seem to me insufficient.

Counsel for the appellant relied upon *K.* v. *K.,* [1943] 2 D.L.R. 102, a decision of the Appellate Division of Nova Scotia (Sir Joseph Chisholm, C.J. and Archibald, J. dissenting), but an examination of that case indicates that there was much stronger evidence of domicil than exists in the case at Bar.

In our view the learned judge must be held to have reached the right conclusion, particularly in view of the decision of this Court in *Henderson* v. *Muncey* (1943), 59 B.C. 312 in which *Trottier* v. *Rajotte,* [1940] S.C.R. 203 and *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 457 are considered and applied.

The appeal is dismissed.

Appeal dismissed.

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

C. A.

1945

Mar. 22, 33; *April* 20.

REX v. LASTIWKA.

Criminal law—Charge of rape—Evidence—Corroboration—Defence of consent—Charge to jury—Criminal Code, Sec. 298.

The complainant, a girl 17 years of age, lived with a Mrs. Walker and her daughter on Broadway in Vancouver, the daughter being her room-mate. According to her testimony she first met accused at a dance on December 1st, 1944. About 10 o'clock on the evening of December 4th he asked her to go for a drive to which she consented. They drove to Stanley Park and after driving round the park, he parked the car in a remote area when they got into the back seat and he attempted to have intercourse with her. She resisted and in the struggle they fell out of the car. Then, on accused's promise to take her home, they got into the front seat when again he attacked her. He seized her by the throat, and forced her over into the back seat where he had connection with her. Accused then drove her to the corner of Burrard and Robson Streets where he made her leave the car knowing it was a long distance from her home. On her arrival home after 12 o'clock at night, she told Mrs. Walker and her daughter she had been raped. Mrs. Walker gave evidence of injury to her throat and marks of other physical injuries, that her clothes were torn and that her girdle, garters, pants and a shoe were in a damaged condition. On his arrest by the police accused denied having had sexual intercourse with complainant, but in the witness box he admitted having had intercourse with her but that it was with her consent. Accused was convicted and sentenced to 30 months' imprisonment.

Held, on appeal, affirming the decision of MANSON, J., that in examining the objection made to the learned judge's charge, it is kept in mind that this is not a case in which corroboration is essential. In view of the learned judge's direction with its consequent advantage to the defence, that there was no corroboration upon the decisive question of lack of consent, there is no need now to discuss what evidence, in the particular circumstances of this case, might or might not amount to corroboration or have supported corroborative inferences. Having reached the conclusion that no substantial objection to the learned judge's charge has been advanced, and that in any event there is no objection to which Code section 1014, subsection 2 would not apply, the appeal must be dismissed.

APPEAL by accused from his conviction by MANSON, J. and the verdict of a jury at the Winter Assize at Vancouver on the 21st of February, 1945, on a charge of rape.

The appeal was argued at Vancouver on the 22nd and 23rd of March, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Hurley, for appellant: This charge is under section 298 of the Criminal Code. The appellant is 24 years old. The girl

complainant is 17 years old, weighs 168 pounds and is active in playing games. She is training as a hairdresser. She lived with a Mrs. Walker and her daughter on West Broadway, Vancouver. Accused and complainant met at a dance on December 1st, 1944, and on December 4th accused took complainant for a drive in a car about 10 o'clock at night. They drove to Stanley Park and after driving around for a time accused stopped the car. They then sat in the back seat where he attempted intercourse. She resisted and in the struggle they fell out of the car. She then got into the front seat and later intercourse took place. It is submitted that there was consent. On driving back, complainant left the car at Burrard and Robson Streets and took a street-car to her home. On arrival she told Mrs. Walker that Lastiwka had raped her. The evidence in this case lacked corroboration and secondly, on the charge, the defence was not put to the jury adequately. In the charge there were insinuations and suggestions that the accused was not telling the truth. There is a statement by complainant that he hoisted her from the front to the back seat. In fact she went to the back seat without pressure. It is not an extravagant inference of consent when she went into the back seat. There is absence of corroboration of the complainant's story: see *Hubin* v. *Regem,* [1927] S.C.R. 442; *Rex* v. *Salman* (1924), 18 Cr. App. R. 50; *Rex* v. *Mudge* (1929), 52 Can. C.C. 402; *McIntyre* v. *Regem,* [1945] S.C.R. 134.

Bull, K.C., for the Crown: The evidence of accused corroborates the complainant's story. He signed a statement when in custody denying that he had sexual intercourse with the complainant and in the witness box he admitted this was untrue. The jury can convict on the complainant's evidence alone and the jury was properly charged in this regard. The marks of violence on complainant's body are corroboration. Her clothes were torn and garters torn off. The only matter that requires corroboration here is that there was consent and the girl's condition on reaching home is an answer to that.

Hurley, replied.

Cur. adv. vult.

20th April, 1945.

O'HALLORAN, J.A.: The appellant was convicted of rape at the last Vancouver Assize. When first taken into custody by the

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police he made and signed a statement denying that he had sexual relations with the 17-year-old complainant. In the witness box he said that statement was untrue and then admitted having had sexual relations with the complainant but testified it was with her consent. Whether there was consent or not became the vital point for the jury to decide, and the learned judge so instructed them more than once.

Counsel for the appellant attacked the learned judge's summing-up to the jury on two grounds, (a) that the defence was not put fully to the jury and (b) that the charge on corroboration was not adequate. As the argument developed, the two grounds appeared to be linked and then resolved into one submission, that the learned judge did not analyze the evidence leading to inferences of innocence with the same thoroughness and effect to be found in his analysis of the evidence leading to inferences of guilt.

Consideration of the whole of the charge against the background of the testimony renders that submission insubstantial.

Reading over the charge carefully it seems to me to preserve throughout a just balance between innocence and guilt so that the defence was in no wise prejudiced in the manner in which the learned judge stated it to the jury. I think the charge was fair and that the jury could not help so regarding it. If at times it may seem strong against the appellant it is because the evidence against him is strong.

In examining the objection made to the learned judge's charge it is kept in mind that this is not a case in which corroboration is essential. The jury were warned that while it was unsafe to convict upon the uncorroborated evidence of the girl, nevertheless, if they believed her they could convict upon her evidence alone. But they were also instructed that there was no corroboration of the girl's lack of consent. I do not think the jury could fail to appreciate the force of the latter direction, although one might wish more attention had been given to the language in which it was presented.

In view of the learned judge's direction, with its consequent advantage to the defence, that there was no corroboration upon the decisive question of lack of consent, there is no need now to

discuss what evidence, in the particular circumstances of this case, might or might not have amounted to corroboration or have supported corroborative inferences. Having reached the conclusion that no substantial objection to the learned judge's charge has been advanced, and that in any event, there is no objection to which Code section 1014, subsection 2 would not apply, I must dismiss the appeal.

ROBERTSON, J.A.: I agree with my brother O'HALLORAN. The appeal should be dismissed.

BIRD, J.A.: In this appeal from conviction of the accused on a charge of rape objection is taken to the charge to the jury on two heads: First, that the charge in respect to corroboration was inadequate and involved misdirection. Secondly, that the evidence led by the defence on the question of consent was not adequately put to the jury.

Substantially the only issue at the trial was "consent" or "no consent."

Upon consideration of the evidence and of the charge in relation to the second objection I am satisfied that the learned judge adequately canvassed the evidence of the accused in contrast to that of the complainant and other Crown witnesses. The defence of consent and the evidence led in support thereof in my opinion was examined and discussed by the trial judge in the course of his charge, as fully and fairly as was the evidence of witnesses called by the Crown.

There is not, in my opinion, any substance to this objection.

Consideration of the adequacy of the charge upon the question of corroboration and whether or not there was misdirection thereon requires examination of the evidence and of the charge to determine what the jury might reasonably have understood from the language used by the trial judge.

The complainant's description of the incident which occurred in a motor-car parked in a remote area of Stanley Park, within two hours prior to midnight, discloses on her evidence, a prolonged struggle, which culminated in a forced act of sexual intercourse. In the course of the struggle both fell from the car to the roadway and upon re-entering the car in consequence of

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accused's promise to take her home, accused again attacked her, seized her throat and forced her over the front seat to the back of the car. Various articles of her underclothing including her girdle, garters, pants and stockings were torn or otherwise damaged during the struggle. She said that thereafter the accused drove her to a point in downtown Vancouver, known to the accused to be a long distance from her home, where he required her to leave the car, although accused proposed to proceed up town in the car to a point much closer to her home.

Upon the trial accused described the incident in the motor-car as an act of sexual relations in which the complainant had freely and willingly engaged. He repudiated any suggestion of resistance on the part of the girl and contradicted her in all that part of her evidence which related to a struggle in the car. He acknowledged to be untrue, his denial that intercourse had then taken place, made in a voluntary statement to the police.

The charge on the subject of corroboration is open to criticism in that, with all deference, the directions in regard to possible corroboration of complainant's evidence failed clearly to express to the jury what evidence they might accept as corroboration.

It is the duty of the trial judge, in addition to warning the jury of the danger of convicting upon the uncorroborated evidence of the complainant, which was given here in the language approved in *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81, at p. 87, to tell them whether or not there is any evidence which they might accept as corroboration and to point out that evidence to them—*Rex* v. *Ellerton* (1927), 49 Can. C.C. 94. Then to leave to the jury the inferences to be drawn from it as well as the weight of that evidence—*Rex* v. *Picken* (1937), 52 B.C. 264, at p. 270; [1938] S.C.R. 457.

After directing the jury upon the law as to corroboration, and the sufficiency of circumstantial evidence in that connection, the learned trial judge said:

> It is my duty as a matter of law to instruct you as to what you may accept as being corroboration, within the law as I have charged you. . . . It is for you to say whether the evidence which I mention to you as possible corroboration has been proved to the degree of proof which I shall mention, or whether you believe it.

He then proceeded to summarize the evidence and to contrast the

evidence of the complainant and the accused upon the question of consent. In so doing he directed the attention of the jury to the evidence of the girl's foster-mother, Gladys Walker, and of her room-mate, Irene Walker, who deposed to the marks on her body and damage to her clothing observed by them upon her return about 12.30 a.m., and invited the jury to consider the damaged condition of the complainant's girdle, and garters, her pants and a shoe, the injury to her throat and other physical injuries in relation to the complainant's story of a violent struggle, as compared with the "peaceful sexual relations," described by the accused. The trial judge later commented upon the evidence that the accused permitted or required complainant to leave the car down town a long way from her home and in connection with that evidence invited the jury to consider it in the light of the two theories advanced by the Crown and defence respectively, *viz.*, rape or sexual relations by consent.

Although the learned judge did not, subsequently to the opening remarks quoted, expressly direct the jury that the condition of her clothing and of her person and the evidence of the complainant's foster-mother and her room-mate relative thereto, or that the incident of permitting or requiring complainant to leave the motor-car down town, might be taken as corroborative of the complainant's evidence of a violent struggle, as opposed to the defence of consent, nevertheless, I consider that the jury will have so understood the language used.

I reach this conclusion notwithstanding the remarks made by the trial judge near the conclusion of his charge, wherein he said:

> There is corroboration on the essential ingredients of the offence except with regard to consent.

This comment was made in the course of a discussion as to the extent to which the accused in his evidence corroborated that of the complainant. I take it to refer to, and I consider that the jury would have understood it, as a reference to corroboration furnished by the evidence of the accused.

Then was there misdirection, assuming that the comments made by the trial judge in relation to damage to clothing, marks of personal injuries, and to the incident relating to complainant leaving the car down town, were understood by the jury as direc-

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tions to evidence upon which, if believed, they might find corroboration of the complainant's story of a struggle?

In *Rex* v. *Salman* (1924), 18 Cr. App. R. 50, the Court of Criminal Appeal found that evidence of bruises, damage to clothing and the girl's condition on her return home, did not constitute corroboration of the girl's story of a rape, but there, I take it from the report, there was evidence of resistance on her part in the first instance, followed by submission held to amount to a real consent, which resistance furnished an explanation for the bruises. That decision, I take it, was founded upon the facts there under consideration as was said in *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81, at p. 91:

> The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged.

Here the only question in issue upon the evidence is whether intercourse followed a struggle which continued until the girl was overpowered, or that it took place with her consent fully and freely given.

In the particular circumstances under consideration here I am of opinion that the evidence of the complainant's foster-mother and of her room-mate as to her physical condition and the condition of her clothing immediately upon her return home, within less than an hour after the incident described by complainant and accused, was evidence in which the jury might find corroboration of complainant's story, in that, to adopt the language of Lord Reading, C.J. in the *Baskerville* case at p. 89, it constituted

> some additional evidence rendering it probable that the story of the [complainant was] true and that it [was] reasonably safe to act upon it.

Likewise, the conduct of the accused, and his evidence in that regard, in permitting complainant to leave the car down town, was in my opinion evidence upon which the jury might properly find corroboration of the complainant's story—*Hubin* v. *Regem*, [1927] S.C.R. 442, at p. 449.

Consequently I am unable to give effect to the able argument of Mr. *Hurley* on the heads of misdirection as well as the adequacy of the charge upon corroboration.

I would dismiss the appeal.

Appeal dismissed.

IN RE SUPERINTENDENT OF CHILD WELFARE AND CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER AND *IN RE* FRANCES NYSTROM, AN INFANT.

C. C.
1945
March 2; April 26.

Child—Public charge—Apprehension—Protection of Children Act—Residence and Responsibility Act—B.C. Stats. 1943, Cap. 5, Sec. 40—R.S.B.C. 1936, Cap. 246—B.C. Stats. 1938, Cap. 48, Sec. 4 (2).

On the 28th of September, 1944, the judge of the juvenile court in Vancouver ordered that an infant, Frances Nystrom, be delivered into the custody of the Children's Aid Society and that the Province of British Columbia pay the Society $6.30 weekly until the child reaches the age of 18 years. The Province appealed, contending that the city of Vancouver was liable for the support of the child. One Gladu, his wife (mother of Frances Nystrom by a former marriage) and the child came to Vancouver in December, 1942. On January 5th, 1943, he joined the armed forces and during the year previous to the child's apprehension he was stationed in barracks at Little Mountain in Vancouver for over three weeks. It was contended that his time in barracks would not operate as a ban to the requirement of "a continuous period of one year," as set out in the Residence and Responsibility Act, R.S.B.C. 1936, and amending Acts.

Held, that the word "barracks," as used in section 4 (2) of said Act, as amended by Cap. 48, B.C. Stats. 1938, Sec. 4, Subsec. (2), means "a set of buildings erected or used as a place of lodgement or residence for troops." Consequently Gladu's time in barracks would not count towards his continuous residence of one year in any particular area.

It was further contended that as his duties as a soldier were that of an "orderly," the provisions of said section 4 (2) did not apply to him.

Held, that the Legislature did not have in their minds any thought of an army "orderly." They undoubtedly were considering the situation of a hospital "orderly" and the appeal is dismissed.

APPEAL by the Province of British Columbia from the decision of the judge of the juvenile court ordering that an infant Frances Nystrom be delivered into the custody of the Children's Aid Society of the Catholic Archdiocese of Vancouver and that the Province do pay a weekly sum to the society towards costs of social assistance until the child reaches the age of 18 years. Argued before BOYD, Co. J. at Vancouver on the 2nd of March, 1945.

Collins, for appellant.

A. DeB. McPhillips, for respondent.

J. B. Roberts, for the city of Vancouver.

Cur. adv. vult.

C. C.
1945

IN RE SUPERINTENDENT OF CHILD WELFARE AND CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER AND IN RE FRANCES NYSTROM, AN INFANT

26th April, 1945.

BOYD, Co. J.: This is an appeal under section 40 of the Protection of Children Act, B.C. Stats. 1943, Cap. 5, from a judgment of Helen Gregory MacGill, a judge of the juvenile court of the city of Vancouver ordering an infant Frances Nystrom be delivered into the custody of the Children's Aid Society of the Catholic Archdiocese of Vancouver and ordering the Province of British Columbia to pay to the said Children's Aid Society the sum of $6.30 weekly until the said child reaches the age of 18 years.

In chronological order the admitted facts are: (1) In April, 1940, one Gladu married Loretta Nystrom in Winnipeg, Manitoba. Loretta Nystrom had one child, Frances Nystrom (aged 7) by a former marriage. (2) About December 25th, 1942, the Gladus' and the child came to Vancouver and took up residence at 568 Powell Street, city of Vancouver. (3) On January 5th, 1943, Gladu joined the armed forces and proceeded to barracks at Little Mountain in the city of Vancouver. (4) About January 10th, 1943, he proceeded to the army camp at Gordon Head, Vancouver Island, where he stayed until 6th October, 1943. (5) On 7th October, 1943, he returned to Little Mountain and remained there until 16th October, 1943, and then went on subsistence until the 21st of June, 1944. Subsistence in this particular case means that Gladu would, according to the evidence, receive allowances to pay for a room but would receive his meals in barracks. He returned to Little Mountain on July 29th, 1944, remained there for about two weeks and then went back on subsistence and remained on subsistence until sometime after the 28th of September, 1944.

The child was apprehended on the 28th of September, 1944, and this is the important date, as it was then that she became a public charge. The argument of counsel for the appellant is shortly that the Province cannot be held liable for the support of the child, but rather it should be the city of Vancouver (being a local area) as the residence of Gladu from the 25th of December, 1942, was the city of Vancouver, and that his time in barracks would not operate as a ban to the requirement of "a continuous period of one year," as set out in the Residence and Responsibility Act, R.S.B.C. 1936, and amending Acts.

On the other hand, counsel for the respondent submits that section 4 (2) of the Residence and Responsibility Act, as amended by B.C. Stats. 1938, Cap. 48, Sec. 4, Subsec. (2), covers the situation. This section is as follows:

> 4. (2.) The period of time during which a person has lived in a local area within any hospital, school, college, barracks, children's home, or other institution supported in whole or in part by public funds, or within any . . . foster-home where he is maintained at public expense, or within any work camp operated by the Government . . . relief or youth training project, shall not be deemed to be a period of residence within that local area; but the provisions of this subsection shall not apply in the case of a person who is a regular member of the paid staff, such as manager, director, or foreman, graduate nurse, orderly, skilled mechanic, or office worker of the institution, foster-home, or work camp within which he lives, nor in respect of the first three months of the period during which a person lives as a patient in a hospital.

It seems to me to be clear that the plain and rational meaning (in other words the natural and ordinary meaning) of the word "barracks" as used in the Residence and Responsibility Act Amendment Act, 1938, and the meaning intended by the Legislature when passing the enactment was that the word meant as set out in Murray's Dictionary:

> A set of buildings erected or used as a place of lodgement or residence for troops.

Consequently Gladu's time in barracks would not count towards his continuous residence of one year in any particular area.

However, counsel for the appellant argues further, that even if the word "barracks" has its rational meaning as above, that the "exception to the exception" as counsel for the city aptly expresses it, would take Gladu out of the operation of the amendment in that he at one time in his duties as a soldier was an orderly. The specific words are:

> The provisions of this subsection shall not apply in the case of a person who is a regular member of the paid staff, such as manager, director or foreman, graduate nurse, orderly, [etc.].

I cannot see that our legislators had in their minds any thought of an army orderly. They undoubtedly were considering the situation of a hospital orderly. Could it ever be said that Gladu was on the paid staff of the battalion or regiment with which he was serving? I think not.

The appeal is dismissed.

Appeal dismissed.

C. C.
1944
Nov. 24.
1945
May 3.

IN RE CITY OF PRINCE RUPERT AND CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER AND *IN RE* SHARON DEXTER, AN INFANT.

Child—Public charge—Apprehension—Protection of Children Act—Residence and Responsibility Act—B.C. Stats. 1943, Cap. 5, Secs. 32 (3) and 40—R.S.B.C. 1936, Cap. 246—B.C. Stats. 1938, Cap. 48, Sec. 4 (1); 1943, Cap. 55, Sec. 3.

On the 28th of September, 1944, the judge of the juvenile court in Vancouver made an order that the city of Prince Rupert do pay to the Children's Aid Society of the Catholic Archdiocese of Vancouver the sum of $6.30 weekly in respect of an infant Sharon Dexter until the said child reaches the age of 18 years. The city appealed on the grounds that the child's residence was not in the city of Prince Rupert, but in the city of Vancouver; that the city of Prince Rupert had not been given notice of any proceedings until the 16th of September, 1944, and that the child was not legally apprehended in the first place and therefore the municipality of Prince Rupert cannot be made liable for its maintenance. From October, 1939, the family lived in Prince Rupert. The father and mother were divorced on May 15th, 1943, the mother being given the custody of the child. She moved to Vancouver with the child in July, 1943, and on January 11th, 1944, the child was apprehended at the Catholic Women's Hostel where she was with her mother, who at the time was having delusions, and shortly after admitted to the mental hospital at Essondale. The child was presented to the juvenile court by the Children's Aid Society on January 13th, 1944, and on the 16th of September, the city of Prince Rupert was notified of an application for an order committing the child to the care and custody of the Children's Aid Society and it was the intention to ask for an order against the city of Prince Rupert.

Held, that the child was apprehended on January 11th, 1944, and the date of apprehension is the governing date that the child became a public charge and under section 32 (3) of the Protection of Children Act and section 4 (1) of the Residence and Responsibility Act, the residence of the child is deemed to be Prince Rupert. The notice of the 16th of September, 1944, is a good and sufficient notice under the Act and as to the third contention, there was no objection taken before the magistrate as to her right to determine the matter, and the child was properly before the magistrate's court. The appeal is therefore dismissed.

APPEAL by the city of Prince Rupert from the order of the judge of the juvenile court of Vancouver of the 28th of September, 1944, whereby the said city should pay the Children's Aid Society of the Catholic Archdiocese of Vancouver the sum of

$6.30 weekly in respect to an infant Sharon Dexter until said child reaches the age of 18 years. Argued before BOYD, Co. J. at Vancouver on the 24th of November, 1944.

A. R. MacDougall, for appellant.
A. DeB. McPhillips, for respondent.

Cur. adv. vult.

3rd May, 1945.

BOYD, Co. J.: This is an appeal under section 40 of the Protection of Children Act, B.C. Stats. 1943, Cap. 5, from an order of Helen Gregory MacGill, judge of the juvenile court, city of Vancouver, made the 28th of September, 1944, whereby the city of Prince Rupert should pay to the Children's Aid Society of the Catholic Archdiocese of Vancouver the sum of $6.30 weekly, in respect to Sharon Dexter, born February 24th, 1941, until the said child reaches the age of 18 years, this sum having been established as a reasonable sum as required by the said Act.

No evidence was called, but by consent of counsel a certified copy of the transcript of the proceedings before the juvenile court was submitted and the facts as shown by the transcript were agreed upon. In chronological order the facts are:

1. The father and mother of the child Sharon Dexter were Thomas Dexter and Irene Dexter. The father from October, 1939, to the present time was a resident of Prince Rupert. The father and mother were divorced in Prince Rupert on the 15th of May, 1943. 2. The mother was given the custody of the child Sharon Dexter. 3. The mother lived in Prince Rupert until July, 1943, when she came to the city of Vancouver, bringing the child with her. 4. The child was apprehended on the 11th of January, 1944, at the Catholic Women's Hostel, 11th Avenue, city of Vancouver, where the child was with her mother. The mother at that time was having delusions. 5. The child was presented by the Children's Aid Society in Court on the 13th of January, 1944, under section 7 (*k*) of the Protection of Children Act. 6. On or about the 17th of March, 1944, the mother was admitted to Ward X in the General Hospital, and on the 21st of March was admitted to the Provincial Mental Hospital at Essondale. 7. On or about the 16th of September,

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IN RE CITY OF PRINCE RUPERT AND CHILDREN'S AID SOCIETY OF THE CATHOLIC ARCHDIOCESE OF VANCOUVER AND IN RE SHARON DEXTER, AN INFANT

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1944, a notification was given to the city of Prince Rupert of an application for an order committing the child to the care and custody of the Children's Aid Society of the Catholic Archdiocese and that it was the intention of the Society to ask for an order against the city of Prince Rupert. 8. On the 28th of September, 1944, the order appealed from was made by the aforesaid judge of the juvenile court.

The appellant argued as follows: 1. The child's residence was not the city of Prince Rupert; it was the city of Vancouver. 2. The city of Prince Rupert had not been given notice of any proceedings until the 16th of September, 1944. 3. The child was not legally apprehended in the first place and therefore the municipality of Prince Rupert cannot be made liable for its maintenance.

I will deal with each of these in turn.

(1) Section 32, subsection (3), of the Protection of Children Act, B.C. Stats. 1943, Cap. 5, reads as follows:

> 32. (3.) For the purposes of this Act, any child shall be deemed to belong to the local area in which the child has last established residence in accordance with the provisions of the "Residence and Responsibility Act"; but in the absence of evidence to the contrary, residence in the local area in which the child was taken into custody shall be presumed.

Section 4 (1) of the Residence and Responsibility Act, R.S.B.C. 1936, Cap. 246, as amended by B.C. Stats. 1938, Cap. 48, Sec. 4 (1); 1943, Cap. 55, Sec. 3, reads as follows:

> 4. (1.) Subject to the provisions of subsections (2) and (3), every person other than a minor who is single or who is the head of a family shall, for the purposes of this Act, be deemed to be a resident:—
>
> (*a.*) Of that local area in which he has most recently completed a continuous period of residing therein for one year or more without having received social assistance, except as a patient in the general hospital for not more than three months.

The child arrived with her mother in Vancouver in July, 1943, and was apprehended on the 11th of January, 1944. It seems absolutely clear to me that the date of apprehension of the child is the governing date, as it was then, that the child became a public charge. Courts do not deal with matters that may arise after the issue of a writ. The references are many. As counsel for the respondent states:

> It is elementary that the facts to be adjudicated upon must be those existing when the cause of action arises.

I agree with the submission of the respondent in his argument as to the date of the apprehension, and do not see how it concerns me whether or not the mother was committed to Essondale on the 21st of March, 1944. I refer also to section 32 (9) of the Protection of Children Act, which is as follows:

32. (9.) Where an order is made under this section for any payment for the maintenance and supervision of a child, the period for which the payment shall be made shall commence at the time the child was apprehended, irrespective of the date of the order of committal of the child or the date of the order for the payment, . . .

(2) In regard to the submission that the city of Prince Rupert was not given the necessary notification to which it is entitled, I think that the notice given to the corporation on the 16th of September, 1944, is a good and sufficient notice under the Act. The corporation was in no way prejudiced. It appeared at the hearing. The delay between the date of apprehension and the hearing is accounted for by the usual delays in lawsuits and similar matters where numerous enquiries have to be made and numerous matters taken into consideration before the final hearing. We all know "Bleak House." It may be unfortunate to penalize a municipality which has had the misfortune (as counsel for the appellant states) at some period of time to have been the residence of the parents.

(3) I see no merit in No. 3. Even although the father at some time or other had decided to take proceedings, there was apparently no objection made before the magistrate as to her right to determine this matter, and it seems to me that the child was properly before the magistrate's court. Further, I do not see how I could deal with this on appeal, as there is no question but the child was in need of protection within the meaning of the Protection of Children Act and the magistrate dealt with the question.

The appeal is dismissed.

Appeal dismissed.

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April 23, 24; *May* 15.

REX v. FLEMING.

Criminal law—Assaulting a police officer engaged in the execution of his duty—Charge—Acquittal by jury—Appeal by Crown—Grounds of misdirection—Criminal Code, Sec. 296.

Upon a jury acquitting accused on a charge of assaulting a police officer engaged in the execution of his duty, the Crown appealed on the grounds that there was misdirection in not instructing the jury that they could bring in a verdict of guilty of common assault and that there was error in his instruction to the jury concerning the right of a police officer to arrest accused without a warrant in the circumstances.

Held, that Crown counsel cannot, by remaining silent, allow the case to go to the jury for decision upon a charge that is considered erroneous in law and then appeal from a verdict of acquittal resulting from such instruction. In the case at Bar Crown counsel by not objecting elected to have the issues decided by the jury upon directions that counsel now submits were faulty. That is a submission which is not open to the Crown to advance in the absence of objection below.

APPEAL by the Crown from the acquittal by MACFARLANE, J. and the verdict of a jury at the Fall Assize at Victoria on the 19th of January, 1945, on a charge of assaulting a police officer when engaged in the execution of his duty. On December 13th, 1944, at about 12.45 a.m. a police officer named Hiscock, while on police patrol car duty, received a radio message from police headquarters and as a result proceeded to 1126 Richardson Street in Victoria where he found two detectives and received information of a prowler with a description of him. He then got into his car and drove east on Richardson. After going a block and a half he saw accused. He pulled up to the kerb and stopped his car. The accused came to the door of the car and the policeman saw that he was carrying a brown paper shopping-bag in his right hand, and a whisky bottle, two thirds full, was protruding from his overcoat pocket. He asked the policeman if he was going to town. The policeman replied "What have you been doing the last 15 minutes?" Accused replied "What business is that of yours and who the hell are you?" The policeman then said "I asked you a question, and if you don't give me a satisfactory answer, you will have to come to the police station." Accused then said "You cannot take me to the police station, you

have no warrant." The policeman then asked him for his registration card to which he replied "I don't have to show you my bloody registration card." The policeman then took hold of him, but he pulled away. The policeman then turned to the car and accused took the bottle from his pocket and hit the policeman on the head with the bottle. He was dazed and fell to his knees. He got up and took out handcuffs, but the accused kicked him in the groin and he let go the handcuffs. After some scuffling the policeman got out his gun and ordered him into the car, then two detectives came to his assistance and they took accused to the police station. Accused denied that he used any bad language and that the bottle struck the policeman by accident, that he was throwing the bottle away and the policeman's head came up suddenly while he was throwing it and it hit him on the head.

The appeal was argued at Victoria on the 23rd and 24th of April, 1945, before SLOAN, C.J.B.C., O'HALLORAN and ROBERTSON, JJ.A.

Maitland, K.C., A.-G. (*Gordon Cameron,* with him), for appellant: Accused assaulted a police officer. The charge is under section 296 of the Criminal Code. The police officer is entitled to protection. There is direct conflict of evidence as to what happened at the time of the arrest. The policeman received instructions that a man was prowling around an apartment-house on Richardson Street shortly after 12 o'clock at night. The policeman's action comes within both section 30 and section 36 of the Code. Section 646 is different. At night one can be arrested for any offence. An officer has a right to arrest one whom he believes to have committed an offence. This policeman in the exercise of his duty had reasonable cause for believing that accused committed an offence at night. On justification see *Anderson* v. *Johnson* (1918), 43 D.L.R. 183; *Swart* v. *Rickard* (1896), 42 N.E. 665. On the charge to the jury see *Rex* v. *Stewart* (1938), 71 Can. C.C. 206; *Rex* v. *Edmonstone* (1907), 15 O.L.R. 325; *Rex* v. *Scherf* (1908), 13 B.C. 407; *Rex* v. *Ashe* (1922), 50 N.B.R. 82; *Rex* v. *Cook* (1906), 11 Can. C.C. 32.

Harvey, K.C., for respondent: The charge is under section 296 of the Code. The accused's evidence is corroborated by the

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witnesses for the Crown. A question of fact as to assault was before the jury and the jury acquitted him. The grounds of appeal are questions of mixed law and fact and not available to the Crown. The question of right of arrest is beside the point, it is a question whether the policeman was assaulted or not. It is a charge of assault pure and simple: see *Rex* v. *Turner* (1938), 52 B.C. 476; Archbold's Criminal Pleading, Evidence & Practice, 31st Ed., 307; *Rex* v. *Grotsky* (1935), 64 Can. C.C. 345. There is no jurisdiction on a question of fact: see section 1013, subsection 4 of the Criminal Code. There is only one offence, *i.e.*, assault and it is not divisible: see Tremeear's Criminal Code, 5th Ed., 336; *Reg.* v. *Forbes and Webb* (1865), 10 Cox, C.C. 362; *Rex* v. *Maxwell and Clanchy* (1909), 2 Cr. App. R. 26; *Rex* v. *Louie Yee*, [1929] 1 W.W.R. 882, at p. 885; *Rex* v. *Stewart*, [1938] 3 W.W.R. 631; *Rex* v. *Melyniuk and Humeniuk*, [1930] 2 W.W.R. 179; *Gilbert* v. *Regem* (1907), 38 S.C.R. 284. The policeman had the right to arrest the accused, but the right to arrest without a warrant is a different matter: see Tremeear's Criminal Code, 5th Ed., 716. When the policeman asked him for his registration card and he refused to produce it, he had no right to arrest him. Sections 30 and 33 of the Code have no application unless the offence is one in which he can be arrested without a warrant: see *Rex* v. *Ward* (1923), 53 O.L.R. 569, at p. 571; *Rex* v. *Schyffer* (1910), 15 B.C. 338. The Crown took no objection to the charge: see *Wexler* v. *Regem* (1939), 72 Can. C.C. 1; *Rex* v. *Munroe* (1939), 54 B.C. 481.

Maitland, in reply, referred to Russell on Crimes, 8th Ed., Vol. 1, pp. 646, 648 and 684.

Cur. adv. vult.

On the 15th of May, 1945, the judgment of the Court was delivered by

SLOAN, C.J.B.C.: The respondent Fleming was charged with assaulting a police officer engaged in the execution of his duty. Upon his trial at the Victoria Assize the jury found him not guilty of the offence charged. From that verdict the Attorney-General appeals to us and appeared himself in support of his contention that the learned trial judge misdirected the jury. The

misdirection complained of was, first, that the trial judge erred in not instructing the jury that they could bring in a verdict of guilty of common assault, and secondly, that the learned trial judge erred in his instruction to the jury concerning the right (or not) of the police officer to arrest the respondent without a warrant in the circumstances herein.

The Attorney-General considers the principles involved to be of manifest importance. In that opinion we concur. There is, however, another principle we consider to be of equal consequence. It is that Crown counsel cannot, by remaining silent, allow the case to go to the jury for decision upon a charge that is considered erroneous in law and then appeal a verdict of acquittal resulting from such instruction. In the case at Bar Crown counsel by not objecting elected to have the issues decided by the jury upon directions the Attorney-General now submits were faulty. That is a submission which is not open to the Crown to advance in the absence of objection below.

We concur in and approve of the judgments of the late Chief Justice MARTIN and Mr. Justice SLOAN, as he then was, now C.J.B.C., in *Rex* v. *Munroe* (1939), 54 B.C. 481.

It must be understood that we have not considered the other interesting points argued in the appeal and reach no conclusion upon the validity or invalidity of the impugned charge.

The appeal is therefore dismissed.

Appeal dismissed.

SIMMONS & McBRIDE LTD. v. KIRKPATRICK *ET AL.*

Contract—Specific performance—Non-delivery—Loss of profits—Measure of damages—R.S.B.C. 1936, Cap. 250, Sec. 56.

The defendants are the executors of the will of S. F. Kirkpatrick, deceased. The will specifically bequeathed to the widow and executrix Mrs. Kirkpatrick a Cadillac car. Shortly after the death of deceased, at a meeting with the two executors, one Shaw was authorized by them to sell the car. Shaw arranged a sale to the plaintiffs (undertakers) for $1,200, which the plaintiffs paid to one *Ray*, who handled the sale as the executors' solicitor, on January 10th, 1944, and the sale was consummated and constructive possession of the car delivered by *Ray's* letter of

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April 14th, 1944. The car, to the knowledge of Shaw and *Ray*, was to be used by the plaintiffs as a hearse, but after the purchase the plaintiffs found that workmen and material were not available and they then intended to use the car to convey mourners to and from cemeteries. After the sale and before the plaintiff had taken physical possession of the car, Mrs. Kirkpatrick raised an objection to the sale and the executors sought to cancel the sale and return the cheque for $1,200. The plaintiffs refused to accept the cheque and brought action for specific performance and for damages for non-delivery of the car when delivery should have been made on April 14th, 1944.

Held, that the title to the car is not and never was in the widow. The title was in the executors and since April 14th, 1944, has been in the plaintiffs. There will be a decree of specific performance. As to damages, the contract only contemplated the use of the car as a hearse and the plaintiffs are entitled to the amount paid in insurance premiums on the car and to general damages of 5 per cent. per annum on the sum of $1,200 from January 10th, 1944.

ACTION for specific performance of a contract for the sale of an automobile and for damages to cover losses suffered from non-delivery of the car on the date on which it ought to have been delivered. The facts are set out in the reasons for judgment. Tried by WILSON, J. at New Westminster, on the 9th of May, 1945.

G. F. McMaster, for plaintiffs.
Bull, K.C., and *A. Hugo Ray*, for defendants.

Cur. adv. vult.

8th June, 1945.

WILSON, J.: The plaintiff company carries on business as an undertaker. The defendants are the executors of the will of S. F. Kirkpatrick, deceased.

The will of the deceased specifically bequeathed to the widow and executrix Lina Dorothy Kirkpatrick a Cadillac automobile. Shortly after the death of the deceased, George N. J. Shaw, at a meeting with the two executors, was authorized by them to sell a boat belonging to the deceased, and the Cadillac car. Mrs. Kirkpatrick, who must be taken to have known of the term of the will giving the car to her, imposed no limitation, as to user, by the persons purchasing the car. She did not contend that the executors had no right to sell the car. I think she must be taken to

have agreed to the sale of the car by the executors as such. Mr. Shaw eventually arranged the sale of the car to the plaintiffs for the sum of $1,200 cash, which the plaintiffs paid. The actual sale was handled on behalf of the executors, by Mr. *Ray,* their solicitor, and the purchase-money was paid him by cheque on January 10th, 1944. The sale was consummated, and constructive possession of the car delivered by Mr. *Ray's* letter of April 14th, 1944. The car, to the knowledge of Mr. Shaw and Mr. *Ray,* whose capacity as agent for the executors is not denied, was to be used by the plaintiffs as a hearse. After the sale, and before the plaintiffs had taken physical possession of the car, the defendant Mrs. Kirkpatrick raised an objection to the sale with the result that the executors sought to cancel the sale and to return the plaintiffs' cheque for $1,200. The plaintiffs refused to accept the cheque and now bring this action for specific performance of the contract of sale and for damages for non-delivery of the car when delivery should, as I find, have been made, *viz.,* on April 14th, 1944. The car was bought for conversion into a hearse, but the plaintiffs, after the purchase, found that it could not be converted as workmen and materials were not available. They therefore changed their plans and intended to use the car to convey mourners and relatives to and from cemeteries. The defendants were not notified before the sale, of this change in the intended use of the car.

I have no difficulty in finding that a binding contract of sale was made between the plaintiffs and the defendants. It has been argued that the sale was made by the defendants as executors and that, since the car was given by the will to Mrs. Kirkpatrick the executors had no right to sell. This is answered by the well-established rule that persons buying from executors' assets of an estate are not bound to enquire into the application of the purchase-money.

As stated by Lord Mansfield, Ch. J. in *Whale* v. *Booth* (1784), M. 25 Geo. 3, B.R., and cited in the report of *Farr* v. *Newman* (1792), 4 Term Rep. 621; 100 E.R. 1211 n.:

> The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; . . . It would be monstrous if it were otherwise; for then no one would deal with an executor.

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Further, one executor of several may exercise this power (*Jacomb* v. *Harwood* (1751), 2 Ves. Sen. 265; 28 E.R. 172). The fact that there may have been in the will a specific bequest of the thing sold does not limit the power of the executor to sell it (*Clark* v. *Mott* (1907), 10 O.W.R. 940).

I think, therefore, that the sale by the executors to the plaintiffs was a binding contract which the plaintiffs are entitled to enforce. I think, too, that this sale must be taken to have been made on behalf of both executors. Mr. *Ray* purported to make the sale on behalf of the estate, and there is no evidence denying that he acted as agent for both executors.

The plaintiffs ask for specific performance of the contract and for damages to cover losses suffered by them from non-delivery of the car on the date on which it ought to have been delivered.

Regarding damages, the Sale of Goods Act, R.S.B.C. 1936, Cap. 250, Sec. 56, provides as follows:

> 56. (1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3.) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Dealing first with subsection (3), my task would be an easy one if in this case the plaintiffs had bought another car to take the place of the car the defendants wrongfully refused to deliver. In that case the measure of damages would be the difference between $1,200 and the price which the plaintiffs were compelled to pay for another car. However, the evidence shows that despite their best endeavours the plaintiffs were unable to buy a car of the type of the one sold. Therefore I have no evidence to act on in fixing damages on this basis. That is, there was no available market within the meaning of the section.

The plaintiffs claimed special damages for non-delivery, and led evidence to show that they have had to hire limousines to convey mourners and relatives to funerals and that this has resulted in their losing the profits they would have made if they

could have used the car here in question for that purpose. The evidence of loss is clear and it remains to be seen if such loss is damage chargeable to the defendants. It is clear that the loss claimed for here is a "loss of profits" and therefore subject to the rule laid down in such cases as *British Columbia Saw-Mill Co.* v. *Nettleship, infra.*

It is claimed that this is under subsection (2) of section 56 of the Sale of Goods Act a

> loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

The third rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341; 96 R.R. 742, followed in numerous decisions, and notably in *British Columbia Saw-Mill Co.* v. *Nettleship* (1868), L.R. 3 C.P. 499 is this: Where special circumstances are known or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract and is recoverable. Later decisions, and particularly that in *British Columbia Saw-Mill Co.* v. *Nettleship* have qualified this rule to this extent (*vide* Willes, J. at p. 509):

> . . . the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.

As pointed out by Stuart, J. in *Canada Foundry Co. Ltd.* v. *Edmonton Portland Cement Co.*, [1917] 1 W.W.R. 382, the tendency is to be more hesitant in awarding damages for loss of profits in cases like *Hadley* v. *Baxendale* and *British Columbia Saw-Mill Co.* v. *Nettleship*, where the actions are against carriers, than in actions against manufacturers or builders. This is made clear in *Smeed* v. *Foord* (1859), 1 El. & El. 602, where Crompton, J. says at p. 616:

> We must not, in my opinion, extend the doctrine of *Hadley* v. *Baxendale*, which was the case of a carrier, intrusted as such by one party, with goods to be delivered to another, to a case like the present, in which the contract was for the delivery, by one of the contracting parties to the other, of a specific article, intended for a particular purpose known to both of them.

But here we have a case where the only special circumstance

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brought home to the vendor at the time of sale was that the car was to be used as a hearse. This use was found to be impossible. Plaintiffs now say they would have used it for passengers. No knowledge of such intended use is brought home to the vendors. Counsel for the plaintiffs says that I should imply from the nature of the plaintiffs' business, which was admittedly known to the defendants, that the defendants must have known the car was to be used commercially. But how can I, when it has been proved to me that defendants only know the car was to be used as a hearse, imply that they knew it was to be used as a passenger vehicle, and accepted this special circumstance in such a way that it formed part of the contract? I might, from evidence that the defendants knew the nature of the plaintiffs' business, have attributed to them a knowledge that the car was to be used commercially and for profits and held them in damages for the loss of such profit. But where a particular intention as to use is communicated to the defendants, it must surely displace any general idea they may be held to have had of the intended use of the car and the contract cannot be held to embrace both the general and the particular use. With some reluctance I am compelled to find that the contract only contemplated the use of the car as a hearse, and that the plaintiffs are entitled only to $20.90 paid in insurance premiums on the car, and to general damages of 5 per cent. per annum on the sum of $1,200 from January 10th, 1944, to date.

If the plaintiffs had proved damages which would have resulted from their deprivation of the use of the car as a hearse I might have been able to allow this damage. *Cory* v. *Thames Ironworks Company* (1868), L.R. 3 Q.B. 181 is a case which might then have been applicable. In that case the plaintiff bought a hull with the purpose of mounting on it cranes for unloading coal. Defendants had no knowledge of this contemplated use, but it was held they must, at the time of sale, have contemplated that it would be used as a hulk for coal storage. They failed to make delivery on the date contracted for. It was held they were liable in damages not for the large amount lost by the plaintiffs through not being able to use the hull to mount its cranes, but for the lesser amount which would have been lost if it had been intended

for use as a storage hulk. I am, however, prevented from applying that principle here by the failure to prove damage on the basis of the car being used as a hearse. I am also very doubtful that the principle would apply at all in the present case where the car could not, in any event, have been made into and used as a hearse.

The defendants say that the plaintiffs must not have specific performance. They say that title is in the widow absolutely, and the defendant executors cannot give title, and refer me to the following cases: *Green* v. *Smith* (1738), West *temp.* Hard. 561; 25 E.R. 1085; *Frederick* v. *Coxwell* (1829), 3 Y. & J. 514; 148 E.R. 1283; *Cary* v. *Stafford* (1725), Amb. 831; 27 E.R. 522; *Howell* v. *George* (1815), 1 Madd. 1; 56 E.R. 1; *Castle* v. *Wilkinson* (1870), 5 Ch. App. 534.

I accept the principle set out in the cases but not the hypothesis on which they are said to apply here. The title to the car is not and never was absolutely in the widow. The title to the car was in the executors and has been since, at any rate, April 14th, 1944, in the plaintiffs. All I am doing here is to end a wrongful retention of possession by the executors, who have had no right to the car or its possession since that date.

I am also referred to *Sneesby* v. *Thorne* (1855), 7 De G. M. & G. 399; 44 E.R. 156. In that case one executor, believing that he had the concurrence of the other executor, contracted to sell a parcel of real estate. The second executor, when advised of the sale, refused to concur in it. The Lords Justices held that the contract could not be specifically enforced.

In considering the application of this case to the circumstances here under consideration, it is only necessary to say this: The sale of this car by the Kirkpatrick estate was not, nor was it ever represented to be, a sale by one executor. Mr. *Ray* purported to act on behalf of the estate, and there has been no denial of his authority to do so. I construe the estate to mean both executors. There is no evidence before me that he was not authorized to act for both executors. There is Mrs. Kirkpatrick's attempted repudiation, *qua* beneficiary, of the contract made by Mr. *Ray* on behalf of herself and the other executor. As to this, I can only say that I would regard it as thoroughly unsound to hold

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that after a perfectly legal sale of a chattel has been made by executors, with a constructive if not physical delivery of possession (see Mr. *Ray's* letter of April 14th) a beneficiary under the will should be entitled to repudiate. Such a state of affairs would, in my opinion, have the effect feared by Lord Mansfield (previously cited) of making it unsafe to deal with executors. I should add to this that Turner, L.J., in the *Sneesby* v. *Thorne* case makes it clear that the decision there relates only to the state of facts before the Court and does not purport to establish a general rule that a contract of sale by one executor may not be specifically enforced.

There will be a decree of specific performance, and the plaintiffs will recover special damages of $70.70 and general damages of 5 per cent. on $1,200 from January 10th, 1944. The plaintiffs will have costs of the action.

Judgment for plaintiffs.

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June 29.

MILES v. WILKINSON.

Practice—Petition for divorce—No appearance or defence—Decree ex parte—Application to extend time for appeal—Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, Sec. 38—Court of Appeal Act, R.S.B.C.. 1936, Cap. 57, Secs. 14 and 24—Rule 457.

On a petition for divorce the respondent did not appear and defend and a decree was made *ex parte*. On motion to the Court of Appeal to extend the time in which to appeal, preliminary objection was taken to the Court's jurisdiction to entertain the motion in view of section 38 of the Divorce and Matrimonial Causes Act and it was held that the word "limited" in said section 38 must be read as referring to the Court of Appeal Act, that is to say, limited by the time expressed in section 14 of the Court of Appeal Act and section 14 is governed by section 24 of said Act, which gives the power to enlarge and the preliminary objection was overruled.

Held, further, on the main motion that under rule 97 of the Divorce Rules, rule 457 of the Supreme Court Rules becomes applicable which reads: "Any verdict or judgment obtained, where one party does not appear at the trial, may, upon application, be set aside by the Court or a Judge upon such terms as may seem fit, and such application may be made at the Assizes or sittings at which the trial took place, or at any other

sittings of the Court." That remedy was open to the appellant in this case and ought, in all the circumstances, to have been the remedy pursued and the motion was dismissed.

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MOTION to the Court of Appeal to extend the time within which to appeal. Heard at Vancouver on the 29th of June, 1945, by O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

G. L. Murray, for appellant.

Guild, for respondent, raised the preliminary objection that owing to the provisions of section 38 of the Divorce and Matrimonial Causes Act there is no jurisdiction to extend the time in which to appeal. The word "limited" means the time limited by section 14 of the Court of Appeal Act and section 24 of said Act does not apply.

Murray, contra: The time is fixed by section 14 of the Supreme Court Act and where there is prejudice an extension will not be granted, but under section 24 there is jurisdiction to extend the time and this will be done whenever the interests of justice require it. There is no prejudice in this case and extension of time should be granted: see *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488; *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70, at p. 72. That the application should be granted see *Rex* v. *Safeway Stores, Ltd.* (1937), 52 B.C. 396; *Rutter* v. *McLeod* (1944), 60 B.C. 233. Appellant will have about $500 in costs against her.

Guild: Appellant has gone to the wrong Court. By section 97 of the Divorce Rules the Supreme Court Rules are deemed to apply. Rule 457 of the Supreme Court Rules applies and the application to set aside the judgment should have been made in the Court below.

Murray, replied.

O'HALLORAN, J.A. (*per curiam*): This is a motion to extend the time in which to appeal. The governing ground of the appeal, it appears, is that costs were awarded against the respondent in the Court below, contrary to an alleged agreement between the parties that the petitioner would not ask for costs against the

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respondent, if she did not appear and defend. She did not appear and defend, and the decree was made *ex parte*.

Three objections, described as preliminary objections, were taken by Mr. *Guild* to our jurisdiction to entertain the motion to enlarge the time for appeal. The first objection was that the Court had no power to enlarge the time for appeal, in view of section 38 of the Divorce and Matrimonial Causes Act; secondly, that under rule 457 of the Supreme Court Rules, application for relief ought to have been made to the judge who gave the decree; and thirdly, that there were no good grounds of appeal.

Regarding the two latter objections, we are of opinion that they are not, properly speaking, preliminary objections. They are in the nature of answers to the motion, itself.

As to the first ground, we are of opinion that the word "limited" in section 38 of the Divorce and Matrimonial Causes Act must be read as referring to the Court of Appeal Act, that is to say, limited by the times expressed in section 14 of the Court of Appeal Act; and section 14, of course, as has been held, must be governed by section 24 of the Court of Appeal Act, which gives the power to enlarge. In these circumstances, the preliminary objections are overruled.

As to the main motion, the principle was laid down in *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488, that the time limited by statutory rule, within which to take an appeal, should be extended whenever the interests of justice require it. That principle was applied by this Court in *Fraser* v. *Neas,* also known as *Roddy* v. *Fraser,* in (1924), 35 B.C. 70, at p. 72, and in many subsequent cases, two recent ones being *Rex* v. *Safeway Stores, Ltd.* (1937), 52 B.C. 396, and in the judgment of our brother ROBERTSON, speaking for the Court, in *Rutter* v. *McLeod* (1944), 60 B.C. 233. In the *Manchester Economic* case, it was noted, as pointed out by MACDONALD, C.J.A. in the *Roddy* v. *Fraser* case, at p. 73, that the interests of justice, as they were found to exist in that case, could be served only by taking an appeal. In this case, that is not so, for, apart from any proper remedy which might exist by substantive action, and on that we express no opinion, rule 457 of the Supreme Court Rules which becomes applicable to the present case by rule 97 of the Divorce Rules, reads:

Any verdict or judgment obtained, where one party does not appear at the trial, may, upon application, be set aside by the Court or a Judge upon such terms as may seem fit, and such application may be made at the Assizes or sittings at which the trial took place, or at any other sittings of the Court.

In our view, that remedy was open to the appellant in this case, and ought, in all the circumstances, to have been the remedy pursued.

This is illustrated by the decision in *Vint* v. *Hudspith* (1885), 29 Ch. D. 322. In that case, at pp. 323-4, Cotton, L.J. said, Bowen, L.J. concurring:

I am far from saying that this Court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the plaintiff should first apply to the Judge who gave the judgment to restore the action. It cannot be said that the plaintiff did not know that the action was going on against him. He has only himself to thank for all the difficulty that has occurred.

In our judgment that language applies aptly to the present circumstances. Counsel supporting the motion indicated that, if leave were given by this Court, an application would have to be made to adduce fresh evidence.

We are all of opinion that this is not a case in which the interests of justice require that the time for giving notice of appeal ought to be enlarged.

The motion is refused, accordingly.

Motion refused.

C. A.
1945
April 11;
May 1.

GIOVANDO *ET AL.* v. CITY OF LADYSMITH.

Municipal law—Assessment—Improvements—Appeal to court of revision dismissed—Appeal to county judge allowed—Assessment roll declared null and void—Lack of jurisdiction—Costs—R.S.B.C. 1936, Cap. 199, Secs. 229 and 243—B.C. Stats. 1940, Cap. 35; 1944, Cap. 35, Sec. 23.

The plaintiffs' appeal to the court of revision of the city of Ladysmith against the assessment of improvements on their lands was dismissed. They then appealed to a county judge who not only allowed the appeal, but declared the city's assessment roll for 1945 to be null and void and directed the assessor to make a new assessment roll setting out therein the assessed value of the improvements upon the plaintiffs' lands at the sums to which he thought they should be reduced and giving the plaintiffs their costs. Section 243, subsection (11) of the Municipal Act, as amended by B.C. Stats. 1944, Cap. 35, Sec. 23, provides for an appeal from the county judge to the Court of Appeal upon any point of law and the question of valuation, being a question of fact, there was no appeal as to the reduction of the assessment by the county judge. The city appealed on the ground that the only ground of appeal to the court of revision was that the improvements were valued too highly, no other ground of appeal was open for adjudication by the county judge and he had no jurisdiction to declare the assessment roll null and void or order the assessor to make a new assessment roll.

Held, on appeal, reversing the decision of HARRISON, Co. J., that the judgment declaring the assessment roll for 1945 null and void and directing the preparation of a new roll should be discharged.

Held, further, that the plaintiffs had no interest in this appeal as they had succeeded in getting their assessments lowered in the Court below from which there was no appeal. There is no reason for depriving them of the costs of the hearing below and in all the circumstances there is good cause for ordering that there should be no costs of the appeal against them.

APPEAL by the city of Ladysmith from those parts of the decision of HARRISON, Co. J. of the 16th of March, 1945, whereby he ordered that the assessment roll of the city of Ladysmith for the year is null and void and whereby it was directed that the assessor and the city of Ladysmith do make a new assessment roll and that the said assessor shall certify such roll when completed and make a return thereof to the clerk of the city of Ladysmith not later than the 31st of March, 1945, in accordance with section 233 of the Municipal Act.

The appeal was argued at Vancouver on the 11th of April, 1945, before SLOAN, C.J.B.C., ROBERTSON and BIRD, JJ.A.

Arthur Leighton, for appellant: The learned judge had no jurisdiction to set aside the assessment roll. The only ground of appeal before him was that the improvements are valued at too high an amount. That portion of the judgment with reference to declaring the roll null and void should be set aside.

Cunliffe, for respondent: We are only interested in the question of costs. Being successful on that portion of the judgment from which no appeal was taken, we are entitled to the costs as ordered below. We have no interest in the appeal from the declaration below that the assessment roll for the city of Ladysmith for the year 1945 is null and void.

Leighton, replied. *Cur. adv. vult.*

1st May, 1945.

SLOAN, C.J.B.C.: I agree with the reasons of my brother ROBERTSON, in his disposition of the questions raised on the appeal, including his direction as to the costs here and below.

ROBERTSON, J.A.: The respondents appealed to the court of revision of the city of Ladysmith against the assessment of the improvements on their lands, made under section 229 of the Municipal Act, upon the sole ground that they had been valued at too high an amount. Their appeal was dismissed. Then, pursuant to section 243 of the Municipal Act, they appealed to a judge of the county court who not only allowed their appeal, but declared the city's assessment roll for the year 1945 to be null and void and directed the assessor to make a new assessment roll setting out therein the assessed value of the improvements upon the lands of the respondents at the sums to which he thought they should be reduced and giving the respondents their costs pursuant to subsection (10) as amended by Cap. 35, B.C. Stats. 1944, Sec. 23. Subsection (11) of section 243, as amended by Cap. 35, B.C. Stats. 1944, Sec. 23, provides for an appeal from the county court judge to the Court of Appeal "upon any point of law raised upon the hearing of the appeal by such Judge." As the question of the valuation was a question of fact, there was no appeal as to this.

The city appealed, *inter alia,* upon the following grounds: That the only ground of appeal to the court of revision was that the improvements were valued too highly; that no other ground

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Robertson, J.A.

of appeal was open for adjudication by the learned judge; and therefore that he had no jurisdiction to declare the assessment roll null and void or to order the assessor to make a new assessment roll.

The respondents were not concerned with that part of the order dealing with setting aside the existing roll and ordering the preparation of a new one. They had succeeded upon their appeal and needed nothing further. The appellant submits, however, that the order declaring the assessment roll null and void was really brought about by the action of the respondents in submitting, as they did, that the roll had not been properly prepared and the assessments were therefore invalid. However this may be, in my opinion, it did not warrant the learned judge in deciding a question upon which there was no appeal.

The second and third paragraphs of the judgment declaring the assessment roll for 1945 null and void and directing the preparation of a new roll should be discharged. Directions should be given to the assessor in accordance with subsections (7) and (8) of section 23 of Cap. 35, B.C. Stats. 1944.

The appellant asked that the respondents be deprived of the costs given them by the judgment appealed from and that they be made to pay the costs of the hearing below, and of this appeal, on the ground that the learned judge made the declarations and order which have been discharged by this Court at the instance of the respondents. The respondents have no interest in this appeal as they had succeeded in getting their assessments lowered. I see no reason to deprive them of the costs of the hearing below. I do not see why they should pay any costs on this appeal as they are really not interested. Under all these circumstances I think there is good cause for ordering that there should be no costs of the appeal against the respondents.

BIRD, J.A.: I would allow the appeal for the reasons given by my brother ROBERTSON, in which I concur; and would dispose of the question of costs in the manner proposed in his reasons for judgment.

Appeal allowed.

Solicitor for appellant: *Arthur Leighton.*
Solicitor for respondents: *F. S. Cunliffe.*

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to the "Court Rules of Practice Act," being chapter 249 of the "Revised Statutes of British Columbia, 1936," and amendments thereto, and all other powers thereunto enabling the "Supreme Court Rules, 1943," be amended by striking out the words "one in the afternoon" wherever they occur in Rule 11 of Order LXIV., and substituting therefor the words "twelve in the forenoon."

And that, pursuant to the authority aforesaid, the "County Court Rules, 1932," be amended by striking out the words "one in the afternoon" wherever they occur in Rule 10 of Order XIX., and substituting therefor the words "twelve in the forenoon."

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., February 16th, 1946.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ESTATE OF SIDNEY STEWART DAWSON, DECEASED.

S. C.
In Chambers
1945
May 16, 25.

Testator's Family Maintenance Act—"Proper maintenance and support"—Farm and equipment bulk of testator's estate—Partnership between testator's son and grandson in operation of farm—Two married daughters petitioners—In fair circumstances—R.S.B.C. 1936, Cap. 285.

The testator, who was 73 years old at the time of his death, owned a farm of 160 acres about 17 miles north of Nanaimo on Vancouver Island. His son and grandson lived with him up to the time of his death. The son, now 49 years old, remained at home, worked hard for many years to clear and cultivate the land and made it a prosperous place, and the grandson, now 26 years old, in more recent years assisted in the farming operations, it being his sole occupation. In 1920 the testator deeded 80 acres of the property, then uncleared, to his son, but they continued to work the property as a unit. The deceased handled the money and transacted the business, the understanding between the father and son being that it was a partnership arrangement with equal interests. Later the grandson was taken in as a partner, each having a one-third interest in the operation. Deceased left an estate of $16,150, the land being valued at $8,150, cash in bank $550 and farm machinery and equipment, stock and furniture $7,450. A week before he died he gave his wife, son and grandson each a cheque for $2,000. The cheques were cashed the day before he died. The testator had two daughters, both married, one with her husband having assets of about $5,500, and the other with her husband about $2,500. They left home, one when 22 years of age and the other at 17 years of age. They were away from home at the time of their father's death for 23 and 25 years respectively. By his will the testator left one dollar to each of his daughters and the remainder of the estate to his son and grandson subject to a life interest in favour of his widow. On the petition of the two daughters for adequate provision from their father's estate under the Testator's Family Maintenance Act:—

Held, on the submission that the three cheques for $2,000 each should have been shown as an asset of the estate, that on the evidence this account was a trading account carried on in the name of the deceased representing moneys received from the operation of the farm in which the parties had each a one-third interest and at least to the extent of the amount paid to the son and grandson would not form a part of the estate.

Held, further, that under the special circumstances there was not any obligation on deceased to make provision in his will for either of the petitioners. He no doubt felt that proper provision for their maintenance and support had already been made by themselves and that they were in no need of assistance from him. He properly felt that his obligation

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was to the others to whom he left the estate, they having a paramount claim on his bounty. This is a case where the will of the deceased should not be varied in any way and the petition is dismissed.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND IN RE ESTATE OF SIDNEY STEWART DAWSON, DECEASED

PETITION by two married daughters of the testator for adequate provision from his estate under the provisions of the Testator's Family Maintenance Act. Heard by COADY, J. in Chambers at Vancouver on the 16th of May, 1945.

Arthur Leighton, for petitioners.

McAlpine, K.C. (*McCulloch,* with him), for executor, and grandson C. E. Dawson.

Cur. adv. vult.

25th May, 1945.

COADY, J.: This is a petition under the Testator's Family Maintenance Act made by Grace Willgress and Beatrice Sprogis, daughters of the above-named deceased, Sidney Stewart Dawson, who died on the 19th of October, 1944, at the age of 73 years. By his will dated the 27th of October, 1932, the deceased left one dollar to each of the petitioners herein, and the remainder of his estate to his son and grandson, subject to a life interest in favour of his widow. The deceased who was a rather successful farmer, carried on farming operations some 17 miles north of Nanaimo. This farm owned by him consisted of at one time 160 acres, but in 1920 he deeded 80 acres, then uncleared, to his son Harry, retaining, it would seem, by a verbal arrangement between them a life interest therein. The farm was not divided, however, and the son remained with his parents and continued with his father to work the land as a unit. They operated it as a dairy farm, and all moneys were handled by the deceased and were used to purchase whatever was required in the way of live-stock, farm machinery and equipment and to pay the other outgoings from time to time, including living expenses of the deceased, his wife, and the son Harry and his wife, and their child, the grandson above referred to. The evidence showed that while the deceased handled the money and transacted the business, the understanding between the father and the son was that it was a partnership arrangement, and they had equal interests therein. Sometime later the grandson who is now 26 years of age was

taken in as a partner, each thereafter having a one-third interest in the operation. The arrangement was a very loose one, but it was a family arrangement, and quite understandable. There was an understanding too that on the death of the father the grandson would be left the 80 acres belonging to the deceased, and the son would receive the live-stock and equipment, the whole subject to a life interest in favour of the widow. The will was made, it would seem, pursuant to that arrangement. Such arrangement or agreement however would not restrict the Court's power under the Act to redistribute the estate in a proper case (*Dillon* v. *Public Trustee of New Zealand,* [1941] 2 All E.R. 284; *In re Testator's Family Maintenance Act and In re McNamara Estate. J. L. McNamara* v. *Hyde et al.* (1943), 59 B.C. 70).

The deceased left an estate of the gross value of $16,150, with liabilities of $531.34. The land is valued at $8,150, cash in the bank $550, and farm machinery and equipment, stock, furniture, at $7,450. Approximately a week before his death the deceased issued cheques in favour of his wife, son and grandson, each for $2,000, on a bank account standing in his name. These were all cashed the day before he died. It is submitted that these moneys should have been shown as an asset of the estate. From the evidence before me it would seem that this account was the trading account carried in the name of the deceased, representing moneys received from the operation of the farm in which the parties had each a one-third interest, and that at least to the extent of the amount paid to the son and grandson, would not form a part of the estate. It was but a transfer to the son and grandson of their accumulated portion of earnings from the farm operation, a transfer made by the deceased when he, no doubt, felt death was imminent. The son gave his evidence very frankly and fairly, and I regard him as a truthful witness. He is now 49 years of age. He remained at home with his parents. He worked hard over a period of many years to clear and cultivate this farm and make it into a prosperous place. For these years of service he got nothing but a living for himself, his wife, and child, except the transfer of the 80 acres of uncleared land as above set out. I am quite satisfied that it was largely by his labours and his son's in more recent years that the farming opera-

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Coady, J.

tion was made the success that it was. The grandson was encouraged to remain at home by the assurance that the deceased's portion of the farm would come to him, and the evidence is that he has worked on the farm since he was able to work, and for the past few years has, it would seem, been doing the heavier part of the work. By reason of their services they were particularly the object of the testator's bounty, and the testator recognized this.

The petitioner, Mrs. Willgress, the evidence shows, quit school when she was 14 years of age, worked at home, doing the usual work that most girls brought up on a farm are accustomed to do, until she was approximately 22 years of age, when she married and left home. She is now 47 years of age. On her marriage her father built a house for her at a cost of approximately $600. She and her husband are not without means. Their present assets are of the value of approximately $5,500. They have a family of two children, both over 21 years of age. The girl is employed and the boy is at present in the army. They may, if in need, reasonably expect some support from their own family. The husband, it is true, is not in good health, but he can do light work.

The petitioner, Mrs. Sprogis, left home when she was 17 years of age. She is married and her husband is well able to support her from his earnings which are substantial, and they have assets of the approximate value of $2,500. The petitioners very properly disclaim any intention on their part to cut down the interest of the mother in the estate, and do not claim for any participation in the estate until after the death of the widow; but they contend that the interests of their brother and the grandson should be reduced and that they should participate in the estate.

Can it be said, under the circumstances, that the deceased as a just parent, was unmindful of his parental obligation to either of these daughters in leaving his estate as he did, or that he has failed to make adequate provision for them? One of them left the parental home some 25 years ago, and the other some 23 years ago, and neither of them has made any contribution whatsoever to the building up of this estate except such services as they rendered when at home, and being supported by their parents. I do not think the Act was intended to operate, and an order

made in all cases where members of a family, adults or minors, are not left anything by a parent's will. That is not the test. The statute refers to failure to make "adequate provision for the proper maintenance and support." If there is no need on the part of the claimant for proper maintenance and support, the Act does not apply. As said by Duff, J., afterwards Chief Justice, in *Walker* v. *McDermott,* [1931] S.C.R. 94, at p. 96:

> What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances,

and to some of these he makes reference.

Moreover, the Act is not intended, it seems to me, to interfere lightly with the testator's right to prefer one child to another, or a grandchild to a child, which may be done for a variety of reasons, to which the testator, it may be assumed, has given due consideration.

Under the special circumstances here I do not think there was any obligation on the deceased to make provision in his will for either of the petitioners. The deceased, no doubt, felt that proper provision for their maintenance and support has already been made by themselves, and that they were in need of no assistance from him, and he felt too, and very properly so, it seems to me, his obligation was to the others to whom he left his estate, and who had a paramount claim upon his bounty. Following the line of reasoning found in *Walker* v. *McDermott, supra; Shaw* v. *Toronto General Trusts Corporation et al.,* [1942] S.C.R. 513, and *In re Testator's Family Maintenance Act and In re Estate of Isabella Caroline Dickinson, Deceased* (1944), 60 B.C. 214, I am of the opinion this is a case where the will of the deceased should not be varied in any way. The petition will therefore be dismissed. The petitioners will pay their own costs. The executor will be entitled to his costs out of the estate.

Petition dismissed.

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1945

May 28; *June* 4.

PREVEDOROS v. MICHAELOVITCH.

Landlord and tenant—Notice of cancellation of lease—Action for relief against forfeiture—Summary proceedings for possession—Interim injunction restraining summary proceedings—R.S.B.C. 1936, Caps. 143 and 148.

The plaintiff obtained a lease of the premises in question from the defendant on the 17th of November, 1944. Notice of cancellation of the lease was given by the defendant to the plaintiff on the 17th of January, 1945, allegedly for non-payment of rent. The plaintiff brought this action on the 2nd of May, 1945, under the Laws Declaratory Act for relief against forfeiture of the lease. Attempts were made to pay the rent in arrears, but payment was refused and the plaintiff paid into Court in this action all the rents owing. The plaintiff now applies for an injunction to restrain the defendant from continuing proceedings commenced by him and now pending in the County Court of Vancouver under the summary provisions of the Landlord and Tenant Act to recover possession of the demised premises; and to restrain the defendant from taking any other proceedings for the recovery of possession of said premises or for cancellation of said lease until the trial of this action.

Held, that if possession by defendant be secured the plaintiff's claim for relief may be defeated. If the proceedings now taken by the defendant in the county court could have been taken in this Court, and were so taken, there would be jurisdiction to make an order to stay proceedings therein until the plaintiff's action be heard. *A fortiori* the Court has jurisdiction to restrain proceedings taken in an inferior court in the same jurisdiction. This is pre-eminently a case under all the circumstances for the exercise of that jurisdiction and an injunction as asked should issue.

APPLICATION by plaintiff for an injunction to restrain the defendant from continuing proceedings commenced by him in the County Court of Vancouver under the summary provisions of the Landlord and Tenant Act to recover possession of the demised premises in question. The plaintiff's action is under the Laws Declaratory Act for relief against forfeiture of a lease of the 17th of November, 1944, made between the defendant as lessor and the plaintiff as lessee. The facts are set out in the reasons for judgment. Heard by COADY, J. at Vancouver on the 28th of May, 1945.

Tysoe (*Mayall*, with him), for the application.

Fraser, K.C., contra.

Cur. adv. vult.

4th June, 1945.

COADY, J.: The plaintiff's action here is under the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936, for relief against forfeiture of lease dated 17th November, 1944, made between the defendant as lessor and the plaintiff as lessee. The present application by the plaintiff is for an injunction to restrain the defendant from continuing proceedings commenced by him and now pending in the County Court of Vancouver under the summary provisions of the Landlord and Tenant Act, being Cap. 143, R.S.B.C. 1936, to recover possession of the demised premises, and to restrain the defendant from taking any other proceedings for the recovery of possession of the said premises, or for cancellation of the said lease until the trial of this action.

The writ of summons herein was issued and served on the 2nd of May, 1945, and on the 3rd of May, 1945, the defendant commenced the proceedings for possession above referred to. In such proceedings counsel agree, as I understand, that relief against forfeiture is not open for consideration by the learned judge of the county court. On application before the learned judge heard on May 11th, 1945, judgment was reserved.

Notice of cancellation of the lease was given by the defendant to the plaintiff on January 17th, 1945, allegedly for non-payment of rent. The material filed before me, and which is not contradicted, shows that attempts were made to pay the rent in arrears, but payment was refused, and the plaintiff has now paid into Court in this action all rents owing. It would therefore seem on the material filed that the present action would not appear to be taken for the purposes of delay, and should be heard and determined by this Court on its merits. The defendant seeks in effect while this action is pending in this Court, to secure possession, not by any process in this Court, but in the county court under the summary provisions of the Landlord and Tenant Act, in which tribunal the plaintiff cannot be heard on the merits of the claim he seeks to advance in the present proceedings. If possession is secured the plaintiff's claim to relief may be defeated. Under the Saskatchewan Act that would appear to be the case (*Ramsay* v. *Hildred,* [1930] 2 W.W.R. 692). I am not deciding, however, whether this would be so under our Act.

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VITCH

Coady, J.

The defendant contends, however, that there is no jurisdiction in this Court to restrain the defendant from continuing the proceedings in the county court or from acting on an order for possession if such be obtained. The defendant contends, too, that such restraining order, if made, is in the nature of a prohibition directed to the judge of the county court, and that such order will not be made where the judge of that court has jurisdiction over the subject-matter. But that is not the point in my view. The learned judge of the county court may make such order as he sees fit. What is asked by the plaintiff is an injunction to restrain the defendant from taking any further proceedings in that court, and this is no interference by prohibition or otherwise with the learned judge of that court. The cases on prohibition have in my view no application.

It seems clear that if the proceeding now taken by the defendant in the county court could have been taken in this Court, and were so taken, there would be jurisdiction to make an order to stay the proceedings therein until the plaintiff's action was heard.

The Court too, it would seem, has jurisdiction, and will in a proper case make an order restraining the defendant from continuing proceedings in a foreign Court (*The North American Life Assurance Co.* v. *Sutherland* (1885), 3 Man. L.R. 147). *A fortiori* the Court has jurisdiction to restrain proceedings taken in an inferior court in the same jurisdiction (*Belrose* v. *Chilliwhack* (1893), 3 B.C. 115; *Welch* v. *Ernewein,* [1928] 3 W.W.R. 20). Whether such jurisdiction should be exercised must depend on the facts of the particular case. The present is pre-eminently a case under all the circumstances for the exercise of that jurisdiction, it seems to me.

While holding that on the material filed on behalf of the plaintiff on this application, an injunction as asked should issue, I refrain from expressing an opinion upon the merits of the plaintiff's claim for relief from forfeiture.

Application granted.

HOPPER v. PRUDENTIAL INSURANCE CO. OF AMERICA.

S. C.
1945
May 30;
June 13.

Insurance, life and accident—"Bodily injury through violent and accidental means"—Loud noise and flash from explosion—Nervous shock—Death of insured—Right to recover under policy.

Two policies of insurance on the life of the plaintiff's deceased wife contained a provision that "Upon receipt of proof that the insured has sustained bodily injury solely through external violent and accidental means resulting in death of the insured, the company will pay in addition to any other sums due under this policy" certain sums. The plaintiff and his wife attended a dance in Vancouver on October 31st, 1942. They were dancing together when suddenly there was a loud noise as from an explosion, thought to be a large firecracker on the ballroom floor with a concurrent flash. The deceased immediately said she thought she was going to faint and asked plaintiff to take her to a seat. They had only taken a couple of steps when she fell and death was instantaneous. The evidence of the doctor who performed an autopsy indicates that deceased suffered from an aneurism of an artery in the anterior portion of the brain and this had ruptured causing death from cerebral hemorrhage. This aneurism was large considering its location and had existed probably for years and was liable to rupture at any time through sudden fear or shock. In an action maintaining that this was an accident within the meaning of the policies:—

Held, that it is unnecessary to decide the point as to whether the shock, assuming there was such in this case, was a bodily injury or not, within the meaning of the policy, for assuming the deceased sustained a bodily injury, death did not result from that, but resulted rather from the bursting of the aneurism which was the proximate cause of death. The plaintiff's claim therefore fails.

ACTION to recover the sums due under two policies of insurance in the Prudential Insurance Co. of America on the life of plaintiff's deceased wife Florence Ellen Hopper. The facts are set out in the reasons for judgment. Tried by COADY, J. at Vancouver on the 30th of May, 1945.

Bray, K.C., for plaintiff.
Braidwood, for defendant.

Cur. adv. vult.

13th June, 1945.

COADY, J.: The plaintiff claims against the defendant under two policies of insurance on the life of his deceased wife, Flor-

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1945

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Coady, J.

ence Ellen Hopper. The policies contain a provision reading as follows:

> Upon receipt of proof that the insured . . . has sustained bodily injury, solely through external violent and accidental means . . . and resulting in death of the insured . . . the company will pay in addition to any other sums due under this policy . . . an accidental death benefit equal to the face amount of the insurance stated in the policy.

It is under this provision that the plaintiff now claims. The facts are not greatly in dispute, if at all.

The plaintiff and his deceased wife, the insured, attended a dance at the Embassy ballroom at the city of Vancouver on Hallowe'en, October 31st, 1942. They were dancing together when suddenly there was a loud noise as from an explosion, thought to be a large firecracker on the ballroom floor, with, the plaintiff says, a concurrent flash. The deceased, it would appear, was startled thereby, and immediately said she thought she was going to faint, and asked the plaintiff to take her to a seat. He proceeded to do so, but they had only taken a couple of steps when she fell. It would seem that death was instantaneous.

The evidence of Dr. Hunter who performed the autopsy indicates that the deceased suffered from an aneurism of an artery in the anterior portion of the brain, and this had ruptured, causing death from cerebral hemorrhage. He described the condition as a bulging of the arterial wall. This aneurism which the doctor indicates was large considering its location, had in his opinion existed for some time, probably for years and was liable to rupture at any time since anything in the way of sudden fear, anger, shock, excitement or undue activity, which would cause a rise in the blood pressure would be likely to produce that result. He says, in effect, that while he has no means of knowing what shock, fear or excitement or emotional disturbance she experienced from the noise of the exploding firecracker, such an occurrence could and did probably bring about a bodily and nervous shock, or emotional disturbance sufficient to increase the blood pressure with the result as aforesaid.

The plaintiff maintains that this was an accident within the meaning of the policy. To bring the matter within the terms of the policy it must appear upon the evidence (a) that there was a bodily injury, (b) that this bodily injury was caused solely by

violent external and accidental means and (c) that this bodily injury resulted in death. As I understand the plaintiff's position here, it is claimed that the bodily injury was the shock either physical or nervous, or a combination of the two. The defendant maintains that the shock occasioned by the explosion was not a bodily injury within the meaning of the policy, but even if it were, it was not this bodily injury, as the peril insured against, which resulted in the death of the insured, but on the contrary the death was due to the bursting of the aneurism, without which death would not have occurred. It was, the defendant submits, the existence of this pre-existing condition or infirmity activated, it may be, by the occurrence of that evening, which resulted in the death and not the shock as contended by the plaintiff. While the matter is not free from doubt I find it difficult to accept the plaintiff's submission that the physical and/or nervous shock experienced by the insured can be regarded as a bodily injury within the meaning of the policy. The plaintiff relies upon *Clover, Clayton & Co., Limited* v. *Hughes,* [1910] A.C. 242, and *Pugh* v. *London, Brighton and South Coast Railway Co.,* [1896] 2 Q.B. 248. The first of these, however, is a workmen's compensation case, having reference to an accident arising out of and in the course of employment, and is not therefore a sound guide to the determination of liability in an insurance case. The other is on a policy covering all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty. It likewise does not help. The defendant on this point relies strongly on the case of *Provident Life and Accident Insurance Co.* v. *Campbell,* 79 S.W. 2d 292, which is also a case of death resulting from the bursting of an aneurism following a shock. It was held there under the circumstances that mental shock was not a bodily injury within the meaning of the policies under consideration, which, however, are worded somewhat differently to the policies under consideration here.

No other cases on this point were cited by counsel, but I find the matter discussed in the case of *Price* v. *Dominion of Canada General Ins. Co.,* [1938] S.C.R. 234, on the first appeal to that Court, and again in [1941] S.C.R. 509, on the second appeal. That was a case of taking insulin, and complications resulting

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in death. There, however, it was held that while the plaintiff could not succeed under the terms of the policy alone, that on the true construction of the policy and section 5 of the New Brunswick Insurance Act it was held there was only one case of death, that is the bodily injury sustained as the result of the taking of the insulin. The case is important not only on the question of what may be a bodily injury, but also on the question of proximate cause.

I find it unnecessary, however, to decide the point as to whether the shock, assuming there was such in this case, was a bodily injury or not, within the meaning of the policy, for I am of the opinion that, assuming the deceased sustained a bodily injury death did not result from that, but resulted rather from the bursting of the aneurism which was, it seems to me, the proximate cause of death.

Welford's Accident Insurance, 2nd Ed., at pp. 175-6 states:

> It is a general rule of insurance law, common to all branches of insurance, that, in considering whether a loss has been caused by the peril insured against, the proximate and not the remote cause of the loss is to be regarded. The rule is based on the intention of the parties as expressed in the contract into which they have entered; but it must be applied with good sense, so as to give effect to, and not to defeat that intention. Its application, therefore, depends upon the broad principle that the policy was intended to cover any loss which can fairly be attributed to the operation of the peril, rather than upon drawing nice distinctions between the varieties of phrases used in particular policies to express the causation of the loss.

Lord Shaw in *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society,* [1918] A.C. 350, says at p. 369:

> The cause which is truly proximate is that which is proximate in efficiency.

As I view the matter here, and it is not clear from doubt, the proximate cause of the death was the bursting of the aneurism and not the shock (*Sanderson* v. *Travellers' Indemnity Co.* (1923), 24 O.W.N. 317, and *Harmon* v. *Travellers Ins. Co.,* [1937] 1 W.W.R. 424.

Whether the bursting of the aneurism was a concurrent cause or one in succession to the shock is, I think, of little consequence. Welford's Accident Insurance, at pp. 179-80, says:

> If, on the other hand, the sequence of causes is interrupted by the intervention of a fresh cause which is not the reasonable or probable consequence directly and naturally resulting in the ordinary course of events

from the peril insured against, but is an independent cause, the cause of the loss within the meaning of the policy is not the peril insured against, but the intervening cause. It is immaterial that, in the particular circumstances, the effect of the peril upon the subject-matter of insurance is to render it more susceptible to the operation of the intervening cause. The peril is exhausted when it has produced its natural result, which is not the loss under discussion. To produce the loss a fresh cause must intervene and operate upon the result produced by the peril; the relation of cause and effect, therefore, does not exist between the peril insured against and the loss.

As stated by McDougall, J. in *Little* v. *London & Lancashire Guarantee & Accident Co.*, [1941] 1 D.L.R. 187, at p. 190:

"The *onus* of proving that the loss was caused by a peril insured against lies upon the assured. He is not, however, required to prove the cause of the loss conclusively; all that he need do is to establish a *prima facie* case. When he has done this the *onus* shifts to the insurers to show that the loss was not caused by a peril insured against, and unless they prove this conclusively, they have not discharged the *onus* cast upon them."

That *onus*, in my opinion, has not been discharged by the plaintiff, and whatever *onus* was placed upon the insurers to show that the loss was not caused by the peril insured against, has, in my opinion, been met. The plaintiff's claim therefore fails.

Action dismissed.

IN RE ESTATE OF CLEMENT HOLDEN, DECEASED. *IN RE* ADMINISTRATION ACT AND *IN RE* TRUSTEE ACT.

Will—Construction—R.S.B.C. 1936, Caps. 5 and 292.

The relevant portions of the will involving consideration are: "I give, devise and bequeath, all my real and personal estate whatsoever and wheresoever in the manner following that is to say: A sum of money standing to my credit in the Canadian Bank of Commerce, London, England, to the Durham County Hospital, Durham, England. Lots—30, 84, 541 Richards Street, Vancouver, B.C. 11, 32, 555 West Vancouver District. Dominion of Canada Bonds. Cash in the Canadian Bank of Commerce, and Bank of Montreal, at Vancouver, B.C. to be realized, and divided into seven (7) equal parts amongst the following persons: (1) Beatrice Watson. (2) Georgina Homer. (3) Rachel Alexander. (4) Hyla Holden. (5) Rose Althea Lane. (6) Nina Dawson. (7) Lonsdale Holden

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(family of). All the residue of my estate, both real and personal, not hereinbefore disposed of, I give, devise, and bequeath unto the aforesaid seven legatees." The will was executed in April, 1933, and deceased died in January, 1944. The portion of the will relating to the gift to the Durham County Hospital was crossed out and the evidence is that this was done some time after the will was executed. This change was not initialled by the testator or witnesses. The moneys standing to the credit of the deceased in the Canadian Bank of Commerce in England were transferred to the Canadian Bank of Commerce in Vancouver in March, 1941. In answer to a question as to whether the Durham County Hospital was entitled to a portion of the estate:—

Held, that without assuming that the attempted change was the testator's act, there was a permanent removal of the funds in question from London to Vancouver and the will specifically disposes of all moneys in the two banks in Vancouver. This particular legacy was therefore adeemed.

Beatrice Watson and Georgina Homer, two of the seven legatees mentioned and sisters of deceased, predeceased the testator and their legacies lapsed. In answer to questions as to what distribution be made of the shares bequeathed to them:—

Held, that the shares bequeathed to them fall into the residuary estate and is divided among the five surviving legatees.

ORIGINATING SUMMONS for the determination of certain questions arising out of the will of Clement Holden, deceased. Heard by COADY, J. at New Westminster on the 6th of April, 1945.

Robson, for plaintiff.

S. H. Anderson, for executors of estate of Rachel Alexander, deceased.

Garfield A. King, for defendant L. H. A. Watson.

Richmond, for defendant Ursula Charles.

J. G. A. Hutcheson, for defendant Durham County Hospital.

Cur. adv. vult.

22nd June, 1945.

COADY, J.: This is an originating summons for the determination of the following questions:

1. Is the Durham County Hospital, Durham, England, entitled to a portion of the estate of the deceased Clement Holden, and if so, in what amount?

2. What distribution shall be made by the executrix of the share bequeathed to Beatrice Watson under the terms of the will of the deceased Clement Holden?

3. What distribution shall be made by the executrix of the share bequeathed to Georgina Homer under the terms of the will of the deceased Clement Holden?

4. Under the terms of the will of the deceased Clement Holden a share was bequeathed to "Lonsdale Holden (family of)" what constitutes the family of Lonsdale Holden and in what proportion do they share the said bequest?

5. Who are the persons entitled to share the estate of the deceased Clement Holden and how do they share in the estate?

The relevant portions of the will involving consideration are:

I GIVE, DEVISE AND BEQUEATH, all my real and personal estate whatsoever and wheresoever in the manner following that is to say:

A sum of money standing to my credit in the Canadian Bank of Commerce, London, England, to the Durham County Hospital, Durham, England.
Lots—30, 84, 541 Richards Street, Vancouver, B.C.
11, 32, 555 West Vancouver District.
Dominion of Canada Bonds.
Cash in the Canadian Bank of Commerce, and Bank of Montreal, at Vancouver, B.C. to be realized, and divided into seven (7) equal parts amongst the following persons:

(1) Beatrice Watson.
(2) Georgina Homer.
(3) Rachel Alexander.
(4) Hyla Holden.
(5) Rose Althea Lane.
(6) Nina Dawson.
(7) Lonsdale Holden (family of).

All the residue of my estate, both real and personal, not hereinbefore disposed of, I give, devise, and bequeath unto the aforesaid seven legatees.

The will is dated the 20th of April, 1933. The deceased died on the 17th of January, 1944. The will, which is on a printed form, filled in by the deceased in his own handwriting, was found in the safety-deposit box of the deceased following the death. That portion of the will relating to the gift to the Durham County Hospital was found to have been crossed out, and the evidence is that this was done some time after the will was executed. This change was not initialled by the testator and witnesses. It still remained a part of the will as admitted to probate.

The moneys standing to the credit of the deceased in the Canadian Bank of Commerce, London, England, were transferred to the Canadian Bank of Commerce in Vancouver in March, 1941, and while there is no evidence to show when or by whom the crossing out of this clause in the will was done, I think

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it can reasonably be assumed that this was done by the testator and probably after he transferred the funds. If that be so, although what was done had not the effect of altering the terms of the will it is significant as indicating the intention of the deceased, and while, as stated in Williams on Executors, 12th Ed., Vol. 2, pp. 861-2,

> the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion,

nevertheless, what the testator has done, if we assume it was his act, is important as indicating an intention to revoke this particular bequest.

But in any case, without assuming that the attempted change was the testator's act, it seems to me that this particular legacy was adeemed. The will speaks from the date of death. There was a permanent removal of the funds in question from the bank in London to the bank in Vancouver, nearly three years before the testator's death. There were no funds remaining in London thereafter, and none at the time of the death. Moreover, the will, it will be noted, specifically disposes of all cash in the Canadian Bank of Commerce and the Bank of Montreal at Vancouver. If the moneys in the Vancouver banks had not been otherwise disposed of, the matter might be open to some doubt, though I hardly think so. I am not overlooking the fact that the evidence discloses that the funds on deposit in the Canadian Bank of Commerce in Vancouver at the time of his death are part of the funds so transferred. Counsel for the hospital relies on *Prendergast* v. *Walsh* (1899), 42 Atl. 1049, but I think that case is distinguishable on the facts. I am of the opinion, therefore, in answer to question 1 that Durham County Hospital is not entitled to any portion of the estate of the said deceased.

Beatrice Watson and Georgina Homer, mentioned in questions 2 and 3, were sisters of the deceased, and predeceased the testator. Their legacies therefore lapsed. It is submitted, however, that since by the terms of the will each of the seven parties named was to receive a one-seventh interest or share, the share of any legatee predeceasing the testator does not go to the survivors but falls into the residuary estate, and it is submitted further that since the residue is again given to the same seven per-

sons and since five only of these seven survive the testator, then there is an intestacy with respect to a two-seventh interest in this two-seventh's share that falls into the residue.

The first part of the submission I think is sound, since the gift to the seven named persons of a one-seventh share each is a gift to several as tenants in common. In Williams on Executors, 12th Ed., Vol. 2, p. 784, it is stated:

> But where legacies are given to legatees, as tenants in common, as where an aggregate fund is to be divided among them, *nominatim*, in equal shares, if any of them die before the testator, what was intended for those legatees will lapse into the residue.

But the second part of the submission, I think, is unsound since in the residuary clause the gift to the seven persons is not a gift to them as tenants in common but as joint tenants. (See Williams, Vol. 2, p. 1003). The testator does not, in the residuary clause here, say that they are to take a one-seventh share each, but that the residue of the estate shall go to the seven legatees thereinbefore named. There are no words of severance here. It is clearly a joint tenancy, and so the survivors take all the residue.

The answer to question 2, therefore, is that the share bequeathed to Beatrice Watson falls into the residuary estate and is divided among the five surviving legatees. The answer to question 3 is to the same effect.

With regard to question 4, the family of the deceased Lonsdale Holden have agreed among themselves as to the manner in which this legacy should be divided among them, and a deed of arrangement has been filed. Distribution will therefore be made among them in the proportions as set out in the said arrangement.

I do not think any answer is required to question 5, in view of the conclusions that I have reached upon the other questions. If I am wrong in this, however, the matter can be spoken to again.

Costs of all parties will be paid out of the estate, and I think it is a proper case for taxation under Appendix N, column 4, as suggested by counsel.

Order accordingly.

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May 22, 23; *June* 27.

GOGO AND GOGO v. EUREKA SAWMILLS LIMITED.

Negligence—Fire started to burn refuse—Spreads to adjoining lands—Destruction of property—Loss and damage—Liability—Assessment—Costs.

On September 14th, 1942, fires were set out on the defendant's lands for the purpose of disposal of slash accumulated in the course of its logging operations. On the next day the fire spread to adjoining lands of the plaintiffs' and destroyed buildings, standing and fallen timber and chattels thereon. In an action for damages it was held that the rule in *Rylands* v. *Fletcher* (1868), 37 L.J. Ex. 161 applied and that there was negligence on the part of the defendant in setting out fires in view of the prevailing extremely dry conditions and low humidity. Damages were assessed at $2,404, but two items, namely: (a) A claim for loss of 3,620 cords of fire-wood was disallowed on the ground that it could not be marketed profitably from the plaintiffs' lands lying at least six miles from the nearest market at Nanaimo and (b) a claim for loss of logging equipment was disallowed in view of paragraph 11 of a logging contract between the parties, providing that the defendant shall not be under any liability for any damage caused to machinery or equipment of the plaintiffs while upon their lands either from burning or any other cause. On appeal by the plaintiff from the disallowance of said items:—

Held, reversing in part the decision of BIRD, J., that the question is not whether the cord-wood could have been marketed profitably in Nanaimo, but what the cord-wood is worth upon the ground, and on the evidence as to its value on the ground 50 cents per cord would be a fair amount to allow for the fire-wood destroyed. As to destruction of the logging equipment, the defendant is not liable by reason of the provisions of paragraph 11 of the agreement between the parties above referred to.

APPEAL by plaintiffs from the decision of BIRD, J. of the 30th of April, 1944, in an action for damages caused by the negligence of the defendant in setting fire to slash and debris at the defendant's logging and sawmill operations in Douglas District, Vancouver Island, on September 14th, 1942, and negligently allowing fire to escape on to the plaintiffs' property. On the trial it was held that in the circumstances proven, the rule in *Rylands* v. *Fletcher* (1868), 37 L.J. Ex. 161 applies and the defendant, having intentionally set out fires upon lands occupied by the defendant, which fires escaped and caused damage to the plaintiffs is liable to the plaintiffs for the damage so caused. The learned judge assessed the loss sustained by the plaintiffs at the

sum of $2,404, which was made up from certain buildings and articles set out in his judgment which were destroyed. The plaintiffs appealed, claiming that in addition to what was allowed them, the learned judge should have allowed their claim for damages in respect of the loss of 3,620 cords of fire-wood lost in the fire and the claim of John Gogo in respect of the logging equipment lost or damaged by the fire.

The appeal was argued at Vancouver on the 22nd and 23rd of May, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Cunliffe, for appellants: We suffered the loss of 3,620 cords of fire-wood and this was not allowed by the learned trial judge. This wood is worth at least $1 a cord notwithstanding its location: see *Browne* v. *Dunn* (1893), 6 R. 67; *Peters* v. *Perras et al.* (1909), 13 Alta. L.R. 80; *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44, at p. 55; *Jarvis* v. *Connell* (1918), 44 O.L.R. 264; *Rex* v. *Foxton* (1920), 48 O.L.R. 207, at p. 209; *United Cigar Stores Ltd.* v. *Buller and Hughes* (1931), 66 O.L.R. 593, at p. 599. As to the logging equipment, we say notwithstanding section 11 of the logging contract, they are liable for the loss of the equipment: see *Alderslade* v. *Hendon Laundry, Ltd.,* [1945] 1 All E.R. 244.

Guild, for respondent: The fire-wood had no value and it was so found. Its location makes it of no value. As to the logging equipment, section 11 of the logging contract precludes any liability: see *Fagan* v. *Green and Edwards* (1925), 95 L.J.K.B. 363; *Turner* v. *Civil Service Supply Association* (1925), 95 L.J.K.B. 111; *Price & Co.* v. *Union Lighterage Co.* (1903), 72 L.J.K.B. 374; *McCawley* v. *Furness Railway Co.* (1872), L.R. 8 Q.B. 57; Salmond on Torts, 9th Ed., 597. Machinery on land is no different from a railway company or a laundry company. There is no actual proof that the 3,620 cords of wood were on the premises.

Cunliffe, replied.

Cur. adv. vult.

27th June, 1945.

O'HALLORAN, J.A.: I agree with my brother ROBERTSON and would allow the appeal to the extent indicated in his judgment.

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ROBERTSON, J.A.: The appellant sued the respondent for damages arising from a forest fire which started on the 14th of September, 1942. He recovered judgment for part of his claim. The learned trial judge found that the fire had destroyed (1) 3,620 cords of wood; and (2) certain guy lines and other equipment. He refused to give damages for the cord-wood on the ground that he did not consider that the fire-wood so lost had any value "since it could not have been marketed profitably from the plaintiffs' lands which lie at least six miles from the nearest market, namely, Nanaimo, B.C." He also refused to give damages for the guy lines and equipment because he held that any claim in respect of this was barred by paragraph 11 of the agreement between the parties under which the appellants were carrying on logging operations. Paragraph 11 reads as follows:

The company shall not be under any liability or responsibility to the contractor for or in respect of any damage caused to or suffered by the machinery or equipment of the contractor while upon the said lands either from burning or any other cause whatsoever.

Dealing now with the cord-wood, I think, with deference that the question to be decided was: What was the value of the wood *in situ,* and, not its market value, at Nanaimo? The following evidence was given by the appellant in examination in chief:

Cunliffe: Mr. Gogo, at the time of this fire, what was mine timber worth, that is, standing in the woods? Two cents a foot.

What was the piling worth? Six cents a foot.

And the fire-wood? One dollar.

In cross-examination:

The prices you have just quoted, Mr. Gogo, are those prices for the timber in place? Timber standing in the woods.

. . . . .

Now, turning to fire-wood, question 361 to 367 [referring to plaintiff's discovery]:

"You make a claim for 2,090 cords of fire-wood. What have you reference to? Trees that were not suitable for saw-logs, that were left standing and lying.

"What variety? Fir.

"And scattered over the four properties? Yes."

. . . . .

You apparently had an estimate, Mr. Gogo, of 2,090 cords at one time? If the figures are there.

And you have increased the claim in that respect to 3,620? Yes.

. . . . .

Question 384 [in plaintiff's discovery] "How did you arrive at the price

for fire-wood? Some of it standing and some of it lying? That is the price the local truck-drivers are paying for stumpage."

Is that a correct statement, Mr. Gogo? Correct.

. . . . .

What you have reference to then is defective logs; that is, logs not fit for saw-logs, large logs in those two particular spots you have mentioned, and scattered? I was referring to the scattered stuff, I was not referring to clumps of timber.

I want to understand you. I want to know where you say the cord-wood was estimated by you and your cruiser. On the places that was logged.

On places that were logged? Yes.

You made no estimate on places where you have got those two claims of good standing green timber? No.

So that what you have in mind for cord-wood is large defective standing and fallen scattered timber? Yes.

Over the whole property? Yes.

The respondent called several witnesses as to the market value at Nanaimo. The first was Smith, a timber cruiser, who said that logging concerns he had worked for "never count any for any cord-wood basis at all." He thought the cord-wood would have no value in the woods, but that slabwood resulting from the cutting of the logs at the mill would sell at $1 per cord to persons who would "resaw" it. He admitted there was a shortage of fuel in Vancouver in the winter of 1942-3, but he had no knowledge of the Nanaimo situation. He thought (speaking of the cord-wood) "it is a little far to haul, I should think, into the city of Nanaimo to be economical."

Another witness, Freeman, was of the opinion that it would not pay to salvage the cord-wood in question. He admitted he was not really interested in the market for cord-wood or anything like that "but as far as I know—I don't know as you could get anybody to cut it at the present time to make profit out of it." He also said that he would not know what the price would be for cord-wood in the bush.

Baskin, who was superintendent for the respondent at the time of the fire, told about 4-ft. slabwood his company had sold in Nanaimo in the summer of 1942 and spring of 1943—some at $1 a cord and some at $1.50 a cord; and he said between October, 1941, and June, 1942, his company had accumulated 4,000 cords of which they sold 1,000 cords at 25 cents and the rest was burned up (I presume by the fire of which the plaintiff complains).

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Dines, a wood dealer in Nanaimo, who sold all the mill wood of the respondent, said that in the winter of 1942-1943, owing to the fire in question which destroyed their mill from which the mill wood was obtained, there was an unusual demand for bush-wood. When mill wood was available there was a small demand for bush-wood. He himself owned timber on the main highway, seven miles north from Nanaimo and one mile off the highway, which he cut for fire-wood during 1942-1943 and he figured his stumpage at 50 cents per cord. He admitted he paid $6 per cord to others logging near his property, and if it cost these others the same to get out their cord-wood as it cost him, *viz.*, $5 per cord, these persons must have been getting $1 stumpage. He said that there was not much bush-wood available within five to seven miles of Nanaimo; that the green timber was getting limited; that during the winter of 1942-43 the Dominion Government was paying a bonus of $1 per cord for bush-wood, but he had not, up to the time of the trial, *viz.*, 17th April, 1944, received it. None of this evidence, except Dines', relates to what the bush-wood was worth on the ground, but such as it is, Dines' evidence would indicate that the stumpage would be anywhere from 50 cents to $1 and in addition to this a possible bonus of $1 per cord.

The learned judge refused to allow the appellant to call evidence in rebuttal to this evidence. I do not find it necessary to consider this in view of the conclusion to which I have come. As I have said, my view is that the question is not whether the cord-wood could have been marketed profitably in Nanaimo, but what the cord-wood was worth upon the ground; and the only evidence as to this is that given by the appellant upon examination and cross-examination and by Dines, *supra*. The appellant's evidence as to value is not very satisfactory, but coupled with that of Dines, it appears to me that 50 cents per cord would be a fair amount to allow for the fire-wood destroyed on the appellants' lands. I would not allow anything for bonus as the evidence as to this is too indefinite. I think then the appellant is entitled to 50 cents per cord for 3,620 cords, *i.e.*, $1,810.

As to the second point, I agree with the learned trial judge that the appellants are not entitled to succeed as to the equipment. The respondent was only liable to the appellants for negligence.

Paragraph 11 expressly provides that the respondent is not to be liable to the appellants for any damage suffered by the machinery or equipment from burning or any other cause whatsoever. The authorities seem clear that under these circumstances the clause applies and there is no liability for negligence. See *Rutter* v. *Palmer*, [1922] 2 K.B. 87; *Turner* v. *Civil Service Supply Association* (1925), 95 L.J.K.B. 111; and *Fagan* v. *Green and Edwards* (1925), *ib.* 363; *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244.

In view of the divided success on this appeal I would direct that the parties do tax his and its costs as if successful on the appeal and that the appellants do recover 70 per cent. and the respondent 30 per cent. of the costs so to be taxed, and that there be a set-off as to such costs.

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON.

Appeal allowed in part.

Solicitor for appellants: *F. S. Cunliffe.*
Solicitor for respondent: *W. S. Lane.*

FAST v. FAST.

Divorce—Charge of sodomy with wife—Cruelty—Acts of infidelity by wife—Condonation—Custody of children—Costs.

On petition for divorce on the ground of sodomy committed on her and in the alternative for judicial separation on the ground of cruelty, the wife gave evidence as to several alleged acts of sodomy and the husband denied on oath that he had ever committed any unnatural crime on her person, there was simply oath against oath.

Held, that the same principles apply in divorce proceedings as in a criminal court for it is the very nature of the charge, easy to make and difficult to repel, which demands such proof as is adequate to establish the guilt of the person charged in the minds of reasonable men.

N—— v. *N*—— (1862), 3 Sw. & Tr. 234, followed.

Held, further, that as the evidence discloses various acts of adultery by the petitioner and acts of gross indecency with other men, she is not a fit

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and proper person to be given the two children's upbringing. The petition is dismissed and the children will be left in the charge of the father with the right of the mother to have reasonable access.

PETITION by a wife for divorce on the ground of sodomy committed on her and in the alternative for judicial separation on the ground of cruelty. The facts are set out in the reasons for judgment. Heard by HARPER, J. at Vancouver on the 11th of May, 1945.

Burton, and *Stanton,* for petitioner.
Bull, K.C. (*R. N. Shakespeare,* with him), for respondent.

Cur. adv. vult.

3rd July, 1945.

HARPER, J.: This is an amended petition for divorce. The original petition filed on December 15th, 1944, was for judicial separation on the grounds of cruelty. The petitioner was granted leave to amend and on January 5th, 1945, the respondent was duly served with the amended petition in which the wife sought a divorce on the ground of sodomy committed on her and in the alternative was a prayer for judicial separation on the ground of cruelty.

The wife gave evidence as to several alleged acts of sodomy. The respondent denied on oath that he had ever committed any unnatural crime on her person, so that there is simply oath against oath. Under such circumstances I accept the reasoning set forth in *N*—— v. *N*—— (1862), 3 Sw. & Tr. 234, at p. 238; 164 E.R. 1264, at p. 1265, as follows:

> There was not on either side any corroborative evidence, nor could it well be expected that any could be adduced. In all cases where a crime is imputed, the presumption of innocence must prevail until the guilt has been proved; and in proportion to the gravity of the charge and the rare occurrence of the crime imputed, it is reasonable to require more cogent evidence to overthrow the legal presumption of innocence. The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge.

N—— v. *N*——, *supra,* was quoted with approval in *Statham, J. T.* v. *Statham, J. C.,* [1929] P. 131, by Lord Hanworth, M.R., at p. 138. Referring to charges of sodomy in divorce proceedings he says at p. 139:

The same principles apply in my judgment in divorce proceedings as in a criminal court, for it is the very nature of the charge, easy to make and difficult to repel, which demands such proof as is adequate to establish the guilt of the person charged in the minds of reasonable men. Whatever may be the consequences to the party charged, whether it be in a criminal court, punishment, or in a civil court, loss of *status*, the nature of the fact remains the same; and that fact must be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence.

The petitioner is now 29 years of age. When 18 years of age she became intimate with the respondent and they have lived together for most of the time from October, 1935. A child of this union being about to be born, they were married in July, 1936. Since that date another child has been born, so that at the present time there are two children to be brought up, a boy and a girl. The parties separated December 11th, 1944, but cohabited together on January 22nd, 1945, after the date when the original petition of judicial separation was filed in this Court. Reference will be made to this fact later herein. Both parties are of Russian parentage. The respondent has at times been carrying on a dry-cleaning establishment at the city of Vancouver, and has been moderately successful in his business operations. During the course of her married life the petitioner has, according to her own statements and written confessions given her husband, committed various acts of infidelity. These acts of adultery on her part were fairly numerous but were condoned by the husband.

In *Cramp* v. *Cramp and Freeman*, [1920] P. 158, at p. 171, McCardie, J. said:

In my opinion, therefore, a husband, who has sexual relations with his wife after knowledge of her adultery, must be conclusively presumed to have condoned her offence. This is the rule of righteousness and I am glad to think it is also the rule of law. To hold otherwise would be a blot on the jurisprudence of this country.

Apart from the various acts of adultery the petitioner has also been shown to have been guilty of a gross act of lewdness with men other than her husband. Whilst she, no doubt, has affection for her children, she has demonstrated that she is not a fit and proper person to be given their upbringing.

The respondent must also bear responsibility for the bickerings and quarrels that have taken place. He is older than the petitioner and induced her to live with him as his wife without any

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marriage vows being taken. He is a man of violent temper and has at times treated her roughly.

As to the night of January 22nd, 1945, after the petition for judicial separation was filed herein sexual intercourse took place between the parties. The wife alleges that she was forced into this act, but a perusal of her own evidence discloses that on the night in question a policeman called at the respondent's place of business in reference to the car which was left standing on the street and had a conversation with her husband in reference to it. If the petitioner wished to escape from the respondent, here was her opportunity. She made no outcry and admittedly sexual intercourse took place.

What is the effect of that? In *Williams* v. *Williams*, [1904] P. 145, at pp. 148-9, Gorell Barnes, J. said:

> Therefore, if it is shewn that the parties have voluntarily resumed cohabitation, that puts an end to any cause of complaint which the one party had or may have had against the other.

On the facts here, in spite of the denial of the petitioner, I find that cohabitation was mutually agreeable.

The petition will be dismissed out of Court. The children will be left in the charge of the father with the right of the mother to have reasonable access.

These parties have lived a tempestuous life together, but in spite of all that has transpired and in spite of all the indecencies disclosed in evidence, there has been some bond perhaps of affection of a kind, which has drawn them together from time to time. It may possibly be that they will live to repent the sordid happenings of their past married existence and resume life together again.

The respondent has been put to some expense in providing for the wife's expenses of this hearing. Although counsel asked for the privilege of speaking to the question of these costs, on consideration I am of the opinion that I should dispose of them now. In view of his conduct at times, I have reached the conclusion that he cannot recover these moneys.

Petition dismissed.

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June 25, 26, 27, 28, 29; *Oct.* 2.

Master and servant—Dismissal of servant—Breach of contract—Oral variations to contract—Admissibility—Errors in estimating commissions—Whether honestly made—Statute of Frauds.

The defendant manufacturer of electrical goods and equipment employed the plaintiff in 1928 in a minor capacity until the 1st of May, 1934, when he was appointed an accountant and salesman under a written agreement which provided for a salary of $20 a week and a commission on the sales of the company, *viz.*, 1 per cent. on all gross sales in excess of $3,000 in any one month and 10 per cent. on the sales of certain specified articles enumerated in the agreement. The employment was to continue for one year with the proviso that the agreement could be revised or continued as might be mutually agreed. At the end of the first year nothing was said about revision or continuance and the parties continued working under its terms for nine years, and the employment became a yearly hiring upon the terms of the 1934 agreement. Upon the outbreak of war the company's business increased enormously and the plaintiff's commissions increased from normal proportions to about $2,000 per month. A proviso to clause 20 of the agreement was to the effect that the company might at any time terminate the agreement in the event of the plaintiff contravening any of its terms, one of which was that the plaintiff should faithfully, honestly and diligently serve the company and at all times obey and carry out the lawful directions of the company's managing director. By letter of September 23rd, 1943, the company terminated the services of the plaintiff as from that day, the reason given for dismissal being that in August, 1943, the managing director had by letter advised the plaintiff that owing to the volume of business and want of factory help no more incoming orders were to be accepted unless first approved by him and subsequently the plaintiff accepted new orders up to $100,000 without his approval. After the plaintiff's dismissal an audit of the company's books disclosed that the plaintiff charged a 10 per cent. commission on articles which were not within those enumerated in the 1934 agreement and he charged a commission on items of sales tax which were included as part of the price charged to the customer but collected by the company for the sole purpose of being paid over to the Dominion Government and these other grounds became available to the company for its defence notwithstanding that they were unknown to the company at the date of dismissal, alleging that the plaintiff throughout the years had been systematically and fraudulently pilfering money from the company. The plaintiff stated in evidence that he thought himself justified in making the commission charges on sales tax, and averred that there were six oral amendments subsequently made to the contract of 1934 and thereby certain articles not first included had been placed within the class of

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articles mentioned in the 1934 agreement, with respect to which the plaintiff was entitled to charge a 10 per cent. commission. On the trial the learned judge expressly accepted the evidence of the plaintiff and found "honest error" on the part of the plaintiff in charging commission on sales tax and allowed in evidence the six oral amendments to the 1934 agreement. He found that the contract had been wrongly repudiated by the defendant company and allowed damages in the sum of $14,500 estimated as the amount he would have earned in profits for the balance of the year in which he was dismissed and ordered an accounting. On the counterclaim he allowed the sum of $2,712.86 for commissions wrongfully taken on sales tax, but dismissed the claim for $4,518.36 for other commissions allegedly wrongly collected by the plaintiff.

Held, on appeal, affirming the decision of WILSON, J., that the plaintiff was wrongfully dismissed and evidence of the variations to the original agreement was rightly allowed in and the company's claim for recovery of commissions paid on articles within these variations was rightly dismissed.

Held, further, *per* ROBERTSON and SIDNEY SMITH, JJ.A., that a person who is wrongfully dismissed and therefore entitled to damages must do everything that a reasonable and prudent man would do under the circumstances to mitigate the damages. Under the Selective Service regulations the company was obliged, upon the dismissal of the plaintiff, to give him a "separation notice." This notice is filed with the Selective Service officials who thereupon give the employee a permit authorizing him to seek new employment. The company said this was done, but this was denied by the plaintiff and the judge accepted his denial. There was a distinct finding by the trial judge that the plaintiff failed to use due diligence in securing further employment and thus failed to minimize his damages. He did seek other employment and found he could get a similar position with either of two companies, provided he could get the permit from the Selective Service office. He enquired there and found such permit would be forthcoming when he obtained a separation notice from his last employer. He made no attempt to obtain this notice. He could have asked for the separation order, reserving his right to sue for damages. He fell short of taking active steps in this regard. The learned judge thought this showed lack of due diligence with which they agreed. A new trial should be ordered limited to the *quantum* of damages.

APPEAL by defendant from the decision of WILSON, J. of the 6th of November, 1944, whereby the plaintiff was awarded $14,500 damages for wrongful dismissal and sums earned by him up to the date of his dismissal and the counterclaim of the defendant was allowed in respect to commission charged on sales tax, costs of delivery and items charged in error. On May 1st, 1934, an agreement was entered into between the parties whereby

it was agreed that the plaintiff should assume and perform the duties of salesman for the defendant with respect to the equipment, accessories, goods and merchandise enumerated, and should serve as supervisor of the office work, accounting department and secretary-treasurer. By way of remuneration he was to receive a salary of $20 per week and 1 per cent. commission on all sales made by the company in excess of $3,000 in each month and a commission of 10 per cent. on sales made on goods, products and merchandise of the company enumerated in the contract of employment. The volume of the company's business extended tremendously following the outbreak of the war and plaintiff's remuneration in 1942 was in excess of $16,000 and up to September, 1943, approximately $14,000 when he was dismissed from the company's employ. The contract of employment required that the plaintiff should at all times obey, observe and carry out the lawful directions of the company's managing director. On August 6th, 1943, the managing director of the company wrote the plaintiff advising him that no more orders (incoming business) were to be accepted unless approved by the writer, as the company had more volume than it had either available man hours or the ability to handle. Between August 17th, 1943, and September 20th, 1943, the plaintiff, without the managing director's approval, accepted orders with a price volume of about $100,000. On the 23rd of September, 1943, the managing director wrote the plaintiff advising him that he was dismissed from the company's employ. By audit the company subsequently found that from 1940 to 1943 inclusive the plaintiff collected 10 per cent. commission on goods sold not enumerated in the plaintiff's contract of employment as subject to commissions and had charged and collected commissions on sales tax payable to the Crown and on delivery charges.

The appeal was argued at Vancouver on the 25th to the 29th of June, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Bull, K.C., for appellant: The contract of employment is of the 1st of May, 1934. The company's business increased immensely after the war broke out. Under the contract the plaintiff was to obey the instructions of the managing director and on

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August 6th, 1943, he was instructed to take no further orders for goods without instructions, but immediately after the plaintiff committed the company to $49,000 worth of business. In the four years he overpaid himself in commissions $7,000. It is submitted these factors justified his dismissal. There was systematic theft from his employers such as to warrant dismissal: see *Clouston & Co., Limited* v. *Corry,* [1906] A.C. 122. There is no evidence on which the learned judge could find that the sums so taken were in honest error: see *Charlton* v. *British Columbia Sugar Refining Co.* (1924), 34 B.C. 408, at pp. 416-7. All the evidence is here and this Court should do what the learned judge should have done below: see *Bahme* v. *Great Northern Ry. Co.* (1916), 23 B.C. 484. That the dismissal is justifiable see *Pearce* v. *Foster* (1886), 17 Q.B.D. 536. Assuming the alleged changes in the contract were made, they are not binding on the company: see *Horncastle* v. *The Equitable Life Assurance Society of the United States* (1906), 22 T.L.R. 735. The action is framed on the contract and the contract was continued after the one year by the conduct of the parties: see *Berlin Machine Works, Limited* v. *Randolph & Baker, Limited* (1917), 45 N.B.R. 201. Evidence that the contract was extended from year to year is not admissible: see *Logan* v. *Commercial Union Ins. Co.* (1886), 13 S.C.R. 270. It is not competent to receive oral evidence of variations in the contract: see *Advance Rumely Thresher Co. (Inc.)* v. *Keene,* [1919] 2 W.W.R. 143; *Dubinski* v. *Stuyvesant Insur. Co. of N.Y.,* [1934] 1 W.W.R. 669. This is a contract within section 4 of the Statute of Frauds and any variation must be in writing. This is not a contract that could be performed within a year: *Reeve* v. *Jennings* (1910), 79 L.J.K.B. 1137; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; *Davey* v. *Shannon* (1879), 4 Ex. D. 81; *Morris* v. *Baron and Company,* [1918] A.C. 1. That parol evidence is inadmissible see Anson on Contract, 17th Ed., 313-4; *Pattle* v. *Hornibrook,* [1897] 1 Ch. 25; *New London Credit Syndicate* v. *Neale* (1898), 67 L.J.Q.B. 825; *Vezey* v. *Rashleigh,* [1904] 1 Ch. 634; Phipson on Evidence, 7th Ed., 552 and 564. The whole of this evidence should be excluded. There is no consideration for the variations: see Anson on Contract, 17th Ed., 102; *Stilk* v.

Myrick (1809), 2 Camp. 317; Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 178, par. 253; *M'Manus* v. *Bark* (1870), 39 L.J. Ex. 65; *Williams* v. *Stern* (1879), 49 L.J.Q.B. 663; *Frazer* v. *Hatton* (1857), 26 L.J.C.P. 226; *Harris* v. *Carter and others* (1854), 23 L.J.Q.B. 295. A mistake in law is never available to an erring trustee. Judgment was given for $14,500 for wrongful dismissal. This amount was wrongfully estimated and the *onus* is on him: see *Lamberton* v. *Vancouver Temperance Hotel* (1904), 11 B.C. 67; *Laishley* v. *Goold Bicycle Co.* (1903), 6 O.L.R. 319.

Bray, K.C., on the same side: There were at least 17 instances where the plaintiff charged full commission on articles not enumerated in his contract which he seeks to justify on alleged variations of the contract. There were also over 20 instances of charging on parts of articles enumerated in the contract. Numerous instances are produced of the plaintiff not charging commissions on articles said to be allowed by the variations from the contract at dates shortly after it was alleged they were included in the enumerated articles. He continuously charged his commission on cost of delivery and freight charges, also on sales taxes payable to the Crown. In all these cases his answers on re-examination were that they were errors. The managing director denies that there were any such variations in the contract. As to the errors, they were so numerous that it establishes conclusively he was deliberately pilfering and guilty of misconduct that justified his dismissal. Although one cause for dismissal was not discovered until after the plaintiff's dismissal, it is available as a cause for his dismissal: see Halsbury's Laws of England, 2nd Ed., Vol. 22, p. 155, par. 258; *Ridgway* v. *The Hungerford Market Company* (1835), 4 L.J.K.B. 157, at p. 159; *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339.

Donaghy, K.C. (*J. L. Lawrence,* with him), for respondent: We rely on the reasons for judgment of the trial judge. The plaintiff was not discharged, and he did not receive notice of separation required under the War Regulations within 48 hours. The Statute of Frauds only applies when the contract is not to be performed within a year by both parties and it is not within the statute: see *Donellan* v. *Read* (1832), 3 B. & Ad. 899; *Cherry*

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v. *Heming* (1849), 4 Ex. 631; *Smith* v. *Neale* (1857), 2 C.B. (N.S.) 67; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; *Milsom* v. *Stafford and others* (1899), 80 L.T. 590; *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424; *Ridley* v. *Ridley* (1865), 34 L.J. Ch. 462; *Beller* v. *Klotz,* [1917] 1 W.W.R. 585. The case of *Davey* v. *Shannon* (1879), 4 Ex. D. 81 was overruled. If the case is not within the statute, variations after the contract by parol agreement are admissible in evidence: see Halsbury's Laws of England, 2nd Ed., Vol. 7, pp. 179-180; Phipson on Evidence, 7th Ed., 564; *Johnson Investments Ltd.* v. *Pagratide,* [1923] 2 W.W.R. 736; *Niagara Falls Co.* v. *Wiley* (1912), 4 D.L.R. 96. Additional terms were added to the agreement from time to time and verbally agreed to as found by the trial judge as to the items upon which commission could be charged. The variations are corroborated by Darnbrough's evidence as he supervised all the business of the company. That there was consideration for the parol additions to the contract, the plaintiff relies upon the reasons for judgment of the trial judge. The accepting of orders after August 6th, 1943, was approved of by Darnbrough and the plaintiff's evidence as to this was accepted by the trial judge. The plaintiff is entitled to be paid an amount equal to what he would have earned between the time of his dismissal and the end of the contract year.

Bull, in reply: In respect to damages, there was no effort to obtain similar employment: see *Hopkins* v. *Gooderham* (1904), 10 B.C. 250, at p. 257; *Roberts* v. *Tartar* (1908), 13 B.C. 474, at p. 475; *Lamberton* v. *Vancouver Temperance Hotel* (1904), 11 B.C. 67.

Cur. adv. vult.

2nd October, 1945.

O'HALLORAN, J.A.: The respondent had been employed for nine years by the appellant company under a written contract for one year, which was continued orally thereafter with no stipulation as to its duration or the manner of its termination. He was a director of the company and was earning some two thousand dollars per month, when he was dismissed summarily without notice on 23rd September, 1943 (about seven and a half months before the contract would expire if it were regarded as renewed

from year to year as I understand counsel for both parties to have accepted it in this Court), on the stated ground that he had obtained substantial orders for the manufacture of electrical equipment after he had been instructed not to do so.

The appellant company relied subsequently on a further ground for dismissal, that he had taken commissions to which he was not entitled. At the trial and before this Court that was described as deliberate and planned pilfering on his part. The learned trial judge, for reasons carefully and clearly stated in this aspect of the case found that the respondent was wrongfully dismissed. His finding is based largely upon credibility. On more than one occasion when a conflict occurred between the evidence of the respondent and the evidence of the managing director of the appellant company, the learned judge accepted the evidence of the respondent.

We are all of opinion the learned judge reached the right conclusion in holding that the respondent was discharged wrongfully and in breach of the contract. I cannot usefully add to the reasons for judgment of my brother SIDNEY SMITH in that respect. But once that conclusion is reached we face the consequential problem of the *quantum* of damages and the principle upon which the *quantum* ought to be ascertained. Even if we may not follow the reasoning the learned judge appeared to adopt in fixing the damages at $14,500, nevertheless we ought not to disturb that assessment if we are of opinion it may be supported by the application of appropriate principles.

In my judgment whether the award of substantial damages ought to be upheld, depends upon our being satisfied that the respondent acted reasonably in the circumstances which confronted him, in not obtaining, or in not seeking to obtain, other employment after he was wrongfully discharged. Counsel for the appellant submitted that since the respondent did not secure a release from the Selective Service office (without which he could not obtain other employment in war time) he had failed to attempt to secure other employment, after he was discharged, and for that reason was entitled to nominal damages only.

For reasons developed hereafter I must hold that this latter submission, said to be founded on the *dictum* of MARTIN, J.A. in

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Andrews v. *Pacific Coast Coal Mines, Ltd.* (1910), 15 B.C. 56, at pp. 63-4 is inapplicable to this case. That *dictum* (which MARTIN, J.A. repeated in *Pratt* v. *Idsardi* (1915), 21 B.C. 497, at p. 501) occurred in the course of an effort to explain an observation of HUNTER, C.J. in *Lamberton* v. *Vancouver Temperance Hotel* (1904), 11 B.C. 67. It may be gravely doubted that MARTIN, J.A. ever intended his remarks to be construed as a principle of general application to conflict with the *ratio* of the considered judgment of the old Full Court in *Hopkins* v. *Gooderham* (1904), 10 B.C. 250, decided some ten months prior to 26th November, 1904, when the *Lamberton* case was argued and decided.

Subject to the question of its exclusion in this case by the War Regulations (Exhibit 16) the common-law principle of mitigation of damage consequent on breach applies generally to contracts of combined agency and employment (such as exists here) as it does to ordinary commercial contracts, *cf. Cockburn* v. *Trusts and Guarantee Co.* (1917), 55 S.C.R. 264, which applied *British Westinghouse Co.* v. *Underground Railways of London* (1912), 81 L.J.K.B. 1132; and *cf.* also *In re Rubel Bronze and Metal Co. and Vos* (1917), 87 L.J.K.B. 466, at p. 470 (McCardie, J.). But it does not follow in every case in which a person is wrongfully discharged, that he is limited to nominal damages, if it appears he has not sought to obtain other employment. That no such rigid principle prevails in our law may be logically deduced from the decision of the old Full Court (HUNTER, C.J., DRAKE and IRVING, JJ.) in *Hopkins* v. *Gooderham* (1904), 10 B.C. 250 and from the decision of the House of Lords in *Addis* v. *Gramophone Co.* (1909), 78 L.J.K.B. 1122, two judgments the *ratio* whereof bears convincingly upon the question we have now to decide.

In *Hopkins* v. *Gooderham* the plaintiff, employed as manager of a mill for one year from August, 1902, at a monthly salary was wrongfully dismissed in December. In January he sued for damages for breach of contract. The Full Court, affirming the judgment of MARTIN, J., held the plaintiff was entitled to recover damages for the unexpired term of his contract and awarded him $1,600 which was the equivalent of his salary for

the remaining eight months. On his dismissal the plaintiff had made no efforts to obtain other employment and that point was urged against him on the appeal but without success. IRVING, J. at p. 257 said it was

> just an application of the general principle of the assessment of damages that the plaintiff must shew that he has acted reasonably.

In *Addis* v. *Gramophone Co.* (1909), 78 L.J.K.B. 1122 (H.L.) the contract provided for six months' notice to an official who as here was paid by salary plus commission. The company gave him that notice in October but prevented him from working during the six-month period and did not pay him. He returned to England in December and brought action. The jury awarded him £600 damages and £340 for commission. The Court of Appeal allowed the appeal and dismissed the action in that respect. The main point was whether the appellant could recover damages for the oppressive manner in which he was discharged. The House of Lords awarded him damages for wrongful dismissal equivalent to the six months' salary he was prevented from earning, and confirmed the £340 for commission the jury had awarded. Whether or not the appellant could have secured other employment or had even attempted to do so did not emerge as an essential element in the *quantum* of damages. The House of Lords regarded the damages as exactly the same whether the claim was treated as one for wrongful dismissal or for breach of contract.

There are, of course, many decisions where the *quantum* of the plaintiff's damages has been governed by his ability to secure other employment. But on examination it will be found they are cases in which it was reasonable that he should seek other employment to lessen the damages, such as where the contract was necessarily terminated at the time of dismissal, or where the discharged person accepted the dismissal as a termination of the contract. One party to a contract cannot terminate it by his breach. The breach must be accepted as a termination by the other party, *cf. Heyman* v. *Darwins, Ld.*, [1942] A.C. 356 and *Galt* v. *Frank Waterhouse & Company of Canada Ltd.* (1944), 60 B.C. 81, at p. 101.

In *Hochster* v. *De la Tour* (1853), 2 El. & Bl. 678; 118 E.R. 922, the courier clearly accepted the contract as rescinded by the

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employer's repudiation, for before the 1st of June, the day on which his employment was to commence, he obtained another position to begin on 4th July. He could not accept the second engagement and at the same time be able, ready and willing to perform the first. Lord Campbell, C.J. speaking for Coleridge, Erle and Crompton, JJ. evidently had that in mind at p. 690 when he said in effect that after the defendant's renunciation the plaintiff had absolved himself from any future performance.

In *Brace* v. *Calder* (1895), 64 L.J.Q.B. 582 (C.A.) the point of the plaintiff's case was that his contract with four partners was terminated by the withdrawal of two partners. That was why he contended he was entitled to his full salary for the balance of the contract term, and refused to accept a similar contract with the two remaining partners; and see also *Laishley* v. *Goold Bicycle Co.* (1902), 4 O.L.R. 350 reversed on appeal on another point in (1903), 6 O.L.R. 319, and also *Reid* v. *Explosives Co.* (1887), 56 L.J.Q.B. 388 (C.A.). In *Addis* v. *Gramophone Co., supra,* I think the inference is plain that the plaintiff had not accepted the contract as terminated.

In *Cockburn* v. *Trusts and Guarantee Co.* (1917), 55 S.C.R. 264, the contract was terminated. In *British Westinghouse Co.* v. *Underground Railways of London* (1912), 81 L.J.K.B. 1132 invoked in the *Cockburn* case as applicable to contracts of employment, the contract had been long completed. In the commercial case of *Payzu, Lim.* v. *Saunders* (1919), 89 L.J.K.B. 17 the Court of Appeal held it was the buyer's duty to mitigate the damages by accepting the seller's new offer. That was consistent only with the termination of the contract.

When one party to a contract repudiates it the other party may elect to treat it as terminated, or may elect to treat it as subsisting. But in the latter case he must remain ready, able and willing to perform it during the balance of its term, and *cf. Dalrymple* v. *Scott* (1892), 19 A.R. 477, at pp. 488-9; and *Australian Dispatch Line* v. *Anglo-Canadian Shipping Co. Ltd.* (1939), 55 B.C. 177, at pp. 187-8. In this case Van Snellenberg must be held to have been within his legal rights when he refused to accept the company's breach as a termination of the contract, and *cf. Hopkins* v. *Gooderham* (1904), 10 B.C. 250; *Laishley* v.

Goold Bicycle Co. (1903), 6 O.L.R. 319; *Addis* v. *Gramophone Co.* (1909), 78 L.J.K.B. 1122; *In re Rubel Bronze and Metal Co. and Vos* (1917), 87 L.J.K.B. 466, at p. 470 (McCardie, J.).

It is not difficult to understand that when a discharged person has accepted the contract as terminated it would be unreasonable for him not to try to lessen his damages by obtaining or seeking to obtain some suitable employment. But it is correspondingly easy to understand that circumstances may also exist in which a discharged person may reasonably regard it as essential to the protection of his rights and interests that he should insist on the contract continuing and not seek other employment. The latter aspect is emphasized in this case by Government control of "hiring and firing" to be found in the War Regulations (Exhibit 16). Once he takes other employment he renders himself incapable of performing the first contract and that incapacity would disable him from claiming damages upon a subsisting contract, *cf. Australian Dispatch Line* v. *Anglo-Canadian Shipping Co. Ltd.* (1939), 55 B.C. 177, at pp. 187-8 and cases there cited and by parity of reasoning also *Mines, Limited* v. *Woodworth* (1941), 56 B.C. 219, at pp. 223-4, affirmed generally [1942] 1 D.L.R. 135. His acceptance of other employment is inconsistent with his keeping the first contract alive. But while he may have the right to keep the contract alive and to refrain from seeking other employment during that time, it must appear as a reasonable course for him to have pursued, if he later seeks damages for the full period of the contract equal to what his salary and commissions would have totalled. In a commercial contract case, *Jamal* v. *Moolla Dawood, Sons & Co.* (1915), 85 L.J.P.C. 29, Lord Wrenbury said at pp. 30-1:

> It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach.

In *Payzu, Lim.* v. *Saunders* (1919), 89 L.J.K.B. 17, Bankes, L.J. (with whom Scrutton, L.J. agreed in that respect) said at p. 18:

> It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case.

That statement was based on what was said in *British Westing-*

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house Co. v. *Underground Railways of London* (1912), 81 L.J.K.B. 1132 which was applied to contracts of employment in *Cockburn* v. *Trusts and Guarantee Co.* (1917), 55 S.C.R. 264. In my opinion the true test to be applied in deciding what damages the respondent suffered, is not whether he used due diligence in obtaining other employment, but rather, whether in the circumstances, then existing, it was reasonable for him to refrain from seeking other employment. The latter test, in accordance with the cases cited treats as a question of fact the decision to be reached upon whether it was reasonable for him to refrain from seeking other employment.

Since it is a question of fact, the first enquiry is what did the learned judge find? There is language in the reasons for judgment from which perhaps, if it stood alone, it might be inferred the learned judge found that the respondent did not act reasonably. But that is so utterly irreconcilable with an award of $14,500 damages (equivalent to what his earnings would have been during the remainder of the contract year, as in *Hopkins* v. *Gooderham* and *Addis* v. *Gramophone Co., supra*) that I cannot bring myself to conclude that the learned judge meant to make any such finding of fact. But if that award is not accepted as an implicit recognition that the respondent acted reasonably, it then becomes necessary for this Court to ascertain whether it may be upheld upon any ground. That involves an examination of the case to determine whether the respondent was in fact reasonable in refraining from seeking other employment. Our jurisdiction to do so is contained in sections 6, 7, 8, and 12 of the Court of Appeal Act, and see also the latter part of rule 5 of The Court of Appeal Rules, 1943.

Under the War Regulations (Exhibit 16) if an employer is of opinion his employee is guilty of serious misconduct he may give the latter "Notice of Separation" (see form thereof in Exhibit 10), and suspend him from duty. The employee may then apply within seven days to the Selective Service officer for a review of his suspension. Upon such review if the Selective Service officer (section 203 (4) of Exhibit 16)

finds that the employee was not guilty of serious misconduct, the employer shall reinstate the employee with full pay from the time the application for

review was made and the notice of separation given prior to the suspension shall be of no effect.

The learned judge has found as a fact that the appellant company did not give the respondent a "separation notice" nor file such a notice with the Selective Service office as required by the War Regulations.

What the appellant did was to ignore the War Regulations (Exhibit 16) completely. It did not suspend the respondent, as the War Regulations required, but instead summarily dismissed him (Exhibits 8 and 9) relying on clause 20 of the 1934 contract (Exhibit 1). The course the appellant saw fit to take had two important consequences of which it could not have been ignorant. One consequence was to deprive the respondent of the right of review to which a suspension would have entitled him. As such a review must have properly resulted in the respondent's favour (since both the trial Court and this Court have concluded he was wrongfully discharged), then under section 203 (4) of Exhibit 16 above quoted, the appellant would have been compelled to reinstate him. The second consequence was that the respondent was deprived of the opportunity of obtaining another position, since under the War Regulations, the Selective Service could not give him a release to take other employment until the separation notice was filed in the Selective Service office.

It seems to me, with respect, that the learned judge overlooked the real significance of the first-mentioned consequence of the respondent's failure to comply with the War Regulations (Exhibit 16). It deprived the respondent of the right to reinstatement to which he was legally entitled. It thereby deprived him of the right to have his contract continued; a right upon which he and his solicitors insisted from the outset (see Exhibits 11 and 13). In such circumstances the respondent could not reasonably in his own interest have sought other employment. Furthermore instead of lessening his damages, taking other employment would have increased them, since events have shown that a proper review of his case would have resulted in his reinstatement. Moreover the War Regulations (Exhibit 16) so controlled the common-law rights of "hiring and firing," that if they did not entirely suspend the common-law principle of mitigation of damages they circumscribed that principle to such

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an extent that it could not apply to the circumstances in which the respondent found himself.

There was a suggestion that the respondent ought to have gone to the appellant company and asked for the separation notice and then filed it with the Selective Service office in order to obtain a release to enable him to secure other employment. That is a curious idea to put forward in the light of the appellant's flagrant disregard of familiar war regulations. To my mind that suggestion could be reasonable only in the event of his desire to terminate his employment and association with the appellant company. But his cause of complaint (and it has been upheld) that he was wrongfully dismissed was coupled with his contention asserted from the first day of his dismissal that he was legally entitled to retain his association and employment with the company of which he was a director and with which he had an important and highly remunerative sales contract. The suggestion must be regarded as foreign to the common-sense realities of the situation.

While I think what has been said compels the conclusion that the respondent acted reasonably in not seeking to secure other employment, several other aspects of the matter confirm that conclusion. As stated the respondent could not in any event obtain other employment without a "release" from the Selective Service. But such a release would necessarily be founded on a separation notice showing on its face that he was discharged for "cause" (see Exhibit 10). It would be a departure from reality to believe in such circumstances that the respondent would have any reasonable chance of obtaining a similar position of trust with a responsible employer, particularly when the latter learned that the respondent's former employer accused him of engaging in what has been described as pilfering. The respondent, as a man of some business experience could not fail to realize the futility in the pertinent circumstances of seeking another similar position.

Evidence was given that the respondent had approached the Electric Panel Manufacturing Co. Ltd., and General Electric Company and that these firms were willing to employ him if he obtained a permit from the National Selective Service to

enter their employment. But that evidence does not go so far as to say they would employ him if he produced a release founded upon a dismissal "for cause," particularly if that "cause" included allegations of pilfering. The respondent found himself in the predicament that he had to clear his reputation before he could hope to be employed by a responsible firm in a position corresponding to that which he had held with the appellant company. He would have to satisfy any responsible employer not only that he was not inclined to assume too much authority but also that he was honest.

Furthermore the respondent was advised by his solicitors to treat the contract as subsisting and to insist on carrying on thereunder and his solicitors so advised the appellant company on 24th September, the day after he was dismissed (Exhibit 13). That, of course, excluded his employment with another firm. Whether his solicitors were right or wrong in law is not the point. The question is one of fact to determine whether the respondent acted reasonably (*Payzu, Lim.* v. *Saunders, supra*). A man can hardly be accused of acting unreasonably when he follows the advice of his solicitors. His counsel submitted in this Court that the respondent acted reasonably in not seeking other employment. Moreover there was no delay in bringing action. The dismissal took place on 23rd September and the writ was issued the following 28th of October. It was reasonable for the respondent not to alter his position in any way before action or while the trial was pending.

There is another consideration which could not be absent from the mind of any man caught in a similar situation. He was losing something more than a job. It was the kind of a position that he could hardly expect to duplicate. His connection was being wrongfully and compulsorily severed from a successful business of which he was leading salesman and a director, and which during his nine years' connection with it, had been built up from a small business to one of large proportions to the point that he was being paid in salary and commissions the sum of $2,000 per month. The end of the war was not in sight in September, 1943. To many people dealing with the appellant, he no doubt by virtue of his position was in effect

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"the company" as was said of Laishley in the *Goold Bicycle Co.* case, *supra*. His future prospects were largely wrapped up in the company. If he went to work for another firm he severed that connection irretrievably.

Taking all things into consideration, I must hold the respondent acted reasonably in pursuing the course he did. I think he acted as a prudent man would have acted in the circumstances. I am also of opinion that the award of $14,500 ought to be upheld as a correct and appropriate assessment of damages as it was in *Hopkins* v. *Gooderham, supra;* and *cf.* also *Jackson* v. *Hayes Candy & Co.*, [1938] 4 All E.R. 587, at pp. 589-90, and the decisions there examined.

I would dismiss the appeal.

ROBERTSON, J.A.: The respondent entered into a contract under seal with the appellant on the 1st of May, 1934. So far as relevant, in this appeal, it provided that the respondent was to serve the appellant as a salesman and otherwise for one year; as a salesman he was to sell certain articles mentioned in paragraph 1 of the agreement at an agreed commission. He was also to receive a fixed salary of $20 per week and an overriding commission of 1 per cent. for his services on all gross sales made by the company in excess of $3,000 per month, and for his services in connection with the "supervision and responsible charge of the office and accounts of the company generally and for services which he shall perform in and about the furtherance of the sale" of the appellant's products, and "the general advancement of the company and its affairs and business."

On 23rd September, 1943, the appellant terminated his employment on the sole ground of his failure to comply with certain instructions given by the managing director, Darnbrough. This was said to be a breach of paragraph 3 of the agreement, which provided that the appellant should at all times obey, observe and carry out the lawful directions of the company's managing director with respect to his duties. On 28th October, 1943, the respondent commenced this action, claiming damages for wrongful dismissal, wages and commission, basing his claim for commission entirely on the written

agreement. By its defence the appellant justified the dismissal on three alleged grounds: (1) Disobedience to Darnbrough's orders; (2) fraudulent taking by the respondent through the years 1940 to 1943 commissions to which he was not entitled, namely, commission on sales tax $2,712.86, and commission on articles not specifically mentioned in the agreement, $4,518.36, and (3) commissions amounting to $407.74 which he was admittedly not entitled to under the agreement or otherwise, taken from September, 1940, to 1943. It counterclaimed for $1,718.61, being the amount of the said commissions ($7,231.-22), less a credit balance for commissions not yet collected, to which the respondent was entitled, *viz.*, $2,019.18, and commission already earned, $3,493.43. In his reply to the counterclaim the respondent set up that he was entitled to the above commission of $4,518.36 under certain verbal agreements made between him and the appellant. During the trial the respondent obtained leave and did amend his statement of claim by setting up as paragraph 9 (a) the said verbal agreements which were practically the same as those set up in the reply to the counterclaim. The appellant denied these agreements and pleaded section 4 of the Statute of Frauds, saying the agreement was one not to be performed within the space of one year from the making thereof; and, as there was no writing, the alleged amendments were ineffective and no evidence could be given of them, and the respondent was therefore not entitled to commissions in respect of them. It further alleged there was no consideration for the commission claimed under the verbal agreements. The learned judge found that the verbal agreements had been made; that the commissions of $2,712.86 and $407.74, *supra,* in respect of sales tax, were taken in error, but in good faith, and gave judgment for the respondent, *inter alia,* in the sum of $14,500 for wrongful dismissal; and for commissions except that on sales tax; salary and auto expenses, and ordered generally an account, directing that in such account no commission be allowed to respondent on the sales tax; he allowed the appellant's counterclaim for commission charged on the sales tax; otherwise he dismissed the counterclaim. No appeal was taken against the judgment on the counterclaim in regard to the

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sales tax. I see no reason to differ from the learned judge's finding that the verbal agreements were made and that there was no disobedience of Darnbrough's orders and that there was consideration. Then did the respondent fraudulently take the commissions of $2,712.86 and $407.74? The respondent admitted he was not entitled to the $407.74, stating these charges were made in error. This amount of $407.74 is made up of commissions on sales appearing in 17 invoices; two of these were in 1940; four in 1941; five in 1942 and five in 1943. I am unable to find the remaining invoice in the appeal book. Considering the volume of business which the appellant was doing during the years 1940 to 1943, it is easy to see that small mistakes would occur in figuring the respondent's commission. In view of this fact and the cases to which I shall later refer, I am of the opinion the learned judge's finding should not be disturbed. The appellant in its statement of claim set up that the respondent had fraudulently taken the commissions on sales tax. The statement of defence merely denied that the respondent had taken these. The learned judge found that there was no dishonesty on the part of the respondent. Whether guilt ought to be inferred was one of fact for the trial judge—*Rex* v. *Miller* (1940), 55 B.C. 121. The appellant submits that there was no evidence upon which the learned judge could so find. In view of the evidence and the authorities *infra,* I think the finding must stand.

The only evidence as to the sales-tax commission is in the cross-examination of the respondent as follows, *viz.*:

> Mr. Van Snellenberg, some of these articles that were manufactured by the company and sold to various customers, some of them are subject to sales tax upon sales to customers? Yes.
>
> Quite a number? Yes.
>
> Question 210 of your examination for discovery.
>
> In all cases in reckoning your commissions throughout the period in question in this action, that is from January, 1940, until August, 1943, and in all cases where sales tax was payable, and included in the price, you calculated your commissions on the gross price including the sales tax. That is correct.
>
> You made that answer on discovery? Yes.
>
> And that is true? That is true.

The respondent was never asked why he claimed and took commission on the sales tax. The appellant submits that the

only inference to be drawn from the evidence above mentioned is that the respondent deliberately "pilfered" or "stole" these moneys. He points out that the learned judge's statement that the respondent did not charge commission on sales tax where the customer's invoice showed sales tax as a separate item, but only in cases where the invoice incorporated the sales tax in the sales price, is not borne out by the evidence. The learned judge appears to be partly incorrect in this, as in a number of instances it was shown that the respondent had collected commission on sales tax where it was shown separately on the invoice. The appellant in its factum referred to eight invoices supporting this submission and said these were only a few of like invoices and charges. The respondent's counsel said that these were the only invoices that had been produced at the trial and that the total commission on the sales tax on these eight invoices amounted to only $6.34. Further, he said there were invoices where the sales tax was shown separately and the respondent did not collect commission on the tax in these cases.

The *onus*, of course, was upon the appellant. The fraud must be strictly proved. Mignault, J., when delivering the judgment of the then Chief Justice Anglin and the present Chief Justice of Canada, Rinfret, and himself, said in *London Life Ins. Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117, at pp. 125-6:

> That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt. In criminal cases this rule is often expressed by saying that the crime imputed must be proved to the exclusion of reasonable doubt. There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases (Taylor, Evidence, 11th ed., vol. 1, par. 112, and cases referred to). Whether or not, however, the cogency of the presumption is as great in civil matters as in criminal law (a point not necessarily involved here), I would like to adopt the statement of the rule by Middleton, J.A., in the court below, which appears entirely sound:—
>
> " . . . While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or *quasi*-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational

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conclusion than that the evil act was in fact committed. See Alderson, B., in *Rex* v. *Hodge* (1838), 2 Lewin, C.C. 227."

In the case of *Rex* v. *Harcourt* (1929), 64 O.L.R. 566, the accused was charged that being an officer of a company he unlawfully circulated or published a prospectus, the statements and accounts in which he knew to be false, in order to induce persons to become shareholders in the company. In that case it was necessary to prove that the accused knew the prospectus and statements in question were false. In the case at Bar it would be necessary to prove that the plaintiff knew that he was not entitled to a commission on the sales tax. Middleton, J.A., with whom the Chief Justice of Ontario and McGee and Orde, JJ.A. agreed, said this at p. 574:

> " . . . His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you can convict him; but while I say that, gentlemen, I by no means mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer that fact, as you are entitled to infer any other fact, from facts and circumstances which shew and carry to your mind the conviction that the man when he circulated, or when he made that balance-sheet, knew that it was false. You must be quite satisfied, however, before you can draw that conclusion, not merely that it is probable, or likely, or possible that he knew, but that he did, in point of fact, know the falsehood of which he is accused."

The appellant submitted that the contract was within the Statute of Frauds because of paragraph 12 of the agreement, which provides that during the continuance of the appellant's employment and after its determination he should not by any means, without the consent in writing of the company, divulge to a person not a director of the company a trade secret, method or manufacture or special information employed in or conducive to the business of the company, and which might come to his knowledge in the course of or by reason of his employment, and it relied on the case of *Reeve* v. *Jennings,* [1910] 2 K.B. 522. In that case the facts were that the defendant quit the service of the plaintiff under the terms of a verbal agreement which provided that his employment might be determined by either party giving the other one week's notice, and that the defendant should not, within 36 months after quitting the plaintiff's service, carry on the business of a dairyman within a certain specified area. The

defendant quitted the plaintiff's service and within 36 months started a dairyman's business within the prescribed area. It was held that the agreement was within the statute. While there was no provision for the length of time, the defendant was to continue in the service of the plaintiff, and the Court held (pp. 527-8):

> . . . ; it was the intention of the parties that the agreement should continue in force until notice to terminate it was given. It was contemplated that it might go on in full force for several years.

At p. 529 Bray, J. said:

> . . . As regards one side it was clearly not to be performed within the year; as regards the other side it could be, but it was not the intention of the parties that it should be, performed within the year.

He was of the opinion that the rule laid down in *Donellan* v. *Read* (1832), 3 B. & Ad. 899, to which reference will later be made, was an exception to the rule. The respondent relied upon the decision of the Court of Appeal in *Milsom* v. *Stafford and others* (1899), 80 L.T. 590, which does not appear to have been cited in *Reeve* v. *Jennings*. The plaintiff in that case was the executrix of her deceased husband who had verbally agreed to hire a gas plant for the term of three years from the defendants. The defendants proved a written offer by them to the deceased to let out the gas plant to him for three years, he to pay £50 on delivery and a quarterly rental, and that the goods had been got ready by the defendant and been seen and approved by the deceased who had orally accepted the offer. Before they could be delivered, he had died. They counterclaimed for the breach of this agreement and obtained judgment. As was said by Williams, L.J. at p. 591:

> . . . the difficulty that the defendants are in here is that the consideration to be performed by the parties to the contract could not in either case be performed within the year.

In my opinion both *Reeve* v. *Jennings* and *Milsom* v. *Stafford and others* are distinguishable upon the facts. But in both cases it is laid down that the contract is not one that is not to be performed within the space of one year if all that is to be done by one party as the consideration of the contract can be done within one year.

Lord Coleridge, J. said in *Reeve* v. *Jennings, supra* (p. 529):

> . . . A contract which cannot be performed on either side within the year is admittedly within the statute; but the authorities show that if it is contemplated by the parties that the performance on one side shall take place within the year, then the statute does not apply.

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In *Donellan* v. *Read* (1832), 3 B. & Ad. 899 the landlord had agreed to do certain repairs, and the tenant was to pay him in consideration thereof an increased rent of so much per year during the remainder of the term, which had yet to run some 15 years. While there was no period fixed within which the landlord was to do the repairs, he actually did them within the year. Littledale, J., who delivered the judgment of the Court, said at p. 906:

> As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case.

Boydell v. *Drummond* (1809), 11 East 142, which was the basis of the decision in *Reeve* v. *Jennings,* was distinguished on the ground that the contract under consideration in the *Boydell* case was

> not completely executed on one side, and the case was such that in the common course of the publication it was not expected that it should be completed in a year.

Then in *Fenton* v. *Emblers* (1762), 3 Burr. 1278, at p. 1281, the opinion of the majority of the judges was:

> The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. . . . It does not extend to cases where the thing only may be performed within the year.

Peter v. *Compton* (1694), 1 Sm. L.C., 13th Ed., 350, declared that the words:

> "An agreement that it is not to be performed within the space of one year from the making thereof" means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year.

So far as the covenant on the part of the respondent is concerned, that is one which might be "performed within the year" as the covenantor might die within the year. *Peter* v. *Compton* and *Fenton* v. *Emblers, supra,* and *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424, and *MacIntosh* v. *Hotham,* [1933] 2 W.W.R. 383, all support this view. There is also an interesting American case, *Barash* v. *Robinson* (1927), 252 P. 680, a decision of the Supreme Court of Washington. There the defendant had sold his business to the plaintiff and agreed not to engage thereafter in the same business in the same city in which the business was carried on. Objection was taken that the contract

was invalid as being under the ban of the Statute of Frauds, the provision in that State being the same as in our statute. Mitchell, J. who delivered the judgment of the Court, said at p. 683:

> . . . The contract must contain "terms" showing that it is not to be performed within a year. There are no terms of the contract here, as testified to by the witness and established by the judgment, that the contract is not to be performed within a year. Certainly the death of the promisor would terminate it, and his tenure of life, like that of all other mortals, is subject to the natural law; he may die at any time within a year.

The learned trial judge dealt with the plaintiff's claim for damages on two grounds: (a) Damages for breach of its duty, pleaded in paragraph 15, to give a notice of separation to the plaintiff, and to the proper official pursuant to the orders in council referred to in paragraph 15 of the statement of claim; and (b) to damages for wrongful dismissal.

He dealt first of all with the latter claim, and awarded the plaintiff damages of $14,500 for wrongful dismissal. He said that he regarded the claim set out in paragraph 15 as a claim for damages, and as the damages could only arise from the appellant's omission to give a notice of separation, it followed that the respondent must show that he used due diligence in trying to get employment and that as he knew he could not get a new job without a "notice of separation," due diligence on his part would certainly involve his making the attempt to get the notice of separation, the lack of which kept him out of employment. He then found that he made no attempt whatever to get the notice and consequently was not entitled to any damages under paragraph 15. With deference, it seems to me that the same reasoning applied to the claim for wrongful dismissal. There is no doubt from the respondent's own evidence, that he could have obtained other suitable employment if he had obtained the notice of separation. It would have been a simple matter for him to apply to the appellant for this. If they had refused to give it, or he had been unable to obtain employment because of the reasons given for his wrongful dismissal, then there would have been no question that he could not obtain other employment and he would have been relieved from the necessity of getting other work. It is submitted by respondent's counsel that if his client had pressed for the notice of separation, that would have been an

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acceptance of his dismissal and his claim would have been limited to a claim for a *quantum meruit* for the services he had actually rendered. He referred to Smith's Law of Master and Servant, 8th Ed., 121. The application to obtain a notice of separation was one imposed by the law and obligatory on the respondent. I am unable to see how the action of the respondent in carrying out what the law required, namely, that he take all reasonable steps to obtain other employment, would affect the remedy for damages which he could only obtain where he used due diligence to obtain same and had failed.

First of all, the law seems to be clear that a person who is wrongfully dismissed and therefore entitled to damages, must do everything that a reasonable and prudent man would do under the circumstances to mitigate the damages. As is stated in Smith on Master and Servant, *supra,* he may treat the contract as continuing, and bring an action against his master for breaking it by discharging him. See also notes to *Cutter* v. *Powell* (1795), 2 Sm. L.C., 13th Ed., 1, at p. 35, and cases there referred to. This is what the plaintiff did in this action.

Viscount Haldane, L.C. said in *British Westinghouse Electric and Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited,* [1912] A.C. 673, at p. 689, that when there had been a breach of contract there were

> certain broad principles which [were] . . . well settled. The first [was] that, as far as possible, he who [had] proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed;

and the second was that the

> first principle [was] qualified by a second, which [imposed upon the] plaintiff the duty of [continuing] all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

(The law as thus laid down was applied in *Cockburn* v. *Trusts and Guarantee Co.* (1917), 55 S.C.R. 264, a suit by an employee for salary). After referring to what James, L.J. said in *Dunkirk Colliery Company* v. *Lever* (1878), 9 Ch. D. 20, at p. 25, Viscount Haldane continued as follows:

> As James L.J. indicates, this second principle does not impose on the

plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. . . .

See also *Brace* v. *Calder,* [1895] 2 Q.B. 253; *Payzu, Ld.* v. *Saunders,* [1919] 2 K.B. 581; *Reid* v. *Explosives Company* (1887), 19 Q.B.D. 264, at p. 269. The same principle has been laid down in our Courts in *Lamberton* v. *Vancouver Temperance Hotel* (1904), 11 B.C. 67; *Andrews* v. *Pacific Coast Coal Mines, Ltd.* (1910), 15 B.C. 56 and *Pratt* v. *Idsardi* (1915), 21 B.C. 497, at p. 501.

But it is said that if the plaintiff were to take other employment he would have elected to treat the contract as rescinded and would (as Smith on Master and Servant, *supra,* says at p. 121) only be entitled to a *quantum meruit* and not to damages. As to this I would refer to what Crompton, J. said in *Emmens* v. *Elderton* (1853), 4 H.L. Cas. 624, at pp. 645-6 as follows:

The question now is, whether there cannot be a breach of such a contract of employment and service as the present by a dismissal; for if so, both parties have agreed on these pleadings that such a breach has taken place. It seems to me quite too late to question the principle upon which so many actions have proceeded in modern times; and which is, that after a dismissal, the servant or party employed my recover such damages as a jury may think the loss of the situation has occasioned. If he has obtained, or is likely to obtain another situation, the damages ought to be less, or nominal, according to the real loss; and in such case the servant need not remain idle, in readiness to give services which cannot be wanted. I quite agree with what was said by my brother Erle in this House, in the case of *Beckham* v. *Drake,* [(1849)] 2 H.L. Cas. 606, that where a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment. If such an action was not maintainable, and the only remedy was by action of debt for the salary, the servant could enter into no inconsistent employment; or, if he did, could recover nothing. Thus, suppose that the servant chooses to enter into a situation at a smaller salary, he could maintain no action at all, because he could not aver that he continued ready to serve till the salary became due. Suppose a clerk or agent to be engaged for some years at a yearly salary and to be wrongfully dismissed, surely he is not bound to remain idle, and to sue his employers every year for his salary; but he may engage himself elsewhere, and at once bring an action for the dismissal; and he does not, by engaging himself elsewhere, lose a right to his remedy, as he would to the other supposed remedy. If there is a contract to keep in the employment, it seems necessarily to follow that a dismissal from such employment is a breach of contract.

See also *Beckham* v. *Drake* (1849), 2 H.L. Cas. 579, at pp. 606-7.

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In *Hochster* v. *De la Tour* (1853), 2 El. & Bl. 678 the plaintiff had been employed as a courier by the defendant who, before the date of the employment, refused to perform the agreement. Lord Campbell, C.J., who delivered the judgment of the Court, said at p. 690:

> But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind.

The view taken by Crompton, J. is, in my opinion, in accordance with what Lord Haldane said in the *Westinghouse* case, *supra,* and the other cases to which I have referred. How could the right to damages be affected by taking other employment if, in order to obtain damages, the plaintiff had to show he had taken all reasonable steps to mitigate the damages and in case he was successful in obtaining other employment, to engage in it?

For these reasons I think that the judgment for $14,500 damages cannot stand. Under all the circumstances and following what was said by the Full Court in *Lamberton's* case, I think a new trial should be ordered, limited to the *quantum* of damages, as indicated above. Costs may be spoken to.

SIDNEY SMITH, J.A.: This is an appeal from a decision of WILSON, J. delivered in November of last year, after a trial which occupied several days. The case was by no means an easy one, and was complicated by a mass of material which had accumulated during nine years. But in the view I take the controversy resolves itself into the application of one or two not unimportant principles of law.

The history of the case is this: The plaintiff (respondent in this appeal) was an accountant and salesman in the employment of the defendant company (the appellant herein) and complains that the termination of his services by that company was wrong-

ful. He was originally engaged by the company, whose business was the manufacture of electrical goods and equipment, in a minor capacity, in the year 1928, at a salary of about $20 per week; by the year 1934 he had reached the position of accountant and was then earning about $30 per week. In the latter year he was appointed salesman, as well as accountant, and the terms of his engagement were then embodied in a written agreement dated 1st May, 1934, under the terms of which he was to receive a fixed salary of $20 per week. But his real remuneration was to be by way of commission on sales made by the company. Such commission was to be of a two-fold character, *viz.*, 1 per cent. on all gross sales in excess of $3,000 in any one month, and 10 per cent. on the sales of certain specified articles enumerated in paragraph 1 of the agreement. The employment was to continue for one year, with the proviso that at the end of the year it was contemplated that the agreement should be "revised and/or continued" as might be mutually agreed upon by the parties. It contained a term that the plaintiff would not, during its continuance or after its determination, divulge any trade secrets, etc. At the end of the first year nothing was said about the revision or continuance of the agreement, nor indeed was anything said at the end of any subsequent year. Some remarks were casually made from time to time by Mr. Darnbrough, the managing director of the company, to the effect that "it seemed to be working out alright"; but there was nothing more than this, and the parties continued working under its terms for nine years in a relationship of mutual confidence. The employment of the plaintiff thus became that of a yearly hiring, upon the terms of this written agreement of 1st May, 1934, and could accordingly only be terminated upon reasonable notice, and at the end of one of the yearly periods (Halsbury's Laws of England, 2nd Ed., Vol. 22, pp. 144 and 149; Smith on Master and Servant, 8th Ed., 36 *et seq.*).

By letter dated 23rd September, 1943, the company terminated the services of the plaintiff as from that day. The letter stated that the company did so under the provisions of clause 20 of the agreement. The proviso to this clause was to the effect that the company might at any time terminate the agreement, with or

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without notice, in the event of the plaintiff contravening any of its terms. One such term was that the plaintiff should

> faithfully, honestly and diligently serve the company . . . and . . . at all times obey, . . . and carry out the lawful directions of the company's managing director.

By a second letter of the same date the company gave reasons for the dismissal, namely, that the plaintiff had disobeyed the express directions of Mr. Darnbrough in that he had accepted orders for certain goods without his approval. There were one or two other reasons given, or perhaps it would be more accurate to say, complaints made, but they are no longer important. After the plaintiff had left the company the books were audited, in the course of which the company discovered various other grounds allegedly justifying dismissal. These other grounds, of course, became available to the company for its defence, notwithstanding that they were unknown to the company at the date of dismissal (*Ridgway* v. *The Hungerford Market Company* (1835), 3 A. & E. 171, at p. 177; *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339); and notwithstanding that they might be altogether different from the grounds already given (*Baillie* v. *Kell* (1838), 4 Bing. N.C. 638, at p. 650). These other grounds were that the plaintiff throughout the years had been systematically and fraudulently pilfering money from the company. This, it was alleged, had been accomplished by the plaintiff charging commission of 10 per cent. on articles which were not within those enumerated in paragraph 1 of the agreement; and also by charging commission on items of sales tax which were included as part of the price charged to the customer, but which were collected by the company for the sole purpose of being paid over to the Dominion Government. This necessitated at the trial a close and tedious examination of the various orders, invoices and commission statements, by which, however, we benefited when the matter came before us for reconsideration.

It will be sufficient for the present to say that the plaintiff in the action claimed damages for wrongful dismissal and for an accounting of certain back items of salary and commission; while the company counterclaimed for certain sums by way of commission which it said had been wrongly collected by the plaintiff from the company, and gave him credit for certain lesser sums

which would become due to him when collected by the company. The Court allowed damages at $14,500 and granted an accounting. On the counterclaim it allowed the company's claim for $2,712.86 for commissions on sales tax and dismissed its claim for $4,518.36 for other commissions allegedly wrongly collected by the plaintiff.

It is necessary to examine the grounds advanced as justifying the dismissal. But I think that, with respect to those originally advanced, this only need be said: that here there was at the trial an issue of fact supported on each side by evidence which might have led the learned trial judge to one of two conclusions. He heard both sides; he expressly accepted the evidence of the plaintiff; he did not misdirect himself; and he reached the reasonable conclusion of fact. In these circumstances his finding will not be disturbed.

With respect to the subsequently discovered grounds it will be convenient to deal first with the charging of commission on sales tax. Under this head the plaintiff charged and collected the sum of $2,712.86, which, as already stated, forms part of the subject-matter of the company's counterclaim. It was the practice of the plaintiff to submit to Mr. Darnbrough each month a statement of the commissions due to him, with a cheque made out for the amount. Mr. Darnbrough would appear to have paid no great heed to the details of the statements, and seems to have signed these cheques as a matter of course. There can be no doubt that such commissions were so charged and paid; and the learned judge has so found. But he has also found that the plaintiff honestly thought that he was entitled to charge them, and that he did not do so fraudulently or in such a manner as would furnish grounds for dismissal. This finding is attacked by the appellant in several ways. We are first asked to look at the pleadings. There we find that the plaintiff flatly denies that he charged any commission upon sales tax, and that such was the plaintiff's position on the pleadings when the trial opened on 15th May, 1944, and throughout its length of seven separate days until it concluded on 30th June, 1944. But I think this was a mistake in pleading which could have been, and should have been, corrected. And I think this is demonstrated by the fact

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that on his examination for discovery in February, 1944, the plaintiff, when questioned on this head, at once admitted having charged such commissions. He made the same prompt admissions at the trial. It seems to me therefore that no inference unfavourable to the plaintiff can properly be drawn on this account.

It was also urged upon us that in this regard the learned judge had misdirected himself in that he pointed out that commission on sales tax was charged by the plaintiff only in cases where the invoice showed sales tax and purchase price in one lump sum, and was not charged in cases where the sales tax was set out separately. As to this, the learned judge would appear to have been mistaken, for we were referred to a number of instances where the charge had been made notwithstanding that the invoice showed the sales tax as a separate item. It is true that the total commissions charged in these instances amounted to a very small sum, $6.34. But it is the principle that is involved, and the amount of the sum, be it large or small, is irrelevant. I am, however, unable, in the event, to allow force to this contention. I think it plain from the evidence that the plaintiff thought himself justified in law in making these commission charges on sales tax (regardless of whether the items of sales tax were or were not shown separately in the invoice), and that it was not until judgment was handed down that his mistake was made clear to him. Moreover, I am satisfied from the reading of the judge's reasons as a whole that this point did not affect his final conclusion.

And this view also affords the answer to the third contention submitted by the company on this part of its case. It says that the learned judge could not properly find "honest error" in this regard because he had before him no evidence to that effect. It is no doubt true that the plaintiff was never expressly asked, and therefore never expressly said, that his mistake was an honest one. But does this matter when the whole argument of his counsel was that he was entitled in law to make these charges? The finding was that the plaintiff was honestly of opinion that he was entitled in law to do so, and there was ample material upon which the judge could so find, although the express question was never put. But in the result I agree with the finding that the

plaintiff must return the moneys so charged and collected by him, and note in passing that this finding was not the subject of complaint or appeal.

I now pass to the second ground advanced by the company as proof of pilfering on the part of the plaintiff, namely, his charging of commission on articles not specified in paragraph 1 of the agreement. The judge on this heading found that at different times there had been six amendments made to the written contract, and that thereby certain articles, not hitherto included, had been lifted within the class of articles mentioned in paragraph 1, with respect to which the respondent was entitled to charge 10 per cent. commission. When he dealt with this finding, counsel for the company took a position which may be summarized thus:

> This finding was made in a conflict of credibility between the plaintiff and Darnbrough and the judge believed the former. Therefore, I do not seek to impeach it as a finding of fact, nor as a finding against me with respect to my defence justifying dismissal. But I contest the finding in law, and say that, in law, no evidence should have been received of those alleged variations and that therefore I am entitled by way of my counterclaim to recovery of the commissions so paid.

I very much doubt whether this contradictory position is open to the appellant, but, on the assumption that it is, I proceed to examine the three contentions advanced in support of the latter part of it.

The appellant company says, firstly, that any classes of additional goods brought within the ambit of paragraph 1 could only be so brought by writing, as provided in the paragraph itself. But the learned judge found in effect that the parties by their conduct had tacitly waived this provision, and that various classes had been expressly brought in by verbal agreement which was binding. There was evidence to support this finding, and so far as I am aware, it is not in violation of any principle of law.

Then, secondly, it was argued that the agreement was one which under the Statute of Frauds had to be in writing, and that therefore any variation of it, to be valid, had also to be in writing. The submission was that the agreement fell within the statute by virtue of the plaintiff's obligation not to divulge any trade secret, etc., before or after its termination; that this obligation extended beyond the year and was projected into the future, and thereby

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made the agreement one which was incapable of performance within the year. In support of this view we were referred to a decision of a Divisional Court of the King's Bench Division in England, *Reeve* v. *Jennings,* [1910] 2 K.B. 522. But I venture to think that the true principle was laid down 24 years before by North, J. in *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, to the effect that if all that one of the parties has to do under the contract may by possibility be performed within the year, then the contract is one which does not come within the statute. This decision was expressly approved by the Court of Appeal in England in *Milsom* v. *Stafford and others* (1899), 80 L.T. 590, an authority which unfortunately was not cited in *Reeve* v. *Jennings, supra.* And so, in my view, the agreement itself, not being required by law to be in writing, neither need any of the variations thereof now under consideration be in writing (Phipson on Evidence, 7th Ed., 564; *Johnson Investments Ltd.* v. *Pagratide,* [1923] 2 W.W.R. 736, at pp. 739 and 746; *Niagara Falls Co.* v. *Wiley* (1912), 4 D.L.R. 96).

But it was said thirdly, that in any event these variations were not supported by consideration, and therefore could not stand. It was pointed out that there was an express obligation put upon the plaintiff under the agreement to advance the sale of all company products generally, and that therefore by assuming the duty of salesman for these specifically uplifted articles he was doing nothing more than he was already required to do under the terms of the agreement. As to this I agree both with the finding and the reasoning of the trial judge. He pointed out that as to the articles originally specified in paragraph 1 of the agreement the plaintiff was made the "salesman of the company," while as to the rest he was simply required to "advance and further" their sales. It seems to me that being appointed salesman of the company for certain specified products is one thing; while being required, in the ordinary run of his duties, to do what he could to advance and further the sale of all company products generally, is a different thing. The company itself in this very agreement makes this distinction in his duties. It may be thought a fine one; but it is there; and it is, I think, sufficient. Consideration need not be adequate; it will suffice if it is of some value (Pollock on Contracts, 11th Ed., 149).

For these reasons I am of opinion that evidence of the variations was rightly allowed in, and that the company's claim for recovery of commission paid on articles falling within these variations was rightly dismissed.

Upon the hearing before us there was a great deal of argument not specifically directed to any of the heads already discussed, but by which the credibility of the plaintiff was sought to be impeached in a general way. For example, we were reminded that although the variations were made, two in 1934, two in 1935, one in 1939 and one in 1941, there was no mention of them made by the plaintiff in his discovery examination in February, 1944; that until the opening of the trial on 15th May, 1944, the only one mentioned in the pleadings was that of the year 1939, and that only in the plaintiff's reply to the company's counterclaim; that not till the said opening day did the plaintiff amend his said reply to the counterclaim by including the other variations; and that not till after the plaintiff had closed his case did he amend his statement of claim by setting up therein the said variations, as his justification for charging commission on the articles falling within them. I admit that these arguments on the part of the appellant are impressive and that in slightly different circumstances they might well prove decisive. But not here. For here these considerations were all spread before the trial judge and he heard the plaintiff most rigorously cross-examined upon them; he heard full argument *pro* and *con.* and in the end he found for the plaintiff. I think that must dispose of the point.

Then it was contended that the plaintiff had charged commission on articles which admittedly fell neither within the original paragraph 1 of the agreement, nor within any of the amendments thereto; and that his now admitting that this was done by him in error is no excuse; that some of such articles, falling within neither the one nor any of the others, he disguised under another name and so sought to qualify them in one way or another; that he charged commission for some articles for which he ought not to have charged, and at other times he did not charge commission for other similar articles for which he could have charged. No doubt the subsequent careful scrutiny made by the company

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auditors disclosed many errors of this description, and it cannot be hoped that at this date every detail will be made clear and every difficulty explained away. We must look at the broad features of the case. It must be remembered that this contract ran through nine years, in the last four of which the company's turnover increased from $100,000 to over a million dollars per year, while the plaintiff's earnings advanced from perhaps $200 to approximately $2,000 per month, and that all the complaints made by the company of wrongful charges fall within these last four years. Errors there were bound to be in the press and hurry of all this increased and increasing business. But the judge has found that they were honest errors, and I think it proper to say quite plainly that I agree with him, and that the grave allegations of dishonesty and fraud made against the plaintiff are wholly without foundation.

There remains the question of damages. The question is a difficult one and has caused me much anxiety. More than once I have felt great doubt as to the view which ought to be taken owing to the fact that the company was in some measure to blame for the events that happened, and now to be mentioned. But in the end I have concluded, with some hesitation, but still quite clearly, that there should be a new trial on damages. The matter presents itself to my mind in this way: In his statement of claim the plaintiff made two claims; the first upon the footing that the contract still existed, as to which he claimed merely for salary and commission to the date of the issue of the writ; and the second, in the alternative, upon the ground that the contract had been wrongfully repudiated by the company, as to which he claimed for commission to the date of dismissal, together with damages for wrongful dismissal. At the trial (but, as I understood, not on appeal) it was urged that the contract was still in existence for this reason: It was adduced in evidence that under the Selective Service regulations the company was obliged, upon the dismissal of the plaintiff, to give him a "separation notice." This notice is filed with the Selective Service officials, who thereupon give the employee a permit, authorizing him to seek new employment. The company said that this was done, and it filed as an exhibit the separation notice alleged to have been given to

the plaintiff, showing that he had been dismissed "for cause." This was denied by the plaintiff and the judge accepted his denial, finding that he had in fact received no such notice and that none had been filed with the Selective Service authorities.

But the learned judge did not agree with the plaintiff in his submission that it followed from this that the contract remained in force. He thought that the giving and the filing of the separation notice had nothing to do with the termination of the contract, wrongfully or otherwise. He found that the contract had been wrongfully repudiated by the appellant company; that the plaintiff's proper remedy was for damages, as set forth in his alternative claim, and he awarded damages in the sum of $14,500, being for the unexpired part of the year at the rate of $2,000 per month. Subject to its argument that nominal damages only should have been given, the appellant did not contest this amount.

In dealing with, and in rejecting, the plaintiff's claim that the non-receipt by him of a separation notice kept the contract alive and binding upon both parties, the learned judge uses this language:

> Now since I see this as a claim for damages, and since those damages can only arise from the fact that the defendant's omission to give a notice of separation prevented the plaintiff from getting employment, it follows that the plaintiff must show that he used due diligence in trying to get employment. And it further appears to me that once he knew that he could not get a new job without a notice of separation "due diligence" on his part would most certainly involve his making some attempt to get the notice of separation, the lack of which kept him out of employment. But he made no attempt whatever to get this notice, even after he had been told he could not get another position without it. Was he, under those conditions, entitled to sit tight and expect to recover from his employer for every day he was out of work? If this is so, he might have sat on his rights for a year and then taken action. I cannot believe that this is the law. I would think that so soon as he found he could not secure employment without the notice he must then, as part of his effort to secure employment, demand the notice from his employer.

The learned judge appears to have applied this language and this finding only to the first claim: that made on the assumption of an existing and continuing contract. He fails to apply it, as respectfully I think he should have done, to the second and alternative claim, that for damages for breach of contract. If it is a true finding as to the first claim, it is not less true with respect

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to the alternative claim. The standard of diligence does not vary. It must be the same in each case. With respect to the claim for damages, it is a distinct finding that the plaintiff failed to use due diligence in securing further employment and thus failed to minimize his damages.

On the hearing it was pressed upon us that this finding of lack of due diligence made by the learned judge was a finding with respect only to the claim that the contract remained in effect and had never been properly determined; and that the learned judge made no such finding with respect to the alternative claim for damages upon the ground that the contract had in fact been determined, although (as he found) wrongfully determined. But assuming this to be so, I am unable to see how it helps the plaintiff. In order to get anything more than merely nominal damages on his alternative claim he must obtain a finding from the learned judge that he had used due diligence in his efforts to secure similar employment (*Andrews* v. *Pacific Coast Coal Mines, Ltd.* (1910), 15 B.C. 56, at p. 64; Smith's Law of Master and Servant, 8th Ed., 121-23). The best he can say on this score is that he has obtained no such finding. Nevertheless, we could, and we would, ourselves make this finding if there was sufficient evidence to support it. But in my view the evidence is not sufficient. Here it is:

Donaghy: Now, Mr Snellenberg, will you tell his Lordship what, if any, means or effort you made to earn money since the 23rd September, outside of this point? Your Lordship, I approached the Electric Panel Manufacturing Company through their manager, Mr. Don, and explained my situation to him, and asked him about a position with their firm, but I explained that I was unable to enter into any definite arrangement, because I had not had my release from Cemco Electric Manufacturing Company, and therefore, had been unable to obtain a permit from the Selective Service to seek employment.

Did you speak of any possibility of employment, or did he, if you should get a permit to seek employment?

Bray: I object. Surely we have no means of checking this. This is a mere verbal discussion.

THE COURT: No, but surely evidence relating to attempts to get employment is relevant in an action for wrongful dismissal.

Bray: He can say that he attempted to and was not successful.

THE COURT: I will allow it, subject to the objection.

Bray: He may tell us a lot of stuff that people told him.

THE COURT: A man may be allowed to give evidence of what he tried to secure, and what he got.

Donaghy: Yes? The arrangement between the Electric Panel Manufacturing Company and myself was that as soon as I was free, and had a permit to enter their employment, that I could do so.

Did you make any other attempts? Yes, I had been to the General Electric Company, and there the same question arose. I told them I was unable to enter into any agreement with them, or employment, until I had my permit and release from the Selective Service, to do so, and it was left at that.

THE COURT: You were offered the employment on that basis, is that what you mean? That is true.

From the foregoing it is clear that he did seek other employment and found that he could get what appears to have been a similar position with either one of two other companies, provided he could get the appropriate permit from the Selective Service office. He enquired there, and found such permit would be forthcoming whenever he obtained a separation notice from his last employer, the appellant company. But there he stopped. He made no attempt to obtain this notice. The explanation tendered to us was that, had he done so, it would have been tantamount to an acknowledgment on his part that he had been rightfully discharged, and would have forever barred his claim for damages. I cannot accept this view, and think it untenable. But be that as it may, he could have asked for the separation order, reserving his right to sue for damages. He fell short of taking any active step in this regard at all. The learned judge thought this showed a lack of due diligence, and I agree with him.

Nevertheless I think the plaintiff should have the opportunity of adducing further evidence to show what he could have earned during the period in question had he accepted the more remunerative of the two positions open to him. I am fortified in this view by some observations of Bowen, L.J. in *Quartz Hill Gold Mining Company* v. *Eyre* (1883), 11 Q.B.D. 674, at p. 691 as follows:

> . . . although every judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past, and the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the counsel for the plaintiff company have put forward.

Likewise in this case there is no decisive authority that a plaintiff must be bound by the strict rule where, as here, his lack of diligence is due in some measure to failure on his employer's

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part to comply with a relevant governmental regulation. And so I would allow a new trial for the purpose aforesaid, and direct that the sum of $14,500 be reduced by the amount so ascertained. Otherwise the judgment below will stand.

Appeal allowed, O'Halloran, J.A. dissenting, and new trial ordered as to quantum of damages.

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *Ian Shaw.*

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May 2, 3, 4; *June* 25.

McCLURE AND McCLURE v. O'NEIL *ET AL.*

Will—Testamentary capacity—Partial unsoundness of mind—Mental delusions, hallucinations and illusions—Effect of.

An action to prove in solemn form the will of Mrs. E. A. Brown, deceased, made on the 28th of November, 1929, was dismissed on the ground that the plaintiff failed to discharge the *onus* which lies upon it of proving testamentary capacity. The husband of the testatrix died in 1919 leaving him surviving his sister, who died in 1927, and his widow. By his last will he appointed his widow and The Royal Trust Company executors. He gave his furniture and a legacy of $2,000 to the widow and directed that the residue of the estate of the net value of $37,000 be invested and $150 a month be paid to the widow during her life, upon her death the estate to go as she might by will appoint and in default of appointment to his sister for life and after her death to his two grand-nieces the McClures. By his will he requested his wife to make a will leaving the entire estate to his sister for life and after her death to his grand-nieces the two McClures. In 1920 the testatrix made a will carrying out her husband's wishes, but in 1927 she made a new will giving substantially the whole of her own and her husband's estate to Susie and George Sutcliffe her own relatives. On July 12th, 1929, the testatrix entered the Hollywood Sanitarium at New Westminster as a voluntary patient and remained there until November 1st, 1929, when she came out for eight days and returned on the 8th of November remaining there until her death in June, 1943. On the 28th of November she sent for her solicitor and made the will in question, leaving both her own and her husband's estate to the McClure sisters in accordance with her husband's wishes. On the 17th of March, 1930, an order was made declaring the testatrix was incapable of managing her affairs and appointing Edward McGougan, W. N. O'Neil and The Royal Trust Company a committee to manage her estate.

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Held, on appeal, reversing the decision of WILSON, J., that the mental difficulties from which the testatrix suffered as described by one doctor in his reference to delusions, hallucinations and illusions as well as the reference by her solicitor to her statement that "she felt sometimes she was going out of her mind; that voices spoke to her at night as if from the grave; and she was at times in great torment," and also the evidence of another doctor that "she mentioned to me that she had heard voices, that is the only delusion I can recall," were not in the circumstances disclosed in this case such unsoundness of mind as would influence her decision as to the disposal of her property. The mental difficulties so described were "of a degree or form of unsoundness which neither disturbed the exercise of the faculties necessary for the making of a will, nor were capable of influencing the result." The essential legal requirements to establish competency expressed by Cockburn, C.J. in *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565 are satisfied by the evidence of these witnesses.

APPEAL by defendants McClure from the decision of WILSON, J. of the 9th of November, 1944, in an action by The Royal Trust Company as administrator of the estate of Elizabeth Amelia Brown, deceased, to prove in solemn form the will of Mrs. Brown of the 28th of November, 1929. The action was dismissed and by the counterclaim of the defendants other than the McClures, a copy of a will dated the 4th of October, 1927, was admitted to probate. Mrs. Brown had lived with her husband John Brown in Vancouver and Mr. Brown's sister Miss Esther Brown lived with them. John Brown died in June, 1919, and by his will appointed Mrs. Brown and The Royal Trust Company executors. The estate was valued at about $58,000. He gave a legacy of $2,000 to Mrs. Brown, the residue to be invested and $150 a month be paid to Mrs. Brown for life. After Mrs. Brown's death the estate was to go as she might by will appoint and in default of appointment to Miss Brown for life and after her death to his two grand-nieces Ellen and Eva McClure who lived in Ireland. The will contained the request that she take care of his sister and that she make a will leaving the entire estate to his sister for life and after her death to Ellen and Eva McClure. In 1920 Mrs. Brown made a will following her husband's request. Miss Brown died in June, 1927. In October, 1927, Mrs. Brown made a new will. Under it she left $100 each to the defendants O'Neil and McMaster and the residue of both her own and her husband's estate to Susie

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and George Sutcliffe her own relatives, who also lived in Ireland. On July 12th, 1929, Mrs. Brown entered the Hollywood Sanitarium at New Westminster as a patient when 64 years old. She came out on November 1st, 1929, for eight days and then returned to the sanitarium where she remained a voluntary patient until her death. On November 28th, 1929, she made a third will which was prepared by Mr. *C. M. O'Brian, K.C.*, by which she left both her own and her husband's estate to Ellen and Eva McClure. On March 17th, 1930, an order in lunacy was made by which it was declared that Mrs. Brown was incapable of managing her affairs and appointed Edward McGougan, William N. O'Neil and The Royal Trust Company committee of her estate. Mrs. Brown died in the sanitarium on June 24th, 1943. By order of October 5th, 1943, The Royal Trust Company was appointed administrator of Mrs. Brown's estate and directing that it bring an action to prove the will of 1929 in solemn form. The Royal Trust Company is plaintiff, the two McClures (who claim under the will of 1929) and the two O'Neils, Ledley McMaster and the two Sutcliffes (who claim under the will of 1927) are defendants.

The appeal was argued at Victoria on the 2nd, 3rd and 4th of May, 1945, before SLOAN, C.J.B.C., O'HALLORAN and BIRD, JJ.A.

A. Bruce Robertson, for appellant: The third will was made on November 8th, 1929. On March 17th, 1930, an order was made declaring Mrs. Brown was incapable of looking after her estate and a committee was appointed. As to the essentials of testamentary capacity see *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565; *Leger et al.* v. *Poirier,* [1944] S.C.R. 152, at p. 161. The evidence shows that she satisfied the requirements for making a will. A witness Dr. McKay said that at times she suffered from delusions, but unless these delusions and hallucinations affected the subject-matter of her testamentary dispositions, they did not render her incompetent to make a will: see *Skinner* v. *Farquharson* (1902), 32 S.C.R. 58; *McHugh* v. *Dooley* (1903), 10 B.C. 537; *McIntee* v. *McIntee* (1910), 22 O.L.R. 241; *Pare* v. *Cusson,* [1921] 2 W.W.R. 8; *Ouderkirk* v. *Ouderkirk,* [1936] S.C.R. 619; *The Royal Trust Co. and*

Fowler v. *Allen* (1936), 51 B.C. 128; *Young* v. *Toronto General Trusts Corporation* (1939), 54 B.C. 284. Her delusions or hallucinations were not connected in any way with any of the persons named in the wills. Mrs. Brown's mind satisfied all the essentials of testamentary capacity laid down in *Banks* v. *Goodfellow* and *Leger et al.* v. *Poirier*. The order of March 17th, 1930, was allowed in and relied on by the other side, but the order was improperly made, having been obtained *ex parte* and otherwise than provided for in the Lunacy Rules. In breach of rule 22 the order as made was commenced by petition and as required by rule 23 the procedings were not served on Mrs. Brown: see *Harvey* v. *Regem*, [1901] A.C. 601, at p. 611. The defendants interested in the 1927 will had put a document in evidence during the plaintiff's case and could not therefore be heard to move for a non-suit. This is not a case in which to dismiss the actions without calling on the defendants. As against the McClures it was a gross denial of justice.

McAlpine, K.C., for respondents: The learned judge properly found that the plaintiff had not proved the testatrix had testamentary capacity when she made the 1929 will. The moment the capacity of a testator is called into question the *onus* is on those propounding the will to affirm positively testamentary capacity: see *Smee* v. *Smee* (1879), 5 P.D. 84, at p. 91; *Robins* v. *National Trust Co.*, [1927] A.C. 515, at p. 519; *Leger et al.* v. *Poirier*, [1944] S.C.R. 152. The evidence of Dr. McKay, psychiatrist, amply proves her incapacity to make a will. Testamentary incapacity exists when there is defective reason, believing in facts that no rational person believes in: Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 39; *In the Estate of Belliss—Polson* v. *Parrott* (1929), 45 T.L.R. 452. A will ought not to be probated where there is evidence on both sides unless the Court believes the testator is competent. The learned judge did not err in admitting as an exhibit the order of FISHER, J. of March 17th, 1930. Judgments affecting *status* are admissible: see *Hill* v. *Clifford*, [1907] 2 Ch. 236, at p. 244; *Harvey* v. *Regem*, [1901] A.C. 601, at p. 611. Even if the order is not admissible, the judge did not base his findings on the order. The plaintiff, not having satisfied the burden of proof and in fact

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having proved lack of testamentary capacity, the learned judge was right in dismissing the action at the close of the plaintiffs' case. He was right in admitting a copy of the will of 1927 and in granting probate of said copy. The 1927 will could not be found; a true copy was produced and admitted to probate. The evidence proves that the will of October 4th, 1927, had been duly executed by a person of sound mind.

Robertson, replied. *Cur. adv. vult.*

25th June, 1945.

SLOAN, C.J.B.C.: I agree with my brother BIRD.

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

BIRD, J.A.: This action was brought to prove in solemn form the will of Elizabeth Amelia Brown, deceased, made November 28th, 1929. The learned trial judge dismissed the action upon the ground that the plaintiff failed "to discharge the *onus* which lies upon it of proving testamentary capacity."

It is apparent from perusal of the reasons for judgment that the trial judge considered that the evidence of Dr. J. G. McKay, an eminent psychiatrist, taken with some evidence that the testatrix suffered from certain delusions and hallucinations, served at least to hold the balance even, after consideration of a considerable body of testimony which supported testamentary capacity given by another expert witness Dr. B. D. Gillies, *C. M. O'Brian*, a prominent and highly esteemed solicitor of the Supreme Court of British Columbia, as well as by several lay persons of responsibility and good repute, the credibility of none of whom is impugned. In such circumstances it is open to the Court of Appeal to draw its own inferences from the evidence. *Crabbe* v. *Shields* (1925), 36 B.C. 89, at p. 96. Moreover, in the consideration of evidence, such as that adduced in this cause, which comprises the testimony of experts, *i.e.*, medical practitioners, as well as of other witnesses, many of whom speak from an intimate knowledge and long association with the testatrix, the Court should not permit the evidence of the experts, simply because it is expert testimony, to outweigh and prevail

over the testimony of eyewitnesses, based upon the evidence of their own senses. *Perera* v. *Perera,* [1901] A.C. 354, at p. 359.

The measure of the degree of mental power which the law requires in order to establish testamentary capacity was expressed by Cockburn, C.J. in *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549, at p. 565, in the following language:

> . . . It is essential to the exercise of such a power that a testator [1] shall understand the nature of the act and its effects; [2] shall understand the extent of the property of which he is disposing; [3] shall be able to comprehend and appreciate the claims to which he ought to give effect; [4] and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

And further (p. 566):

> . . . That a degree or form of unsoundness [of mind] which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will.

The burden of proof here lies upon the plaintiff who seeks to propound the will and

> he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator:

Barry v. *Butlin* (1838), 2 Moore, P.C. 480, at p. 482.

As was said by Viscount Dunedin in *Robins* v. *National Trust Co.,* [1927] A.C. 515, at p. 519:

> . . . In ordinary cases if there is no suggestion to the contrary any man who is shown to have executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question then at once the *onus* lies on those propounding the will to affirm positively the testamentary capacity.

Here the *onus* lies upon the plaintiff, since capacity is called in question.

The will which appellants seek to prove was made November 28th, 1929, when the testatrix was about 64 years of age. She was the widow of the late John Brown, deceased, who died in 1919, leaving him surviving his sister who died in 1927, and his widow, here referred to as the testatrix. By the terms of his last will John Brown appointed his widow and The Royal Trust Company executors. He gave his furniture and a legacy of $2,000 to the widow. He directed that the residue of the estate, which had a net value of about $37,000, be invested and that a

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monthly allowance of $150 be paid to the widow during her life; upon her death the estate to go as she might by will appoint, and in default of appointment, to his sister for life, and after her death to John Brown's grand-nieces Ellen and Eva McClure.

By the will made in 1929, which is here under consideration, the testatrix disposed of the estate of her late husband through the exercise of the power of appointment as well as of her own estate by a bequest of the whole to John Brown's grand-nieces, the McClures. By this disposition of her husband's estate she complied with the request made by his will, expressed in the following terms:

> I earnestly request my said wife to make a will leaving the entire estate to my said sister Esther Jane Brown for her life and after her death to my grand-nieces Ellen and Eva McClure.

Soon after the death of the late John Brown, the testatrix, by a will made in 1920, had likewise carried out the wishes of her husband by distribution of his estate substantially in the manner requested by his will.

In the interval between 1920 and 1927 the testatrix became dissatisfied with the provisions of the will of her late husband, more particularly with the amount of the provision for her life income, as well as with the administration of that estate by the trustees. Apparently arising from this dissatisfaction, she withdrew her will made in 1920 from the custody of Mr. *O'Brian*, who had been her husband's solicitor during his lifetime and her own solicitor subsequently. Mr. *O'Brian*, called as a witness for the plaintiffs, said of the interview which took place on that occasion:

> She came in in September or October of 1927 and got the 1920 will. She told me she had a right to leave Mr. Brown's property to whom she liked and that if she so desired she could leave it to her own grand-nieces, the Sutcliffes. I told her that I considered the directions contained in Mr. Brown's will to be binding on her conscience and that if she did not carry out the directions contained in his will she was doing something very wrong. She remarked to me that that was her own particular business.

It now appears that on October 4th, 1927, the testatrix made a new will, whereby she gave substantially the whole of her own estate, as well as the whole of the estate of her late husband, to the defendants Susie and George Sutcliffe, who were her own relatives. No provision was thereby made in furtherance of the request made by the will of her husband.

It is difficult to avoid the inference from the evidence that the 1927 will was made in consequence of the testatrix's dissatisfaction with the provision made for her by her husband's will and her own economic difficulties which, rightly or wrongly, she attributed thereto.

No question arises as to the testamentary capacity of the testatrix at or prior to the date of the 1927 will, which was admitted to probate upon the learned judge's finding of appellant's failure to prove testamentary capacity at the date of execution of the 1929 will.

In November, 1929, Mr. *O'Brian* visited the testatrix at her request, at Hollywood Sanitarium, New Westminster, B.C., a private hospital operated by the witness McKay, which testatrix had entered in June, 1929, and where she remained until her death in 1943. He brought with him H. H. Watson, also called as a witness by plaintiff, who previously had known the testatrix about the year 1905, though he had not seen her for many years. Mr. *O'Brian* had known the testatrix and her husband for many years, both professionally as well as socially. At this interview the testatrix discussed with *O'Brian* in great detail her husband's estate as well as her own, the provisions of her husband's will, the fact that she had made previous wills in 1920 and in 1927. She recalled the fact of her husband's request that she leave the whole estate to the McClure girls. Watson said:

> She knew me at once. Seemed . . . distressed because she had neglected to bequeath the money and property as her husband had requested her to, and she now desires to make amends. . . . In my opinion she was highly nervous and unstrung but knew what she was about, and was competent to make a will.

The evidence of *O'Brian* as to the testamentary capacity of the testatrix, which was most detailed and exhaustive, and showed that prior to the preparation of the will he had examined the testatrix with extreme care and thoroughness presumably with a view to satisfying himself, as I think it was his duty to do, that she had full testamentary capacity, is summed up substantially in the following answer:

> I thought she was very clear mentally and with full capacity to appreciate the nature and extent of her estate.

The testatrix expressed to *O'Brian* her desire to change her will, *i.e.*, the 1927 will, and leave everything including her own

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estate, to the McClure girls. His evidence convinces me that this desire was induced by the conviction that she had failed to carry out her husband's wishes by the 1927 will and desired now to remedy that situation. The 1929 will was then drawn by *O'Brian* in the presence of Watson and the testatrix, and executed by her in the presence of both.

In January of 1930 Dr. B. D. Gillies, a physician and surgeon, well and favourably known throughout British Columbia, attended the testatrix for the purpose of determining and advising upon her mental capacity. He was then accompanied by the witness *O'Brian*. The doctor's evidence discloses a careful examination, as a result of which he reached the conclusion that the testatrix was then competent to make a will. Mr. *O'Brian* in his evidence said that the testatrix in his presence discussed with Dr. Gillies the terms of the 1927 will and stated in reference to the 1929 will, after it had been read over to her

she felt that it would have been better if The Royal Trust Company had been made executor . . . but the will carried out her intention of leaving the estate to the McClure children.

And again

she desired the McClure children to get the estate because that had been her husband's wish.

In my opinion this evidence makes it abundantly clear that in January, 1930, the testatrix not only remembered the provisions of the 1929 will, but also appreciated the difference between its terms and those of the 1927 will; and she then confirmed to *O'Brian* and Gillies her intention to make the bequest to the McClures and her reasons for so doing.

Dr. McKay, an eminent psychiatrist, called as a witness for the appellants, who had the testatrix under his observation almost continuously from June, 1929, until her death in 1943, said in his examination in chief:

I personally believe that she was competent, for this reason. May I explain my reason, my Lord? . . . That she did not possess any delusions or hallucinations or illusions that would govern her one way or the other in constructing a will.

He referred, in the course of his examination, to the fact that the testatrix was

a little erratic on certain things and she had certain ideas, but not in any way towards any person or persons.

And again:

She used to have an idea that there was gas in her room.

And still again:

The only worries I recall her possessing, was . . . regarding things she had done to her husband. . . . She used to talk about that she hadn't treated her husband well, and she hadn't lived up to his requests.

Having taken those factors into consideration, he nevertheless was of opinion that testatrix was competent to make a will.

However, on cross-examination Dr. McKay was faced with the fact that on January 6th, 1930, for the purpose of an application under the Lunacy Act to appoint a committee of the estate of the testatrix, he had sworn in an affidavit:

At the time of her admission [to the sanitarium] she was restless, delusional and hallucinatory, her delusions being of the persecutory character, believing that people were trying to do her bodily injury. She possessed hallucinations of taste, believing she could taste poison in her food. She also had hallucinations of smell, claiming that she could smell gas which was being forced into her room with the idea of doing her bodily harm. . . . Owing to the delusions and hallucinations that are present, she is incompetent to look after herself or her affairs.

At the conclusion of a forceful cross-examination based upon a comparison of his evidence in chief as to the testatrix's competence to make a will in 1929 and his evidence by affidavit made in January, 1930, and after he had frequently reiterated his belief that she was competent, the witness's evidence was as follows:

In the first place, I understand you to agree that it would be your opinion that she was incompetent to look after herself or her affairs, that she was insane, is that right? If I signed that, I signed that, and therefore I hold myself responsible for it.

. . . . .

If it was your truthful opinion at that time, then it means that, in your opinion, at that time she was not competent to make a will, does it not? We would only be starting another argument, so I will admit it.

. . . . .

And of course, you are there, in saying that, describing her condition as it existed between the 12th of July, 1929, and the 6th of January, 1930, as you have already told me? Presumably I was.

It is not easy to determine what value, if any, should be placed on the evidence as to testamentary capacity given by this witness. There is such manifest contradiction between the evidence given in chief and that at the conclusion of the cross-examination by counsel for the Sutcliffes that in my opinion full support cannot be found for either proposition in such testimony.

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The witness's obvious reluctance to accept the proposition that the affidavit evidence disclosed lack of testamentary capacity creates the impression that neither at the trial nor when sworn to the affidavit, did the witness believe that the testatrix was incompetent to make a will, but was driven into an unwilling acceptance of that position in the witness box because of a statement inadvertently or carelessly incorporated in the affidavit.

One would be disinclined to reject as unworthy of credit the testimony of a reputable and highly qualified medical practitioner of good standing in the community, even in the face of such conflicting testimony. The latter explanation of the conflict in his testimony appears to me to be the more reasonable inference to be drawn from it. However, I do not find it necessary to qualify the answers made on his cross-examination. If that evidence is taken as furnishing the fullest support for the proposition that in McKay's opinion the testatrix lacked testamentary capacity at the date of the will, nevertheless I am not disposed to give the same weight to that evidence as to the testimony of witnesses having such qualifications, opportunities for observation and knowledge of the testatrix as the other witnesses called by the plaintiff.

The evidence of those witnesses in my opinion was sufficient to satisfy the burden which was cast upon the plaintiff, *i.e.*, to

> satisfy the conscience of the Court that the [document] so propounded is the last will of a free and capable testator:

Barry v. *Butlin, supra.*

The essential legal requirements to establish competency expressed by Cockburn, C.J. in *Banks* v. *Goodfellow, supra,* are in my opinion satisfied by the evidence of these witnesses. The mental difficulties from which the testatrix suffered as described by Dr. McKay in his reference to delusions, hallucinations and illusions as well as the reference by Mr. *O'Brian* to her statement that

> she felt sometimes she was going out of her mind; that voices spoke to her at night as if from the grave; and she was at times in great torment,

and also the evidence of Dr. Gillies that

> she mentioned to me that she had heard voices, that is the only delusion I can recall

were not, in my opinion, in the circumstances disclosed in this

case, such unsoundness of mind as was said in *Banks* v. *Goodfellow,* would "influence his decision as to the disposal of his property." I think that the mental difficulties so described were of a degree or form of unsoundness which neither disturbed the exercise of the faculties necessary for the making of a will nor were capable of influencing the result.

Having reached this conclusion, I must hold that the evidence established that the instrument so propounded was the last will of a free and capable testator.

I would allow the appeal.

Appeal allowed.

Solicitor for appellants: *E. M. C. McLorg.*
Solicitor for respondents: *E. A. Burnett.*

REX v. HAINEN.

Criminal law—Charge of murder—Accused's drunkenness as a defence—Degree of incapacity—Directions to jury.

On the trial of accused on a charge of murder, the evidence disclosed that at about 4.45 on the morning of the 2nd of May, 1945, a Mrs. Robinson and her daughter Hazel, living in an apartment on Beach Avenue overlooking the bathing pavilion at English Bay, Vancouver, were awakened by a woman's repeated screams from the beach. They clothed, Mrs. Robinson telephoned for the police and they then crossed Beach Avenue to where the screams appeared to originate when they saw a soldier in battle dress rise from behind some logs at the water's edge. He walked towards the avenue and passed within 15 feet of the ladies with averted face when they asked him if he heard the screams, but he did not reply. Hazel, who had a flash-light, followed him and repeated the question twice to which he replied "No" and hastened on. She then reported the incident to a passing motorist who in turn reported it to a policeman at the corner of Hastings and Granville Streets. Three-quarters of an hour later a hatless soldier in battle dress with blood-stains on his clothes and hands was picked up by the police at the corner of Davie and Granville Streets. The two ladies in the meantime found at the water's edge the body of a young woman whose head had been battered and crushed by blows from two pieces of blood-stained wood lying nearby. They also found a soldier's cap there containing within it the accused's army identification number. The deceased girl had been employed as cashier in the Empire Cafe on Granville Street and was 23 years old.

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The soldier, 28 years old, and his sister, with others, had been on a drinking party the evening before, visiting beer parlours and cafes from the late afternoon until the early morning following when they separated. Between 3 a.m. and 4 a.m. accused was in the Good Eats Cafe on Granville Street when the deceased girl entered for a cup of coffee. He spoke to her and asked her to go out with him, but she refused. As she left the place he followed her. The accused gave evidence and said he had been drinking and he remembered being in a dancing-place at about 1.30 a.m., but after that his mind was a blank. He had a dim recollection of being in a fight and rolling down a bank, but it was all very vague and confused. The accused was convicted of murder.

Held, on appeal, affirming the conviction by MACFARLANE, J., that a question was raised on the trial as to whether it was the appellant who caused the death of the girl, the issue depending largely upon circumstantial evidence, but the evidence was so abundant as to make it a matter of inevitable inference that the appellant was the man seen by the two ladies on the beach and that it was he who murdered the girl.

The main ground of appeal was that accused was too drunk to know what he was doing and did not have the capacity to form the intent required by section 259 (*a*) and (*b*) of the Criminal Code and that the learned judge did not properly charge the jury on the elements of drunkenness as a defence. It was held that the learned judge adequately presented to the jury the relevant principles as laid down in *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479 and *MacAskill* v. *Regem*, [1931] S.C.R. 330.

On the submission that the judge did not clearly instruct the jury that if any doubt existed in their minds and they hesitated between a verdict of murder and one of manslaughter, they should give the prisoner the benefit of that doubt:—

Held, the charge must be read as a whole and he left no doubt in the jury's mind on the point. There were many appropriate references in the charge that every doubt should be resolved in favour of the accused.

APPEAL by accused from his conviction by MACFARLANE, J. and the verdict of a jury at the Spring Assize at Vancouver on the 21st of June, 1945, on a charge of murder. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Victoria on the 11th, 12th and 13th of September, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Branca, for appellant: The learned judge failed to instruct the jury on the question of reasonable doubt: see *Rex* v. *Kovach* (1930), 55 Can. C.C. 40, at p. 42; *Clark* v. *Regem* (1921), 61 S.C.R. 608, at p. 616; *Rex* v. *Illerbrun*, [1939] 3 W.W.R. 546,

at p. 548; *Rex* v. *Harms,* [1936] 2 W.W.R. 114; *Rex* v. *Megill,* [1929] 1 W.W.R. 470; *Woolmington* v. *Director of Public Prosecutions* (1935), 25 Cr. App. R. 72, at p. 95. There was failure to put the law to the jury on the question of drunkenness: see *Rex* v. *MacAskill* (1930), 55 Can. C.C. 51 and on appeal [1931] S.C.R. 330, at p. 335; 55 Can. C.C. 81, at p. 85; *Rex* v. *Studdard* (1915), 25 Can. C.C. 81, at p. 82; *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479. In the alternative the learned judge did not put the case for the appellant reasonably and adequately. Every circumstance must be given of the defence: see *Brooks* v. *Regem,* [1927] S.C.R. 633; *Wu* v. *Regem,* [1934] S.C.R. 609. The circumstances are highly pertinent to the plea of drunkenness. There must be motive for the crime: see *MacAskill* v. *Regem* (1931), 55 Can. C.C. 81.

Whiteside, K.C., for respondent: The jury found that on the question of drunkenness he had the capacity to form an intent to commit the act: see *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479; *Rex* v. *Meade,* [1909] 1 K.B. 895. On the alternative verdicts of murder and manslaughter see *Rex* v. *Illerbrun,* [1939] 3 W.W.R. 546, at p. 548. As to section 1014, subsection 2 of the Criminal Code see Tremeear's Criminal Code, 5th Ed., 1306-7. There was murder and the jury was satisfied as to accused's capacity in relation to intent.

Branca, in reply, referred to *Gouin* v. *Regem,* [1926] S.C.R. 539; *Rex* v. *Krawchuk* (1940), 56 B.C. 7; *Rex* v. *Deal* (1923), 32 B.C. 279; *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57, at pp. 69-70.

Cur. adv. vult.

18th September, 1945.

SIDNEY SMITH, J.A. (*per curiam*): At 4.45 a.m., just before dawn on the morning of 2nd May, 1945, Mrs. Robinson and her daughter Hazel, who were living in an apartment on Beach Avenue overlooking the bathing pavilion at English Bay, Vancouver, were awakened by a woman's repeated screams from the beach. They threw on some clothes, went out, crossed Beach Avenue, and proceeded to the beach whence the screams had appeared to originate. They saw a soldier in battle dress rise from behind some logs at the water's edge. He crossed over

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towards Beach Avenue and passed the ladies about 15 feet away, with averted face, as if to avoid scrutiny. They asked him if he had heard screams but he did not reply. The daughter very courageously followed, turned a flash-light upon him and asked again, and a third time. He then asnwered "No" and hastened along Beach Avenue. She followed him but could not overtake him. She then stopped a passing automobile, reported the incident to the driver, who in turn reported it to a police constable at the corner of Granville and Hastings Streets, in the city. About three-quarters of an hour later a hatless soldier in blood-stained battle dress and with bloodied hands was picked up by police constables in their patrol car at the corner of Davie and Granville Streets. This proved to be the man in question, who is now the appellant. Meanwhile the two ladies had discovered at the water's edge the body of a young woman whose head had been crushed and battered apparently by blows from two pieces of blood-stained wood lying nearby. There was also found there a soldier's cap containing within it the appellant's army identification number.

The appellant was in due course charged with and convicted of the murder of this girl. Her name was Olga Hawryluk, and she had been employed as cashier in the Empire Cafe, on Granville Street. She was 23 years of age. The appellant came up for trial on that charge before MACFARLANE, J. and a jury at the Vancouver Assize, in June, 1945.

The evidence showed that the prisoner, a soldier on embarkation leave, 28 years of age, and his sister, with some other people, had been on a drinking party the night before. They had visited beer parlours, a dancing hall and cafes from the late afternoon to the early morning on the day in question, when they separated. Between 3 a.m. and 4 a.m. the appellant was in the Good Eats Cafe on Granville Street when the deceased entered to have a cup of coffee on her way home from her night work. The appellant spoke to her and asked her to go out with him or to go to his room. She refused. He followed her when she left; and the next episode was the discovery of the two of them by Mrs. Robinson and her daughter at about 4.45 a.m., as has been described.

The appellant gave evidence at the trial and said that he had been drinking that evening. His last recollection was being in the dancing-place (which would be about 1.30 a.m.). Thereafter he said his mind was a blank. He had some dim recollection of a fight and of rolling down a bank; but it was all very vague and confused. It is not necessary to further examine the testimony. Some question was raised at the trial as to whether it was the appellant who caused the death of the girl. The issue depended largely upon circumstantial evidence. There was no eyewitness to the killing. Only two were present; one was dead and the other said his memory was a blank. But this question was not pressed on appeal. Indeed, it could not have been with any hope of success, for the evidence was so abundant as to make it a matter of inevitable inference that the appellant was the man seen by the two ladies on the beach and that it was he who murdered the girl.

The main ground taken on the appeal was that the appellant was too drunk to know what he was doing and thus did not have the capacity to form the intent required by section 259 (*a*) and (*b*) of the Criminal Code; that the judge did not properly charge the jury on the elements of drunkenness as a defence, nor did he present this defence with the same detail as he had done the case for the prosecution; that had he done so the jury might have returned a verdict of manslaughter only; and that therefore the appellant was entitled to a new trial.

We do not consider it now necessary to analyze minutely the defence herein with any particularity. It will suffice to say that in our opinion, formed after a careful consideration thereof, there is no doubt that the learned judge adequately presented to the jury the relevant principles as laid down in *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479 and *MacAskill* v. *Regem,* [1931] S.C.R. 330.

And in our opinion there is also no doubt that the learned judge summarized adequately and fairly the evidence of drunkenness given by the many witnesses at the trial. He did not in any way attenuate its importance; on the contrary, he dwelt upon it fully. He reminded the jury of the evidence about the appellant having consumed an "enormous" quanity of beer as well as some

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whisky and rum. He asked them to consider that and the effect it would have upon the appellant in the light of all the evidence, and particularly in the light of the evidence given by four psychiatrists. He then left it for the jury to say whether the drunkenness of the appellant was of such a character as would deprive him of the capacity to form the intent to commit the crime charged. We can find nothing wrong with this direction.

A final point was made that the judge did not clearly instruct the jury that if any doubt existed in their minds and they hesitated between a verdict of murder and one of manslaughter, they should give the prisoner the benefit of that doubt, and bring in a verdict for the lesser offence. It may be that the learned judge did not say so in express terms, but it is an elementary commonplace that the charge must be read as a whole, and we are satisfied that he left no doubt in the jury's mind on that point. There were many appropriate references in the charge that every doubt should be resolved in favour of the appellant. We think therefore that this contention fails, as do the others that were raised before us.

The appeal must therefore be dismissed.

Appeal dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

GILL BROTHERS v. MISSION SAWMILLS LIMITED (p. 435).—Affirmed by Supreme Court of Canada, 5th October, 1945. See [1945] S.C.R. 766; [1945] 4 D.L.R. 449.

REX v. DUNCAN (p. 266).—Affirmed by Supreme Court of Canada, 4th June, 1945. See [1945] S.C.R. 748; [1945] 3 D.L.R. 481; 84 Can. C.C. 113; 15 F.L.J. 99.

YULE v. PARMLEY AND PARMLEY (p. 116).—Reversed by Supreme Court of Canada, 20th June, 1945. See [1945] S.C.R. 635; [1945] 4 D.L.R. 81; 15 F.L.J. 132.

Cases reported in 60 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

ATTORNEY-GENERAL OF CANADA v. WESTERN HIGBIE AND ALBION INVESTMENTS, LTD. (p. 123).—Reversed by Supreme Court of Canada, 23rd March, 1945. See [1945] S.C.R. 385; [1945] 3 D.L.R. 1.

LEVI AND LEVI v. MACDOUGALL *et al.* (p. 273).—Affirmed by Supreme Court of Canada, 20th November, 1944. Unreported.

REX v. STORGOFF (p. 464).—Application to Supreme Court of Canada for a writ of *habeas corpus* granted 24th April, 1945. See [1945] S.C.R. 526; [1945] 3 D.L.R. 673; 84 Can. C.C. 1; 15 F.L.J. 131.

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directors passed a resolution "that Frank Willis be authorized to conduct and consummate any arrangements with certain firms and any others necessary for the furtherance of the Northern Co-operative Timber and Mill Association and to sign all necessary papers for the said association in the transaction of said business." On May 8th, 1941, Willis, on behalf of the association, entered into a written agreement with the plaintiff whereby the plaintiff agreed to collect moneys that became due to the association as booms of logs were sold and apply these from time to time in payment of liabilities and payment of operating expenses and the plaintiff would be paid a trustee fee of $75 a month and 50 cents per thousand feet for financing the association. The plaintiff and his associate, one King, were to guarantee the account of the association with The Royal Bank of Canada up to $5,000 and this was done. The plaintiff also performed other services for the association in Vancouver. It was a term of the agreement that the association should cut not less than eight million feet of logs per year. By August, 1941, it became apparent that the association could not live up to this undertaking and the plaintiff informed Willis that, owing to the small production of logs, the fee must be increased to 75 cents per thousand or otherwise he would be unable to continue with the agreement. Willis on behalf of the association agreed to this increase. The business of the association continued on this basis until December, 1942, when the directors passed a resolution abolishing the office of managership and Willis resigned as manager. The plaintiff continued to act as trustee with the same financing arrangement until February 25th, 1943, when the agreement with the plaintiff was terminated. In an action by the plaintiff for $1,909.06 as the balance due by the defendant to the plaintiff under the contract of May 9th, 1941, the defendant denied that the financing fee to the plaintiff was increased to 75 cents per thousand feet by oral agreement and that 381,970 feet of logs on which the plaintiff claimed a financing fee were not sold until after the plaintiff's services terminated. On the verdict of the jury judgment was entered for the defendant for $333.75. *Held*, on appeal, reversing the decision of COADY, J., that the verdict can stand only as far as it concerns the claim for financing the 381,970 feet, amounting to $286.48, and not otherwise. The evidence preponderates against the verdict so as to show that it was unreasonable and unjust

and such as to show that the jury have failed to perform their duty. The evidence is conclusive that Jardine was justified in dealing with Willis upon the footing that he had full authority from the association to make the 50 cents arrangement and later the 75 cents arrangement. The appellant will have judgment for the amount of his claim less $286.48 and the counterclaim is dismissed. JARDINE v. NORTHERN CO-OPERATIVE TIMBER AND MILL ASSOCIATION. - - - - - - - **86**

2.——*Meeting of shareholders—Shareholder—Whether alien enemy—Rejection of his votes—Action for damages against chairman—In nature of judicial act.*] The defendant Thomas was president of the defendant company and chairman of a meeting of shareholders on the 27th of January, 1943. The plaintiff Smith regularly tendered proxies from a number of shareholders. Of these, 62,615 shares were the property of the plaintiff Bluechel and 25,000 shares were his own. Six months prior to the meeting, the secretary of the company, who was also its solicitor, received from the sergeant-in-charge, British Columbia Police, a letter stating the plaintiff Smith was then reporting as an enemy alien. The secretary read the letter and advised that as an enemy alien Smith was not entitled to vote. The chairman ruled that Smith's votes either in person or as proxy would not be allowed. At the hearing the defendant company admitted that the votes tendered by the plaintiff Smith should have been counted, that the resolutions referred to in the statement of claim, had the said votes been counted, would have been lost and should be declared null and void. Other than costs, no further relief was required against the company. The plaintiffs claimed general damages as against the defendant Thomas. *Held*, that the act of the chairman is in the nature of a judicial act and that he should be entitled, if he acts in good faith and without malice (and it has been so found in this case), to be protected from liability. BLUECHEL AND SMITH v. PREFABRICATED BUILDINGS LIMITED AND THOMAS. - - - - - **325**

CONFESSION—Whether free and voluntary —Admissibility. - - - **140**
See CRIMINAL LAW. 1.

CONNIVANCE — Suspicions aroused of adultery—Watching wife to obtain evidence. - - - - **48**
See DIVORCE. 9.

2.——*Construction — Duration — Notice terminating the contract—Sufficiency—Damages—Reference.*] The defendant operated a sawmill at Mission, B.C., and the plaintiffs, who were fuel-wood dealers, entered into a verbal contract with the defendant on the 24th of April, 1942, to pay for all wood fuel from the latter's sawmill at $1.50 a cord for fir and nothing for cedar and hemlock and $1.50 per unit for fir sawdust and nothing for the other sawdust, on condition that the plaintiffs would keep the mill-wood bunker "clean," *viz.*, remove from the bunker the "waste" wood collecting there during mill operations. There was no stipulation as to the duration of the contract. The plaintiffs were obliged to keep the bunker from filling up as a full bunker would stop the operation of the mill. From time to time the terms of the agreement were varied: (1) By the defendant taking from the plaintiffs the rights and obligations relating to sawdust; (2) by demanding payment for the hemlock and cedar at 75 cents per cord; (3) by increasing the price for fir fuel wood from $1.50 to $2 per cord. These changes were accepted by the plaintiffs. On the 24th of June, 1943, the defendant notified the plaintiffs that no more wood would be supplied to them after June 30th, 1943. In an action for specific performance of the contract or in the alternative, damages for wrongful termination of the contract, it was held that in April 1942, a contract was concluded between the parties, that the six-days' notice of termination given on June 24th, 1943, was unreasonable and the contract was wrongfully terminated on June 30th, 1943. A reference was ordered to the registrar to determine the *quantum* of damages. *Held*, on appeal, affirming the decision of BIRD, J. (SIDNEY SMITH, J.A. dissenting), that mutual recognition of enforceable reciprocal obligations is not only clearly manifested in the language the parties used, but is collected as well from the efforts made by the defendant to persuade the plaintiffs

CONTRACT—*Continued.*

to enter into the contract, the nature of the relations between the parties and the importance to the defendant of the bunker being kept clear and the wood therefrom removed from its own premises. The proper inference from all the facts is that by words and conduct a contract in the terms found in the Court below was concluded between the parties in April, 1942. GILL BROTHERS V. MISSION SAWMILLS LIMITED. - **435**

3.——*Operation of plant—Agreement to advance money for cost of operation—Chattel mortgages to secure advances—Covenants for payment—Whether joint and several.*] By agreement of January 28th, 1939, between S., T. (old company) and R., T. (old company) agreed to advance to S. such sums of money as required to meet the cost of operation of its plant up to $10,000 in any one year and R., being owner of the plant used by S. held under a lease by S. from R. agreed to secure said advances by executing a chattel mortgage on said plant in favour of T. (old company), in which S. joined as a party, the agreement to be in force until January 1st, 1942. By agreement of December 30th, 1939, between the said parties with T. (new company and plaintiff), T. (new company) assumed the obligations of the old company under the agreement of January 28th, 1939, and the parties agreed to be bound thereby. By further agreement the duration of the agreement of January 28th, 1939, was extended to July 1st, 1943. On December 31st, 1941, a further chattel mortgage was made between R. as grantor and T. (plaintiff) as grantee with S. as the third party joining in the covenant for payment, being in the same terms as in the first chattel mortgage as follows: "and S. and R. do and each of them doth hereby covenant, promise and agree to and with the grantee that they S. and R. or one of them shall and will well and truly pay or cause to be paid unto the grantee the said sums of money in the above proviso mentioned." R. died on December 21st, 1942. During his lifetime he was managing director of S. and was actively engaged in carrying on its business and dealt directly with T. the plaintiff. He was succeeded in the management of S. by one of his executors Ruck. T. continued after the death of R. to make advances to S. pursuant to its contract until July 1st, 1943. It is alleged that on July 1st, 1943, the indebtedness to the plaintiff was $9,109.43. For this sum this action was brought against the executors of R.'s estate. *Held*, that the inclusion of the words "and each of them" in the covenant

CRIMINAL LAW — *Arson—Evidence—Confession—Whether free and voluntary—Admissibility.*] The farm upon which the dwelling-house in question was situated was purchased under agreement for sale by accused's father. After the father's death, the agreement for sale was carried on by accused's older brother Richard. The dwelling-house was destroyed by fire on the 1st of October, 1944. At this time there was about $800 owing under the terms of the agreement for sale. The accused had the use of and lived in the dwelling-house up to the time of the fire. On July 15th, 1944, the accused had the dwelling-house insured in The Milwaukee Mechanics' Insurance Company for $1,000, any loss being made payable to the accused and his brother Richard. After the fire accused and his brother Richard called at the office of the insurance agent for payment of the insurance money, but it was not paid. The accused had previously sold sheep and hay off the farm and spent the proceeds for his own use instead of handing it over to Richard to reduce the indebtedness. On November 9th, 1944, the accused was questioned by the fire marshal for two and one-half hours at an inquiry as to the origin of the fire and accused denied all knowledge of what had caused it. A few minutes after the inquiry had adjourned accused approached one Nichols, assistant fire marshal, and told him he had made a mistake in his testimony regarding certain matters. Nichols warned him and suggested he should see his brother and sister and later see Nichols at his hotel at 7 o'clock in the evening, but accused did not call on Nichols in the evening. On November 15th, Nichols and one Ward, an insurance investigator, visited accused. The three of them sat in a motor-car and after both questioned the accused, Nichols said "Do you want to tell me anything more about the fire?" Accused said he did and admitted he had set the fire deliberately in order to collect the insurance to clear the indebtedness so that his brother Richard would not have to pay it. Nichols then warned him and took down what he said in the form of a statutory declaration. Nichols read it over to him, then handed it to him to read over which he did and then signed it. On the charge of having set fire to a dwelling-house with intent to defraud The Milwaukee Mechanics' Insurance Company, the said confession was allowed in evidence on the trial and he was sentenced to two years and six months' imprisonment. *Held*, on appeal, affirming the decision of HARRISON, Co. J., that under the circumstances the learned judge, after what is not questioned was a proper "trial within a trial," came to the conclusion that the prosecution had affirmatively proven that the confession was voluntary and admitted it in evidence. There is undoubtedly evidence that the accused was motivated in making and signing the confession by a desire to shield his brother. He was afraid his brother might be held responsible for burning the house and then attempting to collect the insurance money, but there is no evidence whatever that Nichols, Ward or any one else said or did anything which could reasonably lead the accused to believe that if he confessed, his brother might escape responsibility. There is nothing to show that Richard could in any wise be held responsible for the fire. *Held*, further, that the sentence should be reduced to two years less one day. REX v. WEIGHILL. - - - - **140**

CRIMINAL LAW—*Continued.*

2.——*Assaulting a police officer engaged in the execution of his duty—Charge—Acquittal by jury—Appeal by Crown—Grounds of misdirection—Criminal Code, Sec. 296.*] Upon a jury acquitting accused on a charge of assaulting a police officer engaged in the execution of his duty, the Crown appealed on the grounds that there was misdirection in not instructing the jury that they could bring in a verdict of guilty of common assault and that there was error in his instruction to the jury concerning the right of a police officer to arrest accused without a warrant in the circumstances. *Held*, that Crown counsel cannot, by remaining silent, allow the case to go to the jury for decision upon a charge that is considered erroneous in law and then appeal from a verdict of acquittal resulting from such instruction. In the case at Bar Crown counsel by not objecting elected to have the issues decided by the jury upon directions that counsel now submits were faulty. That is a submission which is not open to the Crown to advance in the absence of objection below. REX v. FLEMING. - - **464**

3.——*Bail—Application for, pending appeal from conviction.*] Appellant was found guilty of being in possession of housebreaking instruments by night without lawful excuse and sentenced to two years' imprisonment. He gave notice of appeal on questions of law alone and filed notice of motion for leave to appeal on questions of fact or of mixed law and fact. On application under section 1019 of the Criminal Code for bail pending the determination of his appeal:—*Held*, that bail after conviction is governed by entirely different principles from an application before conviction. There is no jurisdiction to entertain applications for bail from convicted persons who have filed a notice of motion for leave to appeal on a question of fact or of mixed law and fact, but have not yet been granted leave to appeal. This does not, however, apply to appeals on questions of law alone which may be brought without leave. Bail will not be granted after conviction unless there are exceptional or unusual circumstances to warrant it. The known previous character of the applicant is one of the essentials and there ought to be present something more than a mere chance of success on appeal. No special or unusual circumstances have been shown in this case and the application must therefore be dismissed. REX v. GOVERLUK. - - - - **261**

CRIMINAL LAW—*Continued.*

4.——*Charge of buggery—Pleads "guilty"—Sentenced to life imprisonment—Appeal from sentence—Criminal Code, Sec. 202.*] On a charge of buggery with a human being the accused pleaded guilty and admitted nine other offences of gross indecency. He was sentenced to life imprisonment. On appeal from sentence:—*Held*, that from all the circumstances, drastic as the sentence is, the only way to protect society from the continued criminal activity of accused is to remove him from the scene until such time as the Minister of Justice is satisfied he is no longer a menace to the community. REX v. BELT. - - - - **159**

5.——*Charge of murder — Accused's drunkenness as a defence — Degree of incapacity—Directions to jury.*] On the trial of accused on a charge of murder, the evidence disclosed that at about 4.45 on the morning of the 2nd of May, 1945, a Mrs. Robinson and her daughter Hazel, living in an apartment on Beach Avenue overlooking the bathing pavilion at English Bay, Vancouver, were awakened by a woman's repeated screams from the beach. They clothed, Mrs. Robinson telephoned for the police and they then crossed Beach Avenue to where the screams appeared to originate when they saw a soldier in battle dress rise from behind some logs at the water's edge. He walked towards the avenue and passed within 15 feet of the ladies with averted face when they asked him if he heard the screams, but he did not reply. Hazel, who had a flash-light, followed him and repeated the question twice to which he replied "No" and hastened on. She then reported the incident to a passing motorist who in turn reported it to a policeman at the corner of Hastings and Granville Streets. Three-quarters of an hour later a hatless soldier in battle dress with blood-stains on his clothes and hands was picked up by the police at the corner of Davie and Granville Streets. The two ladies in the meantime found at the water's edge the body of a young woman whose head had been battered and crushed by blows from two pieces of blood-stained wood lying nearby. They also found a soldier's cap there containing within it the accused's army identification number. The deceased girl had been employed as cashier in the Empire Cafe on Granville Street and was 23 years old. The soldier, 28 years old, and his sister, with others, had been on a drinking party the evening before, visiting beer parlours and cafes from the

CRIMINAL LAW—*Continued.*

late afternoon until the early morning following when they separated. Between 3 a.m. and 4 a.m. accused was in the Good Eats Cafe on Granville Street when the deceased girl entered for a cup of coffee. He spoke to her and asked her to go out with him, but she refused. As she left the place he followed her. The accused gave evidence and said he had been drinking and he remembered being in a dancing-place at about 1.30 a.m., but after that his mind was a blank. He had a dim recollection of being in a fight and rolling down a bank, but it was all very vague and confused. The accused was convicted of murder. *Held*, on appeal, affirming the conviction by MACFARLANE, J., that a question was raised on the trial as to whether it was the appellant who caused the death of the girl, the issue depending largely upon circumstantial evidence, but the evidence was so abundant as to make it a matter of inevitable inference that the appellant was the man seen by the two ladies on the beach and that it was he who murdered the girl. The main ground of appeal was that accused was too drunk to know what he was doing and did not have the capacity to form the intent required by section 259 *(a)* and *(b)* of the Criminal Code and that the learned judge did not properly charge the jury on the elements of drunkenness as a defence. It was held that the learned judge adequately presented to the jury the relevant principles as laid down in *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479 and *MacAskill* v. *Regem*, [1931] S.C.R. 330. On the submission that the judge did not clearly instruct the jury that if any doubt existed in their minds and they hesitated between a verdict of murder and one of manslaughter, they should give the prisoner the benefit of that doubt:—*Held*, the charge must be read as a whole and he left no doubt in the jury's mind on the point. There were many appropriate references in the charge that every doubt should be resolved in favour of the accused. REX v. HAINEN. - - - - - - - - **555**

6.——*Charge of rape — Evidence — Corroboration—Defence of consent—Charge to jury—Criminal Code, Sec. 298.*] The complainant, a girl 17 years of age, lived with a Mrs. Walker and her daughter on Broadway in Vancouver, the daughter being her room-mate. According to her testimony she first met accused at a dance on December 1st, 1944. About 10 o'clock on the evening of December 4th he asked her to

CRIMINAL LAW—*Continued.*

go for a drive to which she consented. They drove to Stanley Park and after driving round the park, he parked the car in a remote area when they got into the back seat and he attempted to have intercourse with her. She resisted and in the struggle they fell out of the car. Then, on accused's promise to take her home, they got into the front seat when again he attacked her. He seized her by the throat, and forced her over into the back seat where he had connection with her. Accused then drove her to the corner of Burrard and Robson Streets where he made her leave the car knowing it was a long distance from her home. On her arrival home after 12 o'clock at night, she told Mrs. Walker and her daughter she had been raped. Mrs. Walker gave evidence of injury to her throat and marks of other physical injuries, that her clothes were torn and that her girdle, garters, pants and a shoe were in a damaged condition. On his arrest by the police accused denied having had sexual intercourse with complainant, but in the witness box he admitted having had intercourse with her but that it was with her consent. Accused was convicted and sentenced to 30 months' imprisonment. *Held*, on appeal, affirming the decision of MANSON, J., that in examining the objection made to the learned judge's charge, it is kept in mind that this is not a case in which corroboration is essential. In view of the learned judge's direction with its consequent advantage to the defence, that there was no corroboration upon the decisive question of lack of consent, there is no need now to discuss what evidence, in the particular circumstances of this case, might or might not amount to corroboration or have supported corroborative inferences. Having reached the conclusion that no substantial objection to the learned judge's charge has been advanced, and that in any event there is no objection to which Code section 1014, subsection 2 would not apply, the appeal must be dismissed. REX v. LASTIWKA. - - - - - **450**

7.——*Charge of theft—Trial—Absence of Crown witness—Postponement—Change of venue—Original indictment quashed—New indictment—Autrefois acquit—Conviction—Appeal.*] The accused, charged with stealing a truck rear end, appeared before WILSON, J. at the Spring Assize for the county of Cariboo held at Pouce Coupe, B.C., in February, 1944. Prior to arraignment the Crown applied for an order to traverse the trial to the next Assize for

the county on the ground of absence of a material witness. This was opposed by counsel for accused on the ground that he had five trucks in operation and he had four local witnesses present and it would entail much expense to have the trial elsewhere. It was ordered that an adjournment be granted on condition that it be traversed to the next sittings of the Court at Pouce Coupe. Counsel for accused was later notified by the Attorney-General that the trial would take place at the Fall Assize at the city of Prince George. Subsequently at the Fall Assize for the same county held at Prince George in September, 1944, the Crown applied, before the accused had been arraigned, to quash the indictment preferred at Pouce Coupe and substitute a further indictment. This was opposed by the defence on the ground that the Crown was bound by the order of WILSON, J. to proceed with the trial at Pouce Coupe, that the defendant was present but had no witnesses and would be prejudiced. He further raised the defence of *autrefois acquit*. An order was made quashing the original indictment and granting the Crown the right to prefer a new indictment which was precisely the same as the original except that "City of Prince George" was marginally noted in lieu of "Town of Pouce Coupe." The accused was then arraigned, the trial proceeded and he was found guilty. *Held*, on appeal, that the appeal be allowed and a new trial ordered. *Per* O'HALLORAN and BIRD, JJ.A.: The main ground of appeal was that a miscarriage of justice under Code section 1014 resulted from the making of said orders. The material shows that the order of WILSON, J. was made conditional upon the adjourned trial taking place at Pouce Coupe for the protection of the accused against additional expense. The Crown acted on that order and it is not open to the Crown to say that the condition as to the place of trial was not operative. The situation contemplated by WILSON, J. developed at Prince George in that the accused appeared, but without witnesses. Notwithstanding the objection that he was thereby prejudiced he was required to stand trial. In that there was a miscarriage of justice, the appeal is allowed and a new trial directed. *Per* SIDNEY SMITH, J.A.: With reference to the ground of appeal that the trial should have taken place at Pouce Coupe, by the original indictment the place of trial was set at Pouce Coupe and this could not be changed except as provided by section 884 of the Criminal Code which

alone gives the right to apply for a change of venue. No application was made under this section and therefore the Crown could not, by switch of indictments, change the place of trial from Pouce Coupe to Prince George. Apart altogether from the special terms of the order of WILSON, J. this submission is sound and must prevail. REX v. DUNN. - - - - - **169**

8.——*Charge of vagrancy — Wandering abroad—Construction—Criminal Code, Sec. 238 (a).*] The accused was found at 2 o'clock in the morning, walking in the corridor of the second or third story of a Chinese rooming-house on Pender Street in Vancouver. The rooming-house operates under a city licence and there is a sign at its entrance that no one is allowed in after 11 o'clock at night without the consent of the proprietor. On the evidence the proprietor gave no such consent. Accused was found guilty by deputy police magistrate Matheson on a charge that she at the city of Vancouver on the 10th of November, 1944, was a loose, idle, disorderly person or vagrant who, not having any visible means of subsistence, was found wandering abroad and not giving a good account of herself. *Held*, on appeal, by way of trial *de novo* that one is not "walking abroad" when someone else is in a position to control his or her movements. As this rooming-house is a private place and she is under the control of the proprietor, the accused cannot be convicted. REX v. MANDZUK. - - **101**

9.——*Common betting-house — Search warrant—Racing-sheets found on premises —Notation of bets on racing-sheets—Private telephone — People on premises reading racing-sheets—Criminal Code, Sec. 227 (c).*] The defendant was in charge of a small tobacco store (12 x 12 feet in front of a counter) known as the Nelson Smoke Shop at 721 Nelson Street, Vancouver. From the 1st to the 27th of October, 1944, the police had the premises under daily observation. Near the counter were two telephones, one with a dial and the other a private telephone to one place only in the city. There was a look-out to give warning. During the racing period from 12 to 35 persons were in the place reading racing-sheets. When the racing was over they dispersed. On the 27th of October, 1944, the police entered the premises with a search warrant and the 15 persons present dropped their racing-sheets on the floor. The police picked four of them up and found what appeared to be notations of bets on them and behind the

CRIMINAL LAW—*Continued.*

counter they found 25 similar racing-sheets. The accused behind the counter put a racing-sheet, dated October 27th, to one side. It contained a list of names of horses purporting to be running in various races giving the first three horses in each race and the prices paid in respect of them for win, place, and show. The accused immediately telephoned someone saying "Get up here right away." Shortly after, the licensed holder of the place appeared, handed the accused several one-hundred dollar bills and then said to the police: "These racing things don't mean anything. You didn't find a bet, did you?" In the till was found $2.10; in a drawer behind the counter was found $463 and on the accused $85. The total value of the cigarettes and tobacco on the premises was $18.54. On a charge of "keeping a disorderly house, to wit, a common betting-house" accused was found guilty and sentenced to six months' imprisonment. *Held,* on appeal, affirming the decision of police magistrate Wood, that it is obvious upon these facts that the magistrate was clearly entitled to find the accused guilty of the offence with which he was charged, and there is no ground for interfering with the sentence imposed. REX V. PORTA. **103**

10.——*Contributing to juvenile delinquency—Juvenile Court—Girl's reputation—Fine of $50—Appeal from sentence by Crown—Sentence increased by six months' imprisonment—Can. Stats. 1929, Cap. 46, Sec. 37.*] The accused pleaded guilty to a charge of contributing to the delinquency of a juvenile, a girl 15 years of age and was fined $50. The chief reason given for fining accused and not giving him imprisonment was that the girl had been involved in other cases recently and the only inference was that the girl "was of a loose and promiscuous type and had been so for some time past." On appeal from sentence by the Crown:—*Held,* that when the magistrate on the basis of what resulted after this man's act, made the assumption that the responsibility for what happened rested on the girl of 15 and not on the man of 40, he proceeded on a wrong principle. In the circumstances as they are revealed here, it is essential in the public interest and also necessary for the due administration of justice that leave be granted to appeal. The effect of imposing a fine of $50 on a man in a position of this kind is to indicate that the offence is not serious. Any attempt of any man of mature years to consort in this manner with a girl of 15 years cannot

CRIMINAL LAW—*Continued.*

be so regarded. The appeal is allowed and in addition to the penalty imposed the accused is committed to gaol at Oakalla for a period of six months to run from the date of arrest. REX V. RICHARDS. - **234**

11.——*Damaging property and theft—Army deserters—Crimes committed to avoid overseas service—Sentence—Appeal.*] The two accused after deserting from the army, broke a window and snatched a purse containing $60. They then surrendered themselves at the police station when they stated they had committed the crimes to be sent to gaol, hoping thus to avoid being sent overseas with reinforcements for the Canadian Army. On charges of damaging property and theft they pleaded guilty to both charges and were sentenced to five years on the first charge and seven years on the second to run concurrently. Since conviction, restitution of the $60 was made and full compensation was paid to the owner of the broken plate-glass window. *Held,* on appeal, that the sentences of both men be reduced to three months for the first offence and six months for the second, to run concurrently, with hard labour. This will permit them to be returned to the army at an early date to face trial for desertion or to be sent overseas, whichever course army policy may decide. REX V. SOANES (1931), 23 Cr. App. R. 142, applied. REX V. RALPH TARTAGLIA. REX V. MARCO TARTAGLIA. - - - - - **334**

12.——*Forgery—Charge—Description of offence — Insufficiency—Essential averment omitted — Matter of substance — Criminal Code, Secs. 476, 468 and 852.*] The accused was tried and convicted under section 467 of the Criminal Code on a charge that he "did unlawfully and knowingly . . . , utter a forged document, to wit, a cheque dated March 20th, 1944, payable to O. Nash for $75.00 drawn on the Canadian Bank of Commerce, by using the same as if it was genuine." The cheque itself was not forged, but the endorsement of the payee Nash was forged thereon and by reason of evidence of such forged endorsement the accused was convicted. *Held,* on appeal, reversing the decision of COLGAN, Co. J., that the count upon which the appellant was convicted lacked a necessary ingredient to sustain the conviction. He was tried and convicted on a count which was not preferred against him. It was not a "defect apparent on the face" of the count requiring objection before plea within the meaning of section 898 of the Code, nor was it something curable by

verdict under section 1010, subsection 2. What occurred was a violation of an essential of justice amounting to an abuse of jurisdiction, since no Court has jurisdiction to convict a person upon a count with which he has not been charged. The appeal is allowed and the conviction quashed. *Brodie* v. *Regem*, [1936] S.C.R. 188, applied. REX v. MCNAB. - - - **74**

13.——*Indecent assault — Evidence of girl eight years old—Corroboration—Statement by accused — Whether voluntary — Criminal Code, Secs. 1003, Subsec. 2 and 1014, Subsec. 2—R.S.C. 1927, Cap. 59, Sec. 16, Subsec. 2.*] Appellant was convicted of indecently assaulting a girl eight years of age. When about to be arrested the policeman informed accused that the complainant had laid an information against him of indecently assaulting his daughter and that he held a warrant for his arrest. The policeman read the warrant to him and gave him a copy of it. After accused had read it, the policeman asked him if he understood it and he said he did. The policeman then gave him the usual warning concerning anything he might say, to which accused replied: "I guess it may be right according to the way you take it. Truth is truth. I don't think I hurt the little girl. Is there any way we can settle it? If we see Mr. McNiven is there any way we can settle it?" *Held*, on appeal, affirming the conviction by MACFARLANE, J., that the statement constituted corroboration in all the circumstances of this case. It was additional evidence rendering it probable that the little girl's testimony was true and not only "tended to connect" but actually did "connect" the accused with the crime. REX v. RICHMOND. - - - - **420**

14.——*In possession by day of housebreaking instruments—Evidence of intent—Sufficiency—Criminal Code, Sec. 464 (b).*] On appeal from a conviction for being in possession by day of a housebreaking instrument with intent to commit an indictable offence, it was held that the secret dropping of pieces of celluloid coupled with the explanation given by accused for having the celluloid in his possession was sufficient evidence in the surrounding circumstances from which intent may be inferred. REX v. SMART. - - - - **321**

15.——*Murder—Trial—Charge to jury—Whether verdict of manslaughter should have been left open to jury—Criminal Code, Sec. 259 (c).*] The accused and one Helen

Lee lived together from August, 1943, to December, 1943, when they quarrelled and she left him. He persisted in looking for her from one boarding-house to another and finally she, with one Doris Olson, obtained rooms 501 and 502 in Mayli Rooms in Vancouver with a communicating door between them. She occupied room 501 and Doris 502. At about 12.30 a.m. on the 7th of May, 1944, Helen was sitting on her bed playing cards with the deceased Lennox in room 501 and Doris was on her bed in room 502 with a six-months-old child of her sister, when accused forced his way into room 501. He had a rifle under his overcoat strapped to his shoulder. He took the gun out and while swinging the rifle around said "everybody stand back" several times and, according to Helen's evidence, the gun went off and the bullet hit Lennox in the lower part of his body. Helen then grabbed the rifle and in the struggle they went into room 502 where Lennox followed them and seized accused from behind and they fell on Doris' bed. Doris, on first seeing the rifle, ran downstairs to telephone the police. In the struggle on the bed Lennox was stabbed in the groin by a sharp pointed file which accused had brought into the room with him. The evidence of accused was that the gun was discharged during the struggle with Helen after they had entered room 502. Lennox died two hours after the shooting. Accused was convicted of murder. *Held*, on appeal (*per* SLOAN, C.J.B.C., ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.), that the learned judge misdirected the jury with reference to section 259 *(c)* of the Criminal Code and failed to instruct them as to a possible verdict of manslaughter under that subsection. The appeal is allowed and a new trial directed. *Per* O'HALLORAN, J.A.: I would substitute a verdict of manslaughter and impose a sentence of 20 years' imprisonment with hard labour. REX v. HARRISON. - - - - - - **181**

16.——*Possession of stolen goods—Evidence of other criminal acts—Secondary evidence—When permitted—Criminal Code, Sec. 399.*] The appellant was convicted for unlawfully retaining stolen goods knowing them to have been stolen. The Cascade Machinery Limited displayed spray-guns and electric saws in the window of its showroom. An employee of the firm made a list of the serial numbers of the articles in the window and after some of the spray-guns and saws were stolen, he gave a police officer the list containing the serial numbers,

CRIMINAL LAW—*Continued.*

but did not keep a copy of the list. The police officer made a typewritten copy within five minutes after receiving it from the employee, but did not keep the employee's list, which was either lost or destroyed. At the trial the police officer had the typewritten copy when giving evidence. Crown counsel asked him to refer to it to refresh his memory which he did and gave in evidence the serial numbers of the articles stolen, one of which was that of a spray-gun which was found in the appellant's car. Crown counsel did not tender the officer's typewritten memorandum in evidence, but on defence counsel insisting that it should go in as an exhibit, the learned judge directed that it be admitted. The defence submitted that this was the same as if the officer had sought to repeat a conversation with the employee wherein the latter had told him that a spray-gun and electric saw with specified serial numbers had been stolen and therefore hearsay evidence. *Held*, on appeal, affirming the conviction by BOYD, Co. J., that the defence failed to recognize the distinction between secondary evidence and hearsay evidence. Secondary evidence is permitted in the absence of primary evidence when a proper explanation of the absence of the latter has been given and the appeal is dismissed. REX v. KEARNS. **278**

17.——*Summary convictions — Case stated—Conviction—Evidence—Sufficiency.*] In a case stated under section 761 of the Criminal Code which involves the sufficiency of the evidence on which the conviction was made, the question is not whether the magistrate arrived at a right conclusion, but whether there was any evidence to support his conclusion. Whether a question relating to the admissibility of evidence is a point of law or not depends on whether the decision with regard to the admissibility "turned upon conflicting statements of facts made by witnesses." If it does, it is not a question of law. REX *ex rel.* LOCKIE v. HASLAM. - - - - **226**

18.——*Theft—Accused employed to sell magazines—Commission basis—Collections in Victoria and tried by magistrate in Vancouver—Jurisdiction—Successive collections—Using Courts for collection of debts—Criminal Code, Sec. 347.*] Accused was employed to sell magazines and was to receive 60 per cent. on all moneys collected on sales of "Toronto Saturday Night" and 85 per cent. for sales of "Canadian Home Journal." In Victoria he obtained 42 orders for "Toronto Saturday Night" for which he received $260, and 2 orders for "Canadian Home Journal" for which he received $5, there being a balance due his employers of $88.55. In September, 1944, accused handed a letter to his employer setting out the sales and the balance due to the company, but he failed to pay the balance due his employers. After delivery of the letter the company entrusted him with a further order-pad and allowed him to continue in their employ. On October 20th, 1944, an information was laid and warrant issued, but he was not arrested until March 12th, 1945. He was convicted and sentenced to six months' imprisonment. *Held*, on appeal, affirming the decision of police magistrate Wood (O'HALLORAN, J.A. dissenting), that although the money was stolen in Victoria, the Vancouver magistrate had jurisdiction as the information was laid while accused was in Vancouver and no objection was taken to the jurisdiction. The submission that the $85.75 was made up of a large number of subscriptions and there should have been a separate charge in respect of each, fails in view of the decision in *Minchin* v. *Regem* (1914), 23 Can. C.C. 414, and the submission that the firm was using the Courts for the purpose of collecting the debt, fails as after receiving the letter from accused in which he said "he was sorry he had spent the company's money and would do everything he could to straighten the matter out," the manager issued to him "one other order-pad" with instructions to report daily and make a small payment on account each day. The manager said he did not see the accused after that until the trial. REX v. EIST. - - - **288**

19.——*Theft — Evidence—Corroboration—Appeal—Report under section 1020 of Criminal Code — Effect of in absence of reasons for judgment.*] On a charge of theft the trial judge found accused guilty, but gave no reasons for judgment. In his report under section 1020 of the Criminal Code he gave elaborate reasons supporting his conclusion of guilt. It was held that a report under section 1020 given after notice of appeal has been filed must be confined to the purpose for which it is permitted, and cannot be regarded as reasons for judgment or a substitute therefor. On appeal from a conviction it was contended that the trial judge misdirected himself in not appreciating that it would be unsafe to convict on the uncorroborated evidence of the main witness and that there was no corroboration. It was held that the test in this case as to

whether or not the judge misdirected himself, is to ascertain if there is testimony in the record which, in the true legal sense, may be properly regarded as corroboration of said evidence and in the present case the testimony corroborates the main witness because it furnishes some additional evidence rendering it probable that her story is true and it is reasonably safe to act upon it. Evidence to be corroborative need not be sufficient *eo ipso* to establish guilt without the evidence of the principal witness. Its purpose is to fortify the credibility of the principal witness and is not in itself to prove the guilty act. REX v. JAMES. **161**

20.——*Theft — Fraudulently taking of goods—Colour of right—Benefit of the doubt —Finding of trial judge—Criminal Code, Sec. 347.*] Accused was sales manager of Electric Panel Manufacturing Limited. The company manufactured panel boxes and switches. One J. S. Don was general manager and principal owner. Prior to August 1st, 1944, the company operated under a sales policy allowing a discount of 18 per cent. off list prices on sales to jobbers, wholesalers and contractors, but owing to pressure by jobbers, on August 1st, it was decided to sell only to jobbers and wholesalers and eliminate sales to contractors. On September 1st, 1944, J. S. Don left for a month's holiday, leaving Duncan in complete charge of sales policy. On the return of J. S. Don on September 27th, accused was charged with unlawfully stealing a number of panel boxes and switches between the 12th and 29th of September and convicted. The Crown established that from time to time during Don's absence the accused took from the stock-room panel boxes and switches, a considerable number of which were delivered by accused to Domino Electric Co., contractors who were old customers of the company. He did not invoice any of these goods, nor did he furnish to the company's accounting department particulars of these transactions or anyone else in the company. Accused in his evidence admitted taking the panel boxes and switches, but delivered them to Domino Electric Co., an old customer, under special circumstances. He found contractors were not taking kindly to increased prices and feared that such increases in respect to some of the older contractors' accounts might be an infraction of the Wartime Prices and Trade Board regulations. He was particularly concerned with Domino Electric as it had on hand considerable work that meant substantial

demand for electric panels if prices were right and it was familiar with the effect of Wartime Prices and Trade Board regulations. He found himself in a dilemma and in the circumstances he took full responsibility as sales manager during Don's absence and delivered the goods to the Domino Electric Co. without making out any sales invoices, leaving the whole matter of prices to be paid to await Don's decision on his return. He kept a memorandum of all deliveries he made to the Domino Electric Co., which the Domino Electric Co. initialled each time a delivery was made. On September 15th, he wrote Don telling him of the danger of their sales policy conflicting with the Wartime Prices and Trade Board regulations. There was no evidence that he received any money from the Domino Electric Co. or that he had profited personally in any way. On appeal on the ground that accused should have received the benefit of the doubt:—*Held*, affirming the decision of police magistrate Wood (O'HALLORAN, J.A. dissenting), that it was open to the learned magistrate upon the evidence to disbelieve the explanation of the accused and to find that the taking of the goods was fraudulent. REX v. DUNCAN. - - - **266**

CROWN WITNESS—Absence of. - **169**
See CRIMINAL LAW. 7.

CRUELTY. - - - - **503**
See DIVORCE. 3.

DAMAGE—Destruction of property by fire —*Liability — Assessment — Costs.* - - - - - **498**
See NEGLIGENCE. 5.

2.——*To crops—Cattle entering another's land—Land within pound district—Liability.* - - - - - - **410**
See ANIMALS.

DAMAGES. - - - - **198**
See NEGLIGENCE. 1.

2.——*Action for.* - . **294, 325**
See BANKS AND BANKING.
COMPANY. 2.

3.——*Collision between motor-cars — Question of fact—Power of Court of Appeal to overrule judge of first instance.* - **70**
See NEGLIGENCE. 3.

4.——*Collision—Channel—Ships meeting.* - - - - - - **309**
See ADMIRALTY.

father and denying the mother access thereto. From the record it appeared that the only issue upon which evidence was led on either side was that of adultery. It further appeared that the trial judge immediately after granting the decree absolute and without consideration of any evidence, other than that led on the issue of adultery, granted custody of the children to the father and denied the mother access thereto notwithstanding the fact that since the alleged adultery in 1941 to the date of the decree in 1944 the mother had had by family arrangement sole custody of one child, a boy now eight years old. On appeal from the order relating to custody of and access to the infant children of the marriage:—*Held*, that in general the Court would not view with favour an application for a rehearing based solely on the present plea of the appellant, but this case involves the welfare of children which is paramount, and all other principles must give way so that justice may be done to them. Because of that dominating principle and because counsel for the respondent was permitted to supplement his material, the interests of the infant children would best be served by allowing the appeal on this branch of it and ordering a rehearing of the issue relating to custody of and access to the children, so that this whole question may be thoroughly investigated below in the light of all the facts. SLATER v. SLATER. - - - - - - - **166**

5.——*Decree absolute.* - - **229**
See HUSBAND AND WIFE. 3.

6.——*Decree absolute — Maintenance — Petition for—Time within which petition must be filed—Divorce Rules 65 and 69.* - - - - - - - **34**
See PRACTICE. 3.

7.——*Petition for — Domicil — Jurisdiction—Declaration of intention—Sufficiency.* - - - - - - - **448**
See HUSBAND AND WIFE. 4.

8.——*Petition for — No appearance or defence — Decree exparte — Application to extend time for appeal.* - - **474**
See PRACTICE. 5.

9.——*Suspicions aroused of adultery—Watching wife to obtain evidence—Whether connivance—Whether such wilful neglect or misconduct of husband as to conduce to the adultery—R.S.B.C. 1936, Cap. 76, Secs. 14, 15 and 16.*] Petitioner and respondent were married in 1936 and lived a normal married life until 1940 when they became estranged. The husband claimed his wife had taken to staying out late at night. He protested this conduct for two years without results and then stopped bothering. She stated her absences from home were innocent and due to her craving for companionship, her husband not allowing her to participate in his social activities and recreations. In 1942 she formed a friendship with the co-respondent. Owing to the frequency of their meetings, the husband became suspicious and devoted his leisure hours in surveillance of his wife's movements. During the spying he made no protest to his wife or the co-respondent. In May, 1944, he caught her with the co-respondent *in flagrante delicto*. The husband was a street-car conductor, the wife a telephone operator, and following their marriage, the wife pursued her vocation first at intervals and later continuously. The husband was close in financial matters. They had no children. During ten years previously the husband formed an attachment for another lady who shared his taste for skiing and mountaineering of which the wife had knowledge, but the facts were not such as to justify the finding that they were guilty of adultery. In an action for dissolution of marriage:—*Held*, that the respondent and co-respondent were guilty of adultery. It remained to be decided whether the petitioner connived at the adultery or was guilty of such wilful neglect or misconduct as to conduce to adultery. Connivance was based on "*volens*" and the question was whether his conduct brought him within the words "to invite, advise or enjoin the commission of a wrong act." The facts here do not show the husband to have done any of these things. An odour of inhumanity clings to his conduct, but it would be dangerous to hold that such conduct amounted to connivance. *Held*, further, that wilful neglect or misconduct is a discretionary matter and involves considering the advantage to society or maintaining or dissolving the marriage and the benefits, moral and material, which would accrue to the parties by maintaining or determining their union. In view of all the circumstances nothing but hatred and unhappiness can result from an attempt to perpetuate this union and no exemplary value to the public would result, in the enforced continuance of a cohabitation odious to both parties. The decree of dissolution is granted. FANE v. FANE AND MCLENNAN. - **48**

that the nature of the operation of the premises appeared to have been changed by the respondent to that of an apartment or lodging-house during the currency of the lease, but no such change could be made to affect the classification of the premises under these orders. The lease, being the lease of an hotel and therefore "commercial accommodation" is subject to regulations under Wartime Prices and Trade Board order No. 315. Consequently order No. 294, relating to "housing accommodation," has no application. The notice to vacate given under the relevant provisions of the Landlord and Tenant Act was effective to determine the tenancy. Law v. Smith (1944), 60 B.C. 437, distinguished. MAXINE, LIMITED v. CUILLERIER. - - - **345**

2.——*Lease for one year—Date of expiry—Notice to quit—Wartime rental regulations—Order 358 of Wartime Prices and Trade Board.*] The appellant is the lessee under a lease executed on the 25th of August, 1943, whereby the respondents let to the appellant certain housing accommodation "for the term of one year, to be computed from the First day of September . . . 1943," at an annual rental of $900 payable "$75 on the 1st day of September, A.D. 1943, and the sum of $75 on the first day of each and every month thereafter . . . ; the first of such payments to become due and to be made on the First day of September, 1943." By order 358 of the Wartime Prices and Trade Board, if the landlord desires to recover possession of leased premises, he is required to give six months' notice to the tenant to vacate at the end of the term. On February 7th, 1944, the respondents gave a written notice to quit whereby the appellant was required to vacate the premises "on the 31st day of August, 1944." The appellant refused to vacate, contending that the notice to quit was bad as she was thereby required to vacate the premises one day prior to the end of the term. *Held*, on appeal, affirming the decision of BOYD, Co. J., that it may be taken as settled that where a term is expressed to commence from a given date without the addition of other words which make it clear that the word "from" is to be inclusive or exclusive of the date, then the context or subject-matter must be looked at to determine in which sense the words are used since "from" may in the vulgar use, and even in strict propriety of language, mean either inclusive or exclusive. Here the lease provides for an annual tenancy with rent payable in equal monthly instalments commencing 1st

September, 1943, and the 1st of each month thereafter. The tenant has the right to possession for the entire month of September, 1943, commencing on the first day of that month and the word "from" in that context must be read as inclusive of September 1st, 1943. The term, having begun on the 1st of September, 1943, must be held to have expired on the 31st of August, 1944. As order 358 of the Wartime Prices and Trade Board requires that notice to quit be given for the end of the term, the notice was so given and is a good notice. WEST AND WEST v. BARR. - - **108**

3.——*Notice of cancellation of lease—Action for relief against forfeiture—summary proceedings for possession—Interim injunction restraining summary proceedings—R.S.B.C. 1936, Caps. 143 and 148.*] The plaintiff obtained a lease of the premises in question from the defendant on the 17th of November, 1944. Notice of cancellation of the lease was given by the defendant to the plaintiff on the 17th of January, 1945, allegedly for non-payment of rent. The plaintiff brought this action on the 2nd of May, 1945, under the Laws Declaratory Act for relief against forfeiture of the lease. Attempts were made to pay the rent in arrears, but payment was refused and the plaintiff paid into Court in this action all the rents owing. The plaintiff now applies for an injunction to restrain the defendant from continuing proceedings commenced by him and now pending in the County Court of Vancouver under the summary provisions of the Landlord and Tenant Act to recover possession of the demised premises; and to restrain the defendant from taking any other proceedings for the recovery of possession of said premises or for cancellation of said lease until the trial of this action. *Held*, that if possession by defendant be secured the plaintiff's claim for relief may be defeated. If the proceedings now taken by the defendant in the county court could have been taken in this Court, and were so taken, there would be jurisdiction to make an order to stay proceedings therein until the plaintiff's action be heard. *A fortiori* the Court has jurisdiction to restrain proceedings taken in an inferior court in the same jurisdiction. This is pre-eminently a case under all the circumstances for the exercise of that jurisdiction and an injunction as asked should issue. PREVEDOROS v. MICHAELOVITCH. - - - **486**

4.——*Order for possession—Tenants ejected—Appeal—Order set aside—Action*

MASTER AND SERVANT—*Continued.*

of being paid over to the Dominion Government and these other grounds became available to the company for its defence notwithstanding that they were unknown to the company at the date of dismissal, alleging that the plaintiff throughout the years had been systematically and fraudulently pilfering money from the company. The plaintiff stated in evidence that he thought himself justified in making the commission charges on sales tax, and averred that there were six oral amendments subsequently made to the contract of 1934 and thereby certain articles not first included had been placed within the class of articles mentioned in the 1934 agreement, with respect to which the plaintiff was entitled to charge a 10 per cent. commission. On the trial the learned judge expressly accepted the evidence of the plaintiff and found "honest error" on the part of the plaintiff in charging commission on sales tax and allowed in evidence the six oral amendments to the 1934 agreement. He found that the contract had been wrongly repudiated by the defendant company and allowed damages in the sum of $14,500 estimated as the amount he would have earned in profits for the balance of the year in which he was dismissed and ordered an accounting. On the counterclaim he allowed the sum of $2,712.86 for commissions wrongfully taken on sales tax, but dismissed the claim for $4,518.36 for other commissions allegedly wrongly collected by the plaintiff. *Held*, on appeal, affirming the decision of WILSON, J., that the plaintiff was wrongfully dismissed and evidence of the variations to the original agreement was rightly allowed in and the company's claim for recovery of commissions paid on articles within these variations was rightly dismissed. *Held*, further, *per* ROBERTSON and SIDNEY SMITH, JJ.A., that a person who is wrongfully dismissed and therefore entitled to damages must do everything that a reasonable and prudent man would do under the circumstances to mitigate the damages. Under the Selective Service regulations the company was obliged, upon the dismissal of the plaintiff, to give him a "separation notice." This notice is filed with the Selective Service officials who thereupon give the employee a permit authorizing him to seek new employment. The company said this was done, but this was denied by the plaintiff and the judge accepted his denial. There was a distinct finding by the trial judge that the plaintiff failed to use due diligence in securing further employment and thus failed to minimize his

MASTER AND SERVANT—*Continued.*

damages. He did seek other employment and found he could get a similar position with either of two companies, provided he could get the permit from the Selective Service office. He enquired there and found such permit would be forthcoming when he obtained a separation notice from his last employer. He made no attempt to obtain this notice. He could have asked for the separation order, reserving his right to sue for damages. He fell short of taking active steps in this regard. The learned judge thought this showed lack of due diligence with which they agreed. A new trial should be ordered limited to the *quantum* of damages. VAN SNELLENBERG, JR. v. CEMCO ELECTRICAL MANUFACTURING COMPANY LIMITED. - - - **507**

MENTAL DELUSIONS—Effect of. - **544**
See WILL. 3.

MIND—Partial unsoundness of—Testamentary capacity. - - - **544**
See WILL. 3.

MISDIRECTION—Grounds of. - **464**
See CRIMINAL LAW. 2.

MISTAKE OF FACT—Transfer of property by man to woman believing they were legally married—Presumption of advancement — Consideration — Action for declaration of trust. - - - - - **19, 426**
See TRUSTS AND TRUSTEES.

MOTOR CARS—Collision between—Damages—Question of fact—Power of Court of Appeal to overrule judge of first instance. - - **70**
See NEGLIGENCE. 3.

MOTOR VEHICLES—Collision at an intersection—Right of way. - **256**
See NEGLIGENCE. 4.

MUNICIPAL LAW — *Assessment—Improvements—Appeal to court of revision dismissed—Appeal to county judge allowed—Assessment roll declared null and void—Lack of jurisdiction—Costs—R.S.B.C. 1936, Cap. 199, Secs. 229 and 243—B.C. Stats. 1940, Cap. 35; 1944, Cap. 35, Sec. 23.*] The plaintiffs' appeal to the court of revision of the city of Ladysmith against the assessment of improvements on their lands was dismissed. They then appealed to a county judge who not only allowed the appeal, but declared the city's assessment roll for 1945 to be null and void and directed the assessor to make a new assessment roll setting out

in favour of the plaintiff. *Held*, on appeal, varying the decision of HARPER, J. (ROBERTSON, J.A. dissenting), that both drivers were at fault and one is unable to differentiate between the conduct of one and the other. The Contributory Negligence Act should be applied and each party is equally responsible. GATES v. HODGSON AND SMITH. - - - - - - - - - - **337**

3.——*Damages—Collision between motor-cars—Question of fact—Power of Court of Appeal to overrule judge of first instance.*] Shortly after 9 o'clock on the morning of December 4th, 1944, the plaintiff was driving his Whippet car north on Lulu Island bridge at New Westminster. On reaching a point a short distance north of the middle of the bridge, he collided with the defendant's Oldsmobile car driving south. The driveway of the bridge is about 15 feet wide, but on its west side and level with it is a railway with planking on each side, in all about eight feet wide. It was foggy and the surface was wet. The plaintiff states he was driving close to the kerb on the east side when he was struck by the defendant's car, and in this he is corroborated by a passenger in his car. The defendant states he was driving well to the west side with his right wheels over the east track of the railway and that when he saw the plaintiff's car coming he stopped. Then the plaintiff side-swiped his car and glanced off north-easterly going across the driveway, his right front wheel jumping the kerb and landing on the sidewalk on the east side. The bridge tender, an independent witness arriving five minutes after the accident, found the plaintiff's car partly on the sidewalk on the east side and the defendant's car was on the west side over the railway tracks. It was held by the trial judge that he accepted the plaintiff's evidence, which was corroborated by one of his passengers, but he could not accept the defendant's evidence as correct when he claimed that the plaintiff's car drove against his car and though its left front wheel was smashed, it dragged the defendant's car in a north-easterly direction some 10 or 15 feet across to the other side of the bridge, the plaintiff's car being much lighter than the defendant's. Judgment was given for the plaintiff. *Held*, on appeal, reversing the decision of WHITESIDE, CO. J., that the learned judge misdirected himself as there is no evidence whatever of the plaintiff's car dragging the defendant's car in a north-easterly direction, or in any direction, across to the other side

of the bridge. On the contrary, the only independent witness, the bridge tender, testified that when he arrived five minutes after the accident he found the defendant's car on the west side of the bridge and helped the defendant to push it across the bridge to the east side and park it behind the plaintiff's car. It was due to this misconception on the part of the learned judge that he accepted the plaintiff's evidence and his misconception in this regard was of "'a governing fact, which in relation to others has created a wrong impression.'" The bridge tender's evidence was accepted by the trial judge and he agrees with the defendant who testified that the plaintiff's car glanced off the defendant's car in a north-easterly direction across the bridge to the east side, leaving the defendant's car on the west side. The plaintiff's claim is dismissed and the defendant's counter-claim allowed. *Powell and Wife* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, at p. 266, applied. ROSS v. GILL. - **70**

4.——*Damages — Motor-vehicles — Collision at an intersection—Right of way—R.S.B.C. 1936, Cap. 116, Sec. 21.*] Blenheim Street, running north and south, intersects 31st Avenue, running east and west in the city of Vancouver, Blenheim being the principal thoroughfare. There is a sharp down grade from west to east just west of the intersection averaging 10 per cent. and a grade of 4.7 per cent. from south to north just south of the intersection on Blenheim Street. 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 about 15 miles per hour and the defendant was proceeding north on Blenheim Street driving a Studebaker at about 25 miles per 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 the defendant's car came in contact with the rear right wheel of the 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. It was held that the two cars entered the intersection almost simultaneously, the plaintiff failed to give the

decree absolute. The petitioner obtained a decree absolute on the 26th of March, 1943. This decree was duly entered on the 9th of April, 1943, and on the 29th of April, 1943, the petitioner filed a petition for maintenance. *Held*, that for the purposes set forth in Divorce rules 65 and 69, a decree is not finally pronounced until it is entered. The petition was filed in time. SCHOFIELD v. SCHOFIELD. - - - - - - **34**

4.——*Motion—Extending time for filing appeal books—Jurisdiction.*] Upon the application of the respondent on the 12th of September, 1944, to dismiss the appeal for want of prosecution, the Chief Justice then stated: "We would refuse to accede to the motion to dismiss for want of prosecution, but we would impose terms upon Mr. *Murphy*" (appellant's counsel). The registrar's note on the Court of Appeal record book of September 12th, 1944, was "Security for costs to be deposited forthwith. Appeal books to be filed by Monday next. Appeal to be placed at the foot of the list. Motion dismissed with costs to respondent." The note in the Bench book of the Chief Justice read "Security to be paid into Court forthwith. Books to be filed by Monday. Case to be placed on the list for hearing at this session. Motion is dismissed with costs to Mr. *Haldane.*" The notes of the other judges were substantially the same as those of the Chief Justice. The formal order taken out after reciting the terms just referred to added this clause, that unless those terms were carried out "this appeal be and the same is hereby dismissed without further order." The appellant, not having complied with the terms imposed on September 12th, now applies for leave extending the time for filing his appeal books. On the question as to whether the Court has jurisdiction to hear the motion:—*Held*, that where there has been error in expressing the manifest intention of the Court, there is power to amend a judgment which has been drawn up and entered. The formal order of September 12th, 1944, does not carry out the intention of the Court in adding the words "the appeal be and the same is hereby dismissed without further order." It is ordered that the words be struck out of the said order and the objection to the jurisdiction of the Court to entertain this motion is overruled. The motion will be heard on the merits. CRAIG v. SINCLAIR. - **253**

5.——*Petition for divorce—No appearance or defence—Decree ex parte—Application to extend time for appeal—Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, Sec. 38—Court of Appeal Act, R.S.B.C., 1936, Cap. 57, Secs. 14 and 24—Rule 457.*] On a petition for divorce the respondent did not appear and defend and a decree was made *ex parte*. On motion to the Court of Appeal to extend the time in which to appeal, preliminary objection was taken to the Court's jurisdiction to entertain the motion in view of section 38 of the Divorce and Matrimonial Causes Act and it was held that the word "limited" in said section 38 must be read as referring to the Court of Appeal Act, that is to say, limited by the time expressed in section 14 of the Court of Appeal Act and section 14 is governed by section 24 of said Act, which gives the power to enlarge and the preliminary objection was overruled. *Held*, further, on the main motion that under rule 97 of the Divorce Rules, rule 457 of the Supreme Court Rules becomes applicable which reads: "Any verdict or judgment obtained, where one party does not appear at the trial, may, upon application, be set aside by the Court or a Judge upon such terms as may seem fit, and such application may be made at the Assizes or sittings at which the trial took place, or at any other sitting of the Court." That remedy was open to the appellant in this case and ought, in all the circumstances, to have been the remedy pursued and the motion was dismissed. MILES v. WILKINSON. - - - - - **474**

6.——*The Excess Profits Tax Act, 1940—Order of board of referees — Certiorari — Jurisdiction — Appeal — 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: "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 under this Act." On motion of the Nanaimo Community Hotel Limited 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 of 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, it was 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

REAL PROPERTY—*Continued.*

Harries: (a) Would not at any time require support for the said lands from any lands of the city adjoining the same at any time used for purposes of highway, school, park or any public place and would release the city from all liability for payment of compensation or damage for failure of such support; (b) that in the event of excavation at any time of the adjoining lands of the city, the Harries would take all steps necessary to prevent obstruction upon the lands of the city by earth or material falling thereon and (c) that in the event of failure of the Harries in this respect, the city would have the right to enter upon the lands and take such steps to remedy such failure and the costs thereof should be paid by the Harries and should be a charge upon the lands until paid, these terms to be binding upon the city, its successors and assigns and upon the Harries, their heirs, executors, administrators or assigns. Upon the city applying for registration by way of easement and indemnity the rights created in its favour under the terms of said conveyance claiming they were registrable under section 163 of the Land Registry Act as a charge or under section 148 of the Act by way of endorsement on the certificate of title to the Harries, the registrar refused registration under both sections on the ground that the aforesaid rights were not registrable. On petition by the city that the registrar be ordered to effect registration of the rights reserved to the grantor under the conveyance as a charge by way of easement and indemnity by endorsing the same upon the certificate of title in accordance with the provisions of sections 148 and 163 of the Land Registry Act, it was held that the question here is whether the language used in the conveyance contains a reservation of an interest in land. The language used in the conveyance in the light of the very wide language of section 148 as indicating what may be an interest in land and registrable as such clearly shows that the city has under the conveyance an interest in land and is entitled to registration under section 148. *Held*, on appeal, affirming the decision of COADY, J., that the appeal should be dismissed. *Per* SLOAN, C.J.B.C. and SIDNEY SMITH, J.A.: The appellant's argument was directed to showing that the rights created in favour of the city did not comprise an easement and was therefore not registrable. The authorities are not easy to reconcile, but the question whether or not an easement was created in the circumstances mentioned must be decided in

REAL PROPERTY—*Continued.*

the affirmative in view of the cases of *Rowbotham* v. *Wilson* (1860), 8 H.L. Cas. 348 and *North British Railway* v. *Park Yard Company*, [1898] A.C. 643; also in view of the decision in *Matheson* v. *Thynne* (1926), 36 B.C. 376 and the appeal should be dismissed. CITY OF VANCOUVER v. THE REGISTRAR, VANCOUVER LAND REGISTRATION DISTRICT. - - - - - - - - **211**

RECEIVER — Appointment of—Tenants in common—Sale on partition—Boarding-house premises — Tenancy only as to real property—Sale as going concern. - - - - - **31**
See PARTITION.

RENTAL REGULATIONS. - - **345**
See LANDLORD AND TENANT. 1.

RESIDENCE AND RESPONSIBILITY ACT. - - - - - - - **457, 460**
See CHILD. 1, 2.

REVOCATION—Whether conditional—Admissibility of evidence—Intestacy. - - - - - - - - **59**
See WILLS.

RIGHT OF WAY—Motor-vehicles—Collision at an intersection—Damages. **256**
See NEGLIGENCE. 4.

RULES AND ORDERS—Divorce Rules 65 and 69. - - - - - **34**
See PRACTICE. 3.

2.——*Supreme Court Rule 251.* - **397**
See PROBATE.

3.——*Supreme Court Rule 457.* - **474**
See PRACTICE. 5.

4.——*Supreme Court Rule 699.* - **238**
See PRACTICE. 2.

SALE OF TIMBER — Timber licence—Renewal fees—Non-payment of certain renewals. - - - - - **315**
See CONTRACT. 4.

SEARCH WARRANT — Common betting-house. - - - - - **103**
See CRIMINAL LAW. 9.

SENTENCE—Appeal. - - - - **334**
See CRIMINAL LAW. 11.

2.——*Appeal from.* - - - **159**
See CRIMINAL LAW. 4.

SEPARATION AGREEMENT. - **229**
See HUSBAND AND WIFE. 3.

TAXES—*Assessment of property—Valuation—Board of Assessment Appeals—Appeal from—Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 39—B.C. Stats. 1931, Cap. 78, Sec. 8 (15)—B.C. Stats. 1940, Cap. 61.*] The Stock Exchange Building in Vancouver was built in 1929 at a cost of $852,086.82, the land costing $300,000. The property was subject to a first mortgage bond issue of $534,000, carrying six per cent. interest. The earnings from the property were not sufficient to pay the interest on the bond issue and after suffering a loss of $300,000 in interest alone the bondholders took over the property and in 1944 sold it for $412,166.82. In the year 1945 the building was assessed at $570,000 and the land at $87,000. An appeal to the Court of Revision on the ground that the assessment was in excess of the actual cash value within the meaning of section 39 of the Vancouver Incorporation Act, 1921, was dismissed, and a further appeal to the Vancouver Board of Assessment Appeals was dismissed. On appeal to the Court of Appeal:—*Held*, that in the circumstances upon the evidence the sum of $412,166.82 most accurately reflects the actual cash value of the property in the year 1945 within the meaning of section 39 of the Vancouver Incorporation Act, 1921. By section 56 (16) of that Act as amended by chapter 61 of 1940 it is provided that on any appeal taken to this Court "the assessment shall not be reduced in an amount greater than ten *per centum* from its assessment for the next preceding year." The assessment for 1945 was six per cent. less

TRESPASS—*Negligence—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 upper. 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 was 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 tooth. In an action for damages for trespass arising from the unauthorized extraction of said teeth, it was held on the trial that both defendants were liable in damages and on third-party proceedings taken by the dentist, that the doctor was liable to indemnify the dentist. *Held*, on appeal, affirming the decision of COADY, J. (O'HALLORAN and SIDNEY SMITH, JJ.A. dissenting), that as there were no instructions from the plaintiff to anyone to take out all her upper teeth, both defendants were liable to the plaintiff. As to the third-party proceedings, the evidence disclosed that it lay within the doctor's province to know the plaintiff's wishes as to what teeth were to be extracted, the dentist was desirous of ascertaining this fact for the purpose of determining his course, and the doctor gave an erroneous answer to his enquiry. The dentist is therefore entitled to be indemnified by the doctor. YULE V. PARMLEY AND PARMLEY. - - - - - - - - - - **116**

TRUST — *Father and son — Wages while under age paid to father—To be repaid on father's death — Transfer of moneys by father to daughter—Father's estate left to daughter by will—Death of father—Action by son against daughter—Creation of trust.*] The plaintiff's father James A. Swanson had four children. The plaintiff was his second son and the defendant was his only daughter. In 1919, when the plaintiff was 13 years old, his father took him from school and found employment for him. From that time until he reached the age of 21 years in October, 1926, the plaintiff turned over all his earnings to his father. The terms upon which he did this were that the father would hold the earnings for the plaintiff and they would be repaid to the plaintiff upon the father's death. On the 29th of December, 1942,

WILL—*Construction—R.S.B.C. 1936, Caps. 5 and 292.*] The relevant portions of the will involving consideration are: "I give, devise and bequeath, all my real and personal estate whatsoever and wheresoever in the manner following that is to say: A sum of money standing to my credit in the Canadian Bank of Commerce, London, England, to the Durham County Hospital, Durham, England. Lots—30, 84, 541 Richards Street, Vancouver, B.C. 11, 32, 555 West Vancouver District. Dominion of Canada Bonds. Cash in the Canadian Bank of Commerce, and Bank of Montreal, at Vancouver, B.C. to be realized, and divided into seven (7) equal parts amongst the following persons: (1) Beatrice Watson. (2) Georgina Homer. (3) Rachel Alexander. (4) Hyla Holden. (5) Rose Althea Lane. (6) Nina Dawson. (7) Lonsdale Holden (family of). All the residue of my estate, both real and personal, not hereinbefore disposed of, I give, devise, and bequeath unto the aforesaid seven legatees." The will was executed in April, 1933, and deceased died in January, 1944. The portion of the will relating to the gift to the Durham County Hospital was crossed out and the evidence is that this was done some time after the will was executed. This change was not initialled by the testator or witnesses. The moneys standing to the credit of the deceased in the Canadian Bank of Commerce in England were transferred to the Canadian Bank of Commerce in Vancouver in March, 1941. In answer to a question as to whether the Durham County Hospital was entitled to a portion

WILL—*Continued.*

of the estate:—*Held*, that without assuming that the attempted change was the testator's act, there was a permanent removal of the funds in question from London to Vancouver and the will specifically disposes of all moneys in the two banks in Vancouver. This particular legacy was therefore adeemed. Beatrice Watson and Georgina Homer, two of the seven legatees mentioned and sisters of deceased, predeceased the testator and their legacies lapsed. In answer to questions as to what distribution be made of the shares bequeathed to them:—*Held*, that the shares bequeathed to them fall into the residuary estate and is divided among the five surviving legatees. *In re* ESTATE OF CLEMENT HOLDEN, DECEASED. *In re* ADMINISTRATION ACT AND *In re* TRUSTEE ACT. - - - - - - **493**

2.——*Rule in Shelley's Case—Whether applicable to will in question—R.S.B.C. 1936, Cap. 292.*] The first requirement for the application of the rule in *Shelley's Case* is that there must be an estate of freehold in the ancestor and the second condition is that the gift over must be to the "heirs" used in the legal technical sense, of the person to whom the freehold estate has been given. If to the heirs of someone else, the rule has no application. The rule was held not to apply to the will in question because (1) The authorities supporting the principle that, in the absence of a context indicating a contrary intention, a devise of the rents and profits or the income of land passes the land itself both at law and in equity, do not apply to a case such as the present where the obvious intention of the testator as expressed in his will was to confer on the parties no estate in the realty, but to give to them a bequest of the income only as legatees for life or *pur autre vie*, as the case may be, and on the death of each of them before the death of the survivor of a group of five, the trustees were directed to pay that income to the surviving child or children, if any, until the death of the survivor of the group of five named in the will. So the first requirement was absent; (2) assuming that an estate of freehold was given to the first-mentioned beneficiaries there was no gift over or remainder to their respective descendants as such, even if the word "descendants" is to be read as equivalent to "heirs" and therefore the second condition for the application of the rule was absent; (3) assuming said two conclusions were wrong, nevertheless the word "descendants" was used by the testator in