THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME LXII.

VICTORIA, B. C.
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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. CHARLES JAMES LENNOX,	Vancouver
HIS HON. HERBERT HOWARD SHANDLEY,	Victoria
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,	Cariboo
HIS HON. REY AGLER SARGENT.	Vancouver
HIS HON. HARRY JOSEPH SULLIVAN,	Westminster

ATTORNEY-GENERALS:

THE HON. ROYAL LETHINGTON MAITLAND, K.C.
THE HON. GORDON SYLVESTER WISMER, K.C.

MEMORANDUM.

On the 1st of October, 1946, the Honourable William Alexander Macdonald, K.C., retired puisne judge of the Supreme Court of British Columbia, died at the city of Vancouver.

TABLE OF CASES REPORTED

IN THIS VOLUME.

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"COURT RULES OF PRACTICE ACT"

HIS HONOUR the Lieutenant-Governor in Council has been pleased, in view of the cessation of hostilities, to rescind Order in Council No. 1264, approved the 18th day of September, 1939; Order in Council No. 762, approved the 25th day of June, 1940; and Order in Council No. 110, approved the 28th day of January, 1942, which Orders provided, *inter alia,* that during the war no probate of a will or letters of administration of the estate of any national of the German Reich, of any subject of Italy, and of any subject or citizen of any country at war with His Majesty, wherever resident, should be granted in respect of any assets in this country without express licence of the Crown, acting through the Minister of Finance.

R. L. MAITLAND,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., February 23rd, 1946.

"COURT RULES OF PRACTICE ACT."

WHEREAS the City of Vancouver and certain other municipalities have adopted or may adopt daylight saving time, seven hours behind Greenwich time, for the period from April 28th to September 29th, inclusive, 1946:

AND WHEREAS it has been represented that inconvenience and confusion will result to Judges, Court officials, and litigants in consequence of maintaining standard time in the administration of the Courts:

On the recommendation of the Acting Attorney-General and under the authority of the "Court Rules of Practice Act," R.S.B.C. 1936, chapter 249, and all other powers thereunto enabling, His Honour the Lieutenant-Governor in Council has been pleased to order that from the 28th day of April to the 29th day of September, inclusive, 1946, where any expression of time occurs in any Rule of Court, or in any pleading, notice, order, or other proceeding in respect of matters in the City of Vancouver or in any other municipality which has adopted or which may adopt daylight saving time as aforesaid, the time referred to shall be reckoned as seven hours behind Greenwich time.

E. PEPLER,
Deputy Attorney-General.

Attorney-General's Department,
Victoria, B. C., May 2nd, 1946.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

IN RE LEGAL PROFESSIONS ACT AND THE BENCHERS OF THE LAW SOCIETY OF BRITISH COLUMBIA AND F APPELLANT.

S. C.
1945
July 3, 9.

Practice — Barrister and solicitor — Suspension from practice — Appeal— Procedure—Additional evidence—Sittings in camera—R.S.B.C. 1936, Cap. 149.

Before hearing the appeal upon its merits from the decision of the Benchers of the Law Society of British Columbia suspending the appellant from practice as a barrister and solicitor, the appellate tribunal heard argument on two points, namely: (a) Does rule 100 of the Rules of The Law Society of British Columbia passed pursuant to the Legal Professions Act require the same procedure to be followed in the admission of additional evidence on the appeal as is required on an appeal before our Appeal Court? (b) Should the sittings of the tribunal be in public or *in camera?*

Held, as to (a) that administrative tribunals performing judicial or semi-judicial functions are required to act judicially, but are not required to follow court procedure and the Benchers of The Law Society as well as this tribunal come within this definition. Additional evidence can only be admitted as and when the appellate tribunal is satisfied that the justice of the case requires the same to be admitted. As to (b), over the centuries the English Benchers have established a course of procedure nearly as old as the courts themselves and the right of the English Benchers or the British Columbia Benchers to sit in private has never

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IN RE LEGAL PROFESSIONS ACT AND THE BENCHERS OF THE LAW SOCIETY OF BRITISH COLUMBIA AND F APPELLANT

been questioned, on the contrary has always been accepted. The proceedings were initiated in private and it would appear that unless good cause be shown to the contrary, the visiting tribunal should continue the proceedings in the same manner as instituted.

APPEAL from the decision of the Benchers of The Law Society of British Columbia of the 7th of April, 1945, suspending F from practice as a barrister and solicitor of the Supreme Court of British Columbia for a period of six months from the 7th of April, 1945. Argued at Vancouver on the 3rd of July 1945, before FARRIS, C.J.S.C., MANSON, COADY, WILSON and HARPER, JJ.

D. J. McAlpine, for appellant.
*Bull, K.*C., for The Law Society. *Cur. adv. vult.*

On the 9th of July, 1945, the judgment of the Court was handed down by

FARRIS, C.J.S.C.: This is an appeal pursuant to section 45 of the Legal Professions Act, R.S.B.C. 1936, Cap. 149, from a decision of the Benchers of The Law Society of British Columbia, suspending a solicitor from practice, and came on for hearing before the Chief Justice, and MANSON, COADY, WILSON and HARPER, JJ. sitting as a special visitorial tribunal on Tuesday, the 3rd of July, 1945.

Before proceeding with the hearing of the appeal upon its merits this tribunal desired argument upon the following two points:

(a) Does rule 100 of the Rules of The Law Society of British Columbia, passed pursuant to the Legal Professions Act, require the same procedure to be followed in the admission of additional evidence on the appeal as is required on an appeal before our Appeal Court? (b) Should the sittings of the tribunal be in public or *in camera?*

This tribunal, after hearing argument, adjourned the hearing of the appeal itself until Thursday, July 12th, 1945, permitting in the meantime consideration and the determining of these points.

In reference to (a) it is the opinion of this tribunal that administrative tribunals performing judicial or semi-judicial

functions are required to act judicially but are not required to follow court procedure (*St. John* v. *Fraser,* [1935] S.C.R. 441, at p. 452; *O'Connor* v. *Waldron,* [1935] A.C. 76, at p. 82). It is further the opinion of this tribunal that the Benchers of The Law Society of British Columbia, as well as this tribunal, come within the definition above referred to.

It would therefore follow that it is not necessary for this tribunal upon the appeal to confine itself to the rules and precedents established in respect to the admission of additional evidence as required by the Appeal Court. While section 100 of the rules provides for the admission of additional evidence this tribunal does not accede to the view that an appellant, as of right, can on the appeal introduce further evidence. Such a view might in effect destroy the value of the hearing before the Benchers and constitute the appellate tribunal, in fact, the primary tribunal. Additional evidence can only be admitted as and when the appellate tribunal is satisfied that the justice of the case requires the same to be admitted.

In regard to (b), this tribunal which constitutes five out of six of the members of the Supreme Court of British Columbia feels that this is an opportune time to restate the principles involved in public and private hearings.

In days past, judges were supposed to be both deaf and blind to all matters occurring except such things as were actually spoken or seen in the Court room. Today we are in a modern age, an age when through the newspapers and the radio every citizen is almost hourly informed of what is taking place, and it would seem a grave reflection upon the members of the Bench that they were of a class who did not keep abreast of the times by the reading of the newspapers and listening to the radio.

It is the feeling of the members of the Court represented on this tribunal that judges should not enter into newspaper controversy or seek through the newspapers or from public forums to explain and justify their acts, nevertheless they should not hesitate from the Bench to state the general law on matters of great public importance, so that the public may be better informed. Never in history has there been greater necessity for recognition of the freedom of the Courts and the freedom of the

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press than at the present time. It took centuries to establish the present freedom of the Courts. Originally the judges were but vassals of the King, and the first real effort that was made to bring about the freedom and independence of the Courts was by Lord Coke early in 1600, who was dismissed from office as Chief Justice because of his refusal to do the King's bidding. It was over a hundred years later before the full independence of the Courts was attained, and the judges were freed from the dictates of any individual and the stage reached as it now is, that members of the Court can no longer be dictated to by the whims or pressure of an official, however great or small. The members of the Court are answerable to Parliament alone.

I mention this to indicate that only through the years has the present independence of the Courts been established, and to emphasize that the freedom and the independence of the Courts is not for the benefit of the members of the Courts themselves but as a protection to the public. If a judge were to be the subject of inquiry or discipline by any officer of the Crown, even a Minister of Justice or an Attorney-General of a Province, he would be hampered in his freedom of action when the rights or liberty of the subject is involved. For this reason no individual or officer can interfere with the Court or a judge, and for the same reason the disciplining of a judge remains not in the hands of an individual but in the people themselves through their elected representative in Parliament.

It has been recognized as the freedom and independence of the Courts grew that it was necessary that the publicity of the action of the Courts be accordingly extended, and it has been so extended until today the necessity that Court actions shall be subject to publicity is recognized as a fundamental principle. To illustrate this I can do no better than quote the words of Lord Shaw in the case of *Scott* v. *Scott* (1913), 82 L.J.P. 74, at p. 105:

> . . . To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.
>
> It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable

to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the Judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "The civil liberty in this kingdom has two direct guarantees, the open administration of justice according to known laws truly interpreted, and the fair construction of evidence, and the right of Parliament without let or interruption to enquire into and obtain redress of public grievances. Of these the first is far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom where this condition is not found both in its judicial institutions and in their constant exercise."

With this statement of fundamental law the members of the Court constituting this tribunal are in complete agreement.

During the course of argument counsel suggested that the only exceptions to this rule that Court hearings must be held in public were in those cases specifically provided for by statute, as, under the Criminal Code where in the interest of public morals the Court has the right to exclude the public. In this, counsel was in error, for, while the rights of the public and even the Court itself must be protected through publicity, yet there are occasions in which the public is not particularly concerned and there is the right of individuals to be protected from the glare of the light of publicity.

There are three well recognized exceptions to the holding of hearings in public in addition to the statutory exceptions. As to these exceptions I again quote the words of Lord Shaw (p. 108):

> The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are—first, in suits affecting wards; secondly, in lunacy proceedings; and thirdly, in those cases where secrecy—as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these classes depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the Judges as representing His Majesty as *parens patriæ*. The affairs are truly private affairs; the transactions are truly transactions *intra familiam;* and it has long been recognized that an appeal for the protection of the Court in case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge it to the world, under the excuse of a report of proceedings in a Court of law, would be to

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destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secrecy which the Court may judicially determine to be of patrimonial value and to maintain.

In addition to the statutory and the three definite exceptions above referred to there are other instances possibly difficult of determination, based on general principles where the public may be excluded. I emphasize the word "principles" because the exclusion of the public must be upon principle and not expediency. I quote the words of the Lord Chancellor (Viscount Haldane) in *Scott* v. *Scott, supra,* at p. 83:

> . . . But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the Judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

It is clear the mere agreement of parties that the case shall be tried behind closed doors or the desire to consider the feelings of delicacy or the fact that the litigant rather than give publicity to the facts would not bring the action, might not be sufficient to justify a case being held *in camera.* I quote the words of the Earl of Halsbury in *Scott* v. *Scott, supra,* at pp. 85-6:

> While I agree with the Lord Chancellor in the result at which he has arrived in this case, and generally in the principles which he has laid down, I wish to guard myself against the proposition that a Judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category; but I should require to have brought before me the concrete case before I could express an opinion upon it. Probably, as has been said, a mere desire to consider feelings of delicacy, or to exclude from public hearing details which it would not be desirable to publish, is not enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the procedure in English Courts of justice.
>
> The difficulty which I have in accepting this as a sufficient exposition of the law is that the words in which the rule has been laid down are of such wide application that individual Judges may apply them in a way which, in my opinion, the law does not warrant. The paramount object, that justice cannot be done unless a secret hearing is ordered, is doubtful of attainment. I am not venturing to criticize the Lord Chancellor's language, which, as he and I venture to say, I myself understand it, is probably enough to secure the observance of the rule of public hearing; but what I venture to point out is that it is not so definite in its application but that an individual

Judge might think that in his view the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension.

The foregoing would appear to be a correct summary of the law in regard to the holding of Court in public, and the exceptions thereto.

It might be helpful at this time to mention as an example of what might be an exception among the general exceptions referred to. In a recent case which has been somewhat publicized the learned trial judge saw fit to hold the case *in camera*. The members of this tribunal do not intend to pass upon the correctness or incorrectness of the learned judge's decision in that regard, but only by way of illustration it mentions the same. Speaking broadly, the facts in such case, as we understand them, are as follow: It was a trial involving a will, and the learned trial judge was of the opinion that an important, if not the most important feature of the trial was the testing of the mental attitude of the testator at the time of making the will. All parties were represented by counsel. Certain letters and documents, which were found with the testator's effects after his death, containing certain scandalous statements concerning certain parties to the proceedings were admitted in evidence. These statements were not evidence of the fact as alleged therein against such party, nor were they admissible in evidence as proof of the allegations made therein. They were admitted only for the purpose of indicating the mind of the testator at the time of making the will. It can be seen at a glance that the publication of these statements might do a great injustice to the parties, and yet at the same time the production of the same might be of the greatest benefit to the Court in determining the mental attitude of the testator. This is a factor to be taken into consideration by the judge.

The purpose of the members of this tribunal in referring to this case, as before stated, is not to pass upon the action of the trial judge but only to point out in general terms that if the judge in that case adhered to the principle of law as hereinbefore referred to, and the full facts as disclosed before him were such

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as to bring the case within the principles of law permitting exclusion of the public, then it was within the right of the judge to so exclude the public.

From the foregoing, the necessity of a court holding public hearings has been fully emphasized, and it is now for this tribunal to determine whether the present appeal before us should be held in public or *in camera.*

It is the opinion of this tribunal that if we were sitting as a Supreme Court of British Columbia *en banc,* it might well be the duty of the Court to hear the appeal in public.

As before pointed out, we have determined that we are not sitting as a Supreme Court *en banc* but as a special visiting tribunal, composed of members of the Supreme Court. Reference has been made to the fact that as a special tribunal we must proceed upon judicial lines, nevertheless we are not bound by the rules of court procedure.

It would appear that over the years Benchers in England and in this Province have been holding their meetings as private meetings, and the public has not access thereto. Over the centuries the English Benchers have established a course of procedure nearly as old as the Courts themselves, and the right of the English Benchers or the British Columbia Benchers, so far as we know, to sit in private has never been questioned, but on the contrary has always been accepted.

As a visiting tribunal, and so designated by the Act, we have certain functions to perform. In this particular case we have to determine whether or not the appellant F has been properly suspended from practice by the Benchers. If, as in England or at Osgoode Hall in Toronto, the Benchers of this Province had quarters of their own we would as visitors go to the home of the Benchers themselves and there investigate the matter before us. We would under such circumstances, we think, be bound as visitors to conform with the rules of the Society and would not be permitted to open their quarters to the general public. It seems that the mere fact that the Benchers in this Province do not have quarters of their own does not take away from them that right of privacy which they otherwise would enjoy. The proceedings were initiated in private and it would appear that

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unless good cause be shown to the contrary the visiting tribunal should continue the proceedings in the same manner as initiated.

It would seem that if the framers of the statute did not have this form of procedure in mind they would have followed a simple course of allowing an appeal in the ordinary way to the Supreme Court *en banc*. The hearing of this appeal upon the merits before this visitorial tribunal at the time fixed for the hearing thereof shall accordingly so proceed.

14th July, 1945.

Since the delivery of the above judgment the appeal came on before this tribunal, and Mr. *Bull* stated in reference to the paragraph in the judgment being taken as follows:

> During the course of argument counsel suggested that the only exceptions to this rule that Court hearings must be held in public were in those cases specifically provided for by statute, as, under the Criminal Code,

that the Court had misunderstood the position as taken by him; that he had not meant to convey the idea that there were no other exceptions except the statutory exceptions; that in the course of his argument he had referred to the case of *McPherson* v. *McPherson* (1935), 105 L.J.P.C. 41; [1936] A.C. 177, in which case the three definite exceptions set out in the *Scott* v. *Scott* case were referred to, and that he took it for granted the Court would understand that his general reference to the exceptions would also include these three exceptions. This tribunal is glad to accept Mr. *Bull's* explanation.

WINSBY v. TAIT AND TAIT & MARCHANT.

S. C.
1943
Dec. 3, 23.

Res judicata—Second action involving similar issues to first—Dismissal as frivolous and vexatious.

The plaintiff in 1938 had sued the defendants upon a partnership agreement, claiming an account and a proportion of certain shares and other property said to have been acquired out of partnership assets. This action, after a trial and several appeals, was dismissed by the Privy Council on the grounds that the partnership was for a limited purpose and had terminated and that the plaintiff had received all the benefits he was entitled to under the agreement, and had no right to the said shares and other specific property claimed. In 1943 the plaintiff began

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a second action against the same defendants based on the same partnership agreement, and claimed that the defendants by breach of trust, fraud and conspiracy, had deprived him of the same shares and other property claimed in the first action, and for this he claimed damages.

Held, that the second action was frivolous and vexatious and should be dismissed on motion.

MOTION by the defendants to dismiss the plaintiff's action as frivolous and vexatious or alternatively to stay it until the costs of a former action and appeals therein, amounting to some $10,000, were paid. The facts are sufficiently set out in the head-note and judgment. Heard by MACFARLANE, J. at Victoria on the 3rd of December, 1943.

D. M. Gordon, for the motion.
W. A. Brethour, contra.

Cur. adv. vult.

23rd December, 1943.

MACFARLANE, J.: The former action No. W 3/1938 commenced by writ issued January 5th, 1938, was begun in this Court between the plaintiff herein and the defendants *D. S. Tait* and *Tait & Marchant*. The defendant *W. P. Marchant* was not named as a party in the said action.

On the trial of the action, however, the plaintiff put in evidence (discovery of the defendant *Tait*) an admission that the defendant *W. P. Marchant* was his partner in the firm of *Tait & Marchant*. That action proceeded until it was finally disposed of by the Privy Council by order dated the 27th of January, 1942. Pursuant to that order judgment was entered dismissing the action.

The action above mentioned was founded, as is this one, on a memorandum of agreement bearing date the 21st day of March, 1935. In it the plaintiff claims: (1) An account of all dealings and transactions by the said *Tait* and by the firm of *Tait & Marchant* . . . falling within the terms of the agreement above mentioned; and (2) a judgment, order or decree adjudging the carrying out of the trust created and defined in and by the said agreement; and (3) an order directing the vesting in the plaintiff of his rights and interests in and by virtue of the said agreement.

The defence to that action was that the agreement dated the 21st of March, 1935, was entered into by the defendant *Tait* on his own account only and not on behalf of his firm, the firm of *Tait & Marchant,* and was for a single adventure which did not materialize and that therefore the partnership acquired no assets.

The defence set up, however, that two properties known as the Van Isle and Rimy groups of claims which were included in the agreement of the 21st of March, 1935, were subsequently acquired by a syndicate organized by the defendant *Tait* and that the plaintiff Winsby was given three and one-half units in the capital of the syndicate organized to develop these claims and that he accepted such units or the shares issued in lieu thereof as the sole remuneration to which he was entitled. In his reply the plaintiff in paragraph 2 (c) sets up that the defendants *Tait* and *Tait & Marchant* are bound by the provisions of the agreement of the 21st of March, 1935, as trustees, partners and solicitors for the plaintiff and were at all material times under fiduciary relationship and duty to the plaintiff. By paragraph 5 (a) of the reply the said allegations were extended and more fully stated.

The decision of the Privy Council [1943] 1 D.L.R. 81, was that the partnership was formed for a single adventure and that on July 11th, 1935, an arrangement was made to dispose of the only asset of the partnership and that for it the plaintiff and the defendants together should receive 15 units in the Nootka Gold Mining Syndicate, a syndicate which took over an option acquired in respect of the said Van Isle and Rimy groups and that of these 15 units the plaintiff should receive three and one-half and the defendants 11½ in full satisfaction and settlement of their respective interests. With the transfer of the option on these two groups of claims to the syndicate the partnership came to an end.

With regard to the clause of the agreement dealing with future interests Lord Macmillan at p. 90, says:

> . . . It is true that the enumeration of the specific claims is followed by the words "and any and all other mineral claims, rights, interests, etc., which the parties or either of them may acquire or become interested in" in the Nootka Sound area, but these words, in their Lordships' opinion, were intended only to cover the possibility of the partners acquiring further

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1943

WINSBY
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Macfarlane, J.

mining interests which they might be able to associate with the specified claims and dispose of along with them to the contemplated syndicate.

The decision proceeded on the basis that no further mining interests were acquired by the partnership and concluded by a declaration at p. 92, that:

> . . . The appellants are therefore under no liability to account to the respondent who has received in full his share in the partnership assets and has no further claim on the partnership.

If this action were an action making any claim to any assets of the partnership that would most certainly conclude the matter.

The plaintiff submits, however, that while the first action was one for an accounting he is now suing for damages for breach of trust, fraud and conspiracy. As I understand his claim he admits that the basis of the relationship between him and the defendant *Tait* and the firm of *Tait & Marchant* is to be found in the agreement of March 21st, 1935, in respect of which he asks for an accounting in the first action. The statement of claim in this action in paragraphs 6, 7, 8, and 9 in terms limits his claims to the mineral claims that did come or might come within the ambit of the wording of that agreement. The Privy Council has held that no further assets than those accounted for were acquired under the arrangements set out in that agreement.

The Privy Council has further held that that agreement was for a single adventure and came to an end with the disposal of the two groups of claims above mentioned.

It is in these circumstances that the plaintiff proceeds to set up new causes of action based on breach of trust, fraudulent conversion to the use of the defendant and conspiracy to defraud the plaintiff of his interests. If the Privy Council was right in its finding that there has been complete satisfaction of all the claims of the plaintiff arising under the said agreement, then there is nothing in respect of which there would be a breach of trust, nothing which could be the subject of fraudulent conversion and nothing of which the plaintiff by conspiracy could be deprived. In other words in order to find anything in respect to which these causes of action could operate the findings of fact of the Privy Council would have to be determined to be without foundation.

In the first action I have already said that the plaintiff asks

for a judgment order and/or decree adjudging the carrying out of the trust created and defined by the said memorandum of agreement bearing date the 21st day of March, 1935, and for appropriate transfer of the interests which the plaintiff claims to be entitled to under the said agreement.

That claim was dismissed. Now in this action the plaintiff asks for damages for breach of trust which the Privy Council has definitely held has been fully carried out. In fact the finding of the Privy Council that the plaintiff has received in full his share of the partnership assets excludes, I think, any basis for any claim either of fraud or of conspiracy to deprive the plaintiff of his share of its assets.

I have not dealt with the addition of the defendant *Marchant* as a party in his individual capacity. I do not see how inclusion of this defendant can have any effect on the result of the litigation whether he is specially named or not when he is admitted to be a member of the partnership and that admission has been put in evidence by the plaintiff. In addition no special allegations are made against him.

This motion asks that the second action be dismissed with costs on the ground that the same is frivolous and vexatious and an abuse of the process of the Court; or alternatively that all proceedings be stayed on the said ground; or alternatively that all further proceedings in this action be stayed until the plaintiff has paid the taxed costs of the first action and of the appeals therein.

Two affidavits were filed on this motion—one by the defendant *Marchant* in which he swears that this action is based substantially on the same cause of action as the first action; all the other statements in this affidavit are matters of record. The other affidavit is that of the plaintiff and it contains a general denial of all the allegations contained in the affidavit of *Marchant* and says that the former action had nothing whatever to do with the present action as the present action is entirely an action for fraud and conspiracy including perjury and that the fraud and conspiracy were not known until after the completion of the first action. He further swears that he has been deprived of his just rights and his livelihood by reason of the defendants' fraudulent

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conspiracy in depriving him of his interest in the properties in dispute in this action and that for the same reason he is destitute and unable to pay the costs of the first action.

Counsel for the plaintiff asked for an order requiring the defendant *Marchant* to submit to cross-examination on his affidavit. I declined to make such an order on an application made a full month after the affidavit had been filed and particularly, as it was obvious that all statements in the affidavit of *Marchant* could be verified or otherwise by reference to the proceedings in the first action which were matters of record, or by comparison of the proceedings there with the proceedings in this action. As any proper examination of the defendant *Marchant* could elicit no further information in respect to the matters alleged in his affidavit than was already before me I refused it.

With regard to the dismissal of the action, the late Chief Justice MARTIN in *May* v. *Hartin* (1938), 53 B.C. 411, at p. 418, in a dissenting judgment agreed with what Fletcher Moulton, L.J. said in *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410, at p. 419, *viz.*:

> . . . To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

I think the cause of action here is obviously and incontestably bad. In that case the late Chief Justice collected in a very cogent manner all that could possibly be said in the way of authority in opposition to a motion such as this. I have considered all of the decisions to which he referred and I think this is a case where the power to dismiss although one to be sparingly used should be used.

I think this case should be decided on the same grounds as were adopted in the House of Lords in *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210, and particularly in the reasons given by the Earl of Selborne, L.C. in that case. That was a case brought by a bankrupt whose adjudication in bankruptcy had not been set aside. In his reasons the Earl of Selborne at pp. 216-7 says:

> Under those circumstances it is perfectly clear and certain, that Mr. Pooley, as a bankrupt and as a bankrupt irreversibly found to be so, has no *locus standi* to come into Court and to say what he does say by his state-

ment of claim, that he "has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring him to be adjudicated bankrupt," or to say, as he does in his writ, which is explained by that statement of claim, that he seeks "damages for fraud and conspiracy."

. . . . .

It was settled as long ago as the case of *Whitworth* v. *Hall* [(1831)], 2 B. & Ad. 695, which was referred to in the argument, that in an action for maliciously and without reasonable cause suing out a commission of bankruptcy it must be averred and proved that the commission was superseded before the action was brought, and that for a reason which applies to other analogous cases. An action for malicious prosecution cannot be maintained until the result of the prosecution has shown that there was no ground for it. If a man has been tried and convicted on that prosecution, and there is no writ of error brought and no reversal of the decision, such an action will not lie. And it is manifestly a matter of high public policy that it should be so; otherwise the most solemn proceedings of all our Courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind. It is therefore clear (and the learned counsel for the respondent found a difficulty in denying it in the course of his argument) that on that ground, namely, causing the plaintiff to be fraudulently and without reasonable cause adjudicated a bankrupt, there can be no pretence for the action. It is manifestly groundless, and even without the other facts, I should have been disposed to say manifestly frivolous. The adjudication stands; and, even if he had never litigated or disputed it, the fact of its standing would be a sufficient answer to this alleged cause of action. But when you find from the affidavits filed in the cause that he had litigated it with full knowledge of those facts, which if true and if his view of them were correct would be a sufficient reason for setting it aside, and that it was solemnly confirmed, and that this occurred two or three years before the action was brought, I am bound to say that I can conceive nothing more frivolous, I can conceive nothing more vexatious, than an action brought on that ground.

Further on the question of unpaid costs of the previous action which there, as here, had amounted to a considerable sum, the Earl of Selborne said (p. 220):

. . . It would be a scandal and disgrace to the administration of justice in this country, if such proceedings were permitted to be repeated, whether with some colourable variation of the *dramatis personæ* or not. Anything more vexatious than to allow, after that, a groundless action, upon such a statement of claim as this, by a bankrupt to go on at the risk of incurring £3,000 more costs, I cannot conceive.

There will be an order dismissing the action with costs.

Motion granted.

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May 17, 18; *June* 25.

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Criminal law — Retaining stolen property — Evidence — Exculpatory statements denying guilt—Admissibility—Not within rule governing confessions—Criminal Code, Sec. 399.

Police officers, while engaged in the investigation of an offence quite separate and distinct from that with which the accused was here charged, discovered in a bedroom in an auto-camp cabin occupied by the accused and his wife a quantity of motion-picture equipment contained in several packages. Suspecting the goods were stolen and having decided to lay a charge against accused in that connection, one of the two officers asked accused for an explanation as to how and under what circumstances he had the equipment, to which accused replied that it was the property of his brother. The officer then told him he might be charged with retaining stolen property and gave him a proper precautionary warning. Then in response to questions the accused replied "that the stuff was not stolen, that his brother had come from Winnipeg three months prior and had brought it with him." Evidence on the trial disclosed that the equipment was stolen a month after accused said his brother had brought it from Winnipeg. Accused appealed from his conviction for retaining stolen goods knowing the same to have been stolen on the grounds of wrongful admission in evidence of certain statements made by accused to police officers and that there was not sufficient evidence of retaining.

Held, affirming the conviction by BOYD, Co. J., that the appeal be dismissed.

Per SLOAN, C.J.B.C.: The statement of accused falls within the principle enunciated in *Rex* v. *Hurd* (1913), 21 Can. C.C. 98 and there is in consequence no necessity to consider whether, if it were a confession, it would be inadmissible under the circumstances herein. There is ample evidence to support the conviction.

Per O'HALLORAN, J.A.: The statement cannot be regarded as "a confession." Taken at its full value at the time it was made, it was not in itself inculpatory for there was no element of guilt in the facts there acknowledged. It did not in itself involve guilt, directly or by legitimate inference, nor was it essential to proof of the crime charged. The statement when made and when advanced by the prosecution as admissible evidence was entirely exculpatory for it excluded in itself any legitimate inference of guilt under Code section 399.

Per SIDNEY SMITH and BIRD, JJ.A.: The Crown called the two officers who testified that the accused was properly warned and that his statements were made voluntarily without threats or inducement. The judge was satisfied with the evidence given and that the Crown had sustained the *onus* of proving that the statements had been voluntarily made and there was ample evidence from which the learned judge could conclude that the accused was in possession of the goods and was retaining them.

Per ROBERTSON and SIDNEY SMITH, JJ.A.: When exception is taken to the admission of evidence, the evidence objected to must be set out with particularity in the notice of appeal.

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APPEAL by accused from his conviction by BOYD, Co. J. on the 12th of March, 1945, and sentence on a charge that between the 26th day of October, 1944, and the 25th day of December, 1944, [he] unlawfully did retain in his possession stolen goods knowing the same to have been stolen, to wit, one moving-picture projector and equipment of the total value of over twenty-five dollars.

One Claude L. Donald, an employee of the National Film Board on the 26th of October, 1944, had in his car a projector and equipment, a microphone and power converter and three films. At 11 o'clock at night he parked his car outside his house on Nicola Street. Next morning the car with contents was missing. On December 24th following at 8.30 p.m. detective Whalen with two other detectives went to the Carleton Auto Court in the 2800 block on Kingsway where accused and his wife occupied cabin 5. On their arrival the accused and his wife were not there, but shortly after accused drove up in his car. Whalen told him he wished to have conversation with him in regard to certain articles he was alleged to have in his possession other than the movie equipment. The detectives searched the premises and found the movie equipment under a bed in the cabin. The detective then asked the accused to explain his possession of the equipment to which he replied it was the property of his brother. The detective then gave him the warning that he might be charged with retaining stolen property and that anything he said might be used in evidence. Then in answer to questions he said "that stuff was not stolen, that his brother had come from Winnipeg three months prior and had brought them with him." The brother gave evidence in which he stated he received the articles from a boy named Joe Marrin near the Hong Kong Cafe and brought them to his brother's cabin where he put them under the bed. Accused was sentenced to two years' imprisonment.

The appeal was argued at Vancouver on the 17th and 18th of May, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Crux, for appellant: There was not sufficient evidence of retaining. There was wrongfully admitted evidence. The *onus* is on the Crown to prove admissibility of detective's evidence and there should have been a trial within a trial. They did not

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have a trial within a trial: see *Rex* v. *Anderson* (1942), 58 B.C. 88; *Rex* v. *Pais* (1941), 56 B.C. 232; *Thiffault* v. *Regem* (1933), 60 Can. C.C. 97. That there was not sufficient evidence of retaining see *Rex* v. *Parker* (1941), 57 B.C. 117. There was no attempt to hide the articles. There is want of guilty knowledge.

Remnant, for the Crown: The goods were valued at $800. The Court must find that the trial judge was obviously wrong before reversing: see *Rex* v. *M.* (1926), 58 N.S.R. 512; *Rex* v. *Murphy, Kitchen and Sleen* (1931), 4 M.P.R. 158. That there was guilty knowledge of the stolen goods see *Rex* v. *Hurd* (1913), 21 Can. C.C. 98; *Reg.* v. *McKay* (1900), 6 Can. C.C. 151. Even if what was said was a confession, it was properly admitted: see *Thiffault* v. *Regem* (1933), 60 Can. C.C. 97, at p. 102; *Rex* v. *Weighill,* [(1945), 61 B.C. 140]. It was a free, voluntary statement: *Ibrahim* v. *Regem,* [1914] A.C. 599, at p. 614; *Rex* v. *Voisin,* [1918] 1 K.B. 531. They urge that there was not sufficient evidence of retaining and no control: see *Rex* v. *Gfeller,* [1944] 3 W.W.R. 186. Even if this were struck out there is evidence upon which the trial judge could find against him: see *Rex* v. *Dillabough* (1944), 60 B.C. 534.

Crux, in reply, referred to *Rex* v. *Scory,* [1945] 2 D.L.R. 248 and *Markadonis* v. *Regem,* [1935] S.C.R. 657, at p. 660.

Cur. adv. vult.

25th June, 1945.

SLOAN, C.J.B.C.: In my opinion the questions relating to the admissibility of the statement of the accused fall within the principle enunciated in *Rex* v. *Hurd* (1913), 21 Can. C.C. 98, and there is in consequence no necessity to consider whether if it were a confession it would be inadmissible under the circumstances herein.

There is ample evidence to support the conviction of retaining and the sentence imposed was not excessive.

I would therefore dismiss the appeals from conviction and sentence.

O'HALLORAN, J.A.: The appellant was convicted by BOYD, Co. J., of retaining stolen goods under Code section 399, and

received a sentence of two years' imprisonment. The stolen goods comprised commercial motion-picture equipment consisting of a power converter, microphone sound equipment, a projector and two rolls of film valued in all at about $800. The police discovered the equipment beneath a bed in a two-roomed cabin occupied by the appellant and his wife in the Carlton Auto Court, Vancouver. The appeal was grounded on (a) wrongful admission of evidence, and (b) insufficient evidence of retaining.

After one of the police officers had dragged the equipment from beneath the bed, the other officer asked the appellant to explain his possession of it. The latter then said it was the property of his brother. The officer thereupon told him he might be charged with retaining stolen property and gave him a proper cautionary warning to which the appellant replied

that the stuff was not stolen, that his brother had come from Winnipeg three months prior and had brought it with him.

It will be observed the appellant made two statements to the police. The first, that the equipment was the property of his brother, was made without a warning, but the second as above quoted was made after warning.

Counsel for the appellant took no objection to the first statement. But he submitted the second statement although made after warning, was wrongly admitted as evidence because (a) it created an inculpatory inference against the appellant and hence came within the scope of the rules peculiar to the use of confessions, and (b) the prosecution failed to show affirmatively that it was voluntary, in that it is said no proper "trial within a trial" was held. It is desirable to emphasize that no question arises in this appeal concerning the lack of warning or sufficiency of the warning given to the appellant, and hence there is no occasion now to interpret observations found in *Gach* v. *Regem,* [1943] S.C.R. 250, at p. 254, and *cf. Rex* v. *Weighill* (1945), 61 B.C. 140, at pp. 145-6.

The evidence at the trial discloses that the equipment was stolen about a month after the appellant said his brother had brought it from Winnipeg. His statement to the police was therefore untrue. Counsel for the appellant argued that its untruth necessarily caused an inculpatory inference in the mind of the trial judge against the appellant. However, in my judgment the

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statement cannot be regarded as "a confession." Taken at its full value at the time it was made, the statement was not in itself inculpatory, for there was no element of guilt in the facts then acknowledged. It did not in itself involve guilt directly or by legitimate inference, nor was it essential to proof of the crime charged. The statement when made, and when advanced by the prosecution as admissible evidence, was entirely exculpatory, for it excluded in itself any legitimate inference of guilt under Code section 399.

The distinction between a confession as such and a statement admitting or denying a fact is understandingly set forth in Wigmore on Evidence, Can. Ed., Vol. 1, sec. 821, p. 930, founded on the charge of Eyre, L.C.J., to the jury in *Rex* v. *Crossfield* (1796), 26 St. Tri. 1, at p. 215, *viz.*:

> An acknowledgment of a subordinate fact, not directly involving guilt, or, in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions (*post* sec. 822) is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions.

And *cf.* also *Attorney-General* v. *M'Cabe*, [1927] I.R. 129, Kennedy, C.J. at pp. 133-4.

A recent decision of the Saskatchewan Court of Appeal in *Rex* v. *Scory* (1944), 83 Can. C.C. 306 was cited to support as a positive rule of law, that any statement of an accused "by which the Crown seeks to advance its case," must be regarded as a "confession," and cannot be introduced in evidence unless the prosecution establishes after a proper trial within a trial that it was voluntary. It appears that the Court in *Rex* v. *Scory* declined to follow the unanimous opinion of the Alberta Appellate Division (Harvey, C.J., Scott, Stuart, Simmons and Walsh, JJ.) in *Rex* v. *Hurd* (1913), 10 D.L.R. 475. *Rex* v. *Hurd* adopted Wigmore's reasoning which I have quoted and also adopted Wigmore's reasoned statement of the law (Vol. 1, sec. 821, p. 928) that

> Exculpatory statements, denying guilt, cannot be confessions. This ought

to be plain enough, if legal terms are to have any meaning and if the spirit of the general principle is to be obeyed.

With great respect, the reasoning of Wigmore and *Rex* v. *Hurd* seems to me to be conclusive.

In the case at Bar the appellant's statement was an explicit denial of guilt as well as a denial of any ingredient or quality of guilt. He said the equipment was not stolen and also that his brother had brought it from Winnipeg three months before. He thereby denied inferentially (a) that he knew the goods were stolen and (b) that he was retaining possession of stolen goods. A denial cannot become an admission, simply because it is untrue. But as I understand *Rex* v. *Scory* it is founded on the proposition that a statement entirely exculpatory in its nature, if found to be untrue, becomes an inculpatory statement by reason of its untruth. Naturally if a witness tells a lie, and it is proven to be a lie his credibility is severely weakened. For example if an accused gives two conflicting statements to the police, the objective fact that they are conflicting was held in *Hubin* v. *Regem*, [1927] S.C.R. 442 (see pp. 449-50) to be evidence under Code section 1003 which could be corroborative of the complainant's story.

In my judgment the test whether a statement is admissible without proof that it is voluntary must depend not upon its eventual truth or untruth, but upon its character and nature at the time it was made. If it is inculpatory when made then it is subject to the rules relating to confessions. If it is exculpatory when made it is not so subject and may be received as any other evidence. For example, a police officer asks X his name and address. X gives him a wrong name and a wrong address, and is charged with theft shortly after. X's statement on its face is obviously neither exculpatory nor inculpatory. But it may easily be that in the course of the trial, X's false statement of his name and address may so weaken his credibility in the mind of the jury or other fact-finding tribunal, that it detracts from the weight of the evidence sufficiently to exclude his innocence, which might otherwise have been found. But that does not make his false statement of name and address an admission of guilt, or an admission of an essential of guilt.

In the "trial within the trial" it is no part of the duty of the

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judge to adjudicate upon the weight or truth of the confession as such since that function belongs exclusively to the jury and *cf.* what was said in *Rex* v. *Weighill* (1945), 61 B.C. 140, at p. 147. Nor are the jury to adjudicate upon whether the confession was voluntary, as that function belongs exclusively to the judge as an essential basis upon which to decide the admissibility of the confession. The reason why this is so was indicated by MARTIN, J.A., later C.J.B.C., when he said in *Rex* v. *Gauthier* (1921), 29 B.C. 401, at p. 405:

> . . . The obvious reason, of course, for deciding once for all [in] "a trial within a trial" upon the admission or rejection of a confession is (apart from the obvious unseemliness and inconvenience of repeated rulings and reviewals of the same at intervals during the course of the trial as new witnesses on the point are heard) that if it is improperly admitted and goes before the jury, it must result in a new trial, as pointed out in the *De Mesquito* case, *supra* [(1915), 21 B.C. 524, at pp. 526-7].

Once these distinctive functions of the judge and jury (which apply equally in principle where as in this case the judge sits alone and thereby assumes the additional function of the jury) are appreciated, it becomes apparent that in determining the admissibility of a statement which may be a confession, it is not the function of the judge to consider its likely effect upon the minds of the jury. He is confined to determining whether the statement in itself is a confession in whole or in part and if so whether it is voluntary. He is not concerned with its truth or its untruth as such or the good or bad effect it may ultimately have upon the minds of the jury. He is, of course, concerned with the truth of testimony as to whether the statement was or was not made and as to what statement was made. But once the confession is admitted in evidence, then it is to be weighed and judged in the same way as any other testimony which may affect the minds of the jury advantageously or adversely to the accused.

In my opinion, once it appears the prosecution seeks to adduce a statement in evidence, it is the duty of the judge—the jury (if there is one) being first withdrawn—to learn what the statement is, and then to decide as a matter of law whether the statement is or is not "a confession." If he decides it is not a confession, then there is no need for a "trial within a trial," as the statement is as admissible as any other communication of the accused, and the jury can be recalled and the trial proceed. If the judge decides

it is a confession, then a "trial within a trial" must be held to determine whether it was made voluntarily. This course tends to avoid confusion, delay and uncertainty in the trial.

The object of all testimony presented by the prosecution must be presumed to be "to advance its case." If not it ought to be struck out as irrelevant. But a great deal of relevant testimony may not in itself be evidence of guilt in whole or in part. Testimony, which so to speak, forms one of many links in a chain, or one of many meshes in a net, may be quite pointless, unless all the links are forged together or all the meshes are joined together in the net. The same testimony which forms a link in one chain pointing to guilt, may if joined with other links complete another chain pointing toward innocence.

Markadonis v. *Regem*, [1935] S.C.R. 657 was referred to as if it sanctioned an interpretation of confession different from that found in Wigmore and *Rex* v. *Hurd*. If it did so it could not have failed to discuss or distinguish *Rex* v. *Hurd*, a unanimous decision of a Court of five appellate judges. In the *Markadonis* case the accused, charged with murder, was taken from gaol in the middle of the night by three officers to aid in search of the revolver with which the victim was shot. He made certain statements to the police at the place to which he was taken. They were made without any cautionary warning. The prosecution did not attempt to introduce these statements in evidence as part of its own case in chief. When Markadonis went into the witness box at the trial he was cross-examined thereon but did not answer directly, and in rebuttal the prosecution called a police officer to tell what the accused had said. The officer testified that the accused when asked why he did not go and find the gun, had said (p. 660)

> we did not let him go far enough, and he said let us go back a little farther and when he came back he said we would have better luck in the day time.

That answer of the accused Markadonis afforded legitimate inferences of guilt, *viz.*, that he knew where the revolver was, that he had hidden it there so it would not be found, and if such inferences were reached that he had not wanted it found because he had shot the victim with it. In *Rex* v. *Sileski* (1921), 36 Can. C.C. 368, a considerable portion of the statement was also inculpatory. The statement in the case at Bar contains no per-

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missible inferences of guilt whatever. The nature of the statement being entirely exculpatory any inference of guilt is prohibited. Paraphrasing what Lord Wright said in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, at pp. 169-70 in regard to distinguishing inference from speculation and conjecture, there are no objective facts in the statement from which an inference of guilt can be made. If the statement by later relation to other evidence is found to be untruthful, inculpatory inferences which may then arise, spring not from anything contained in the statement itself, but from the objective fact that it is contradicted by or is inconsistent with other testimony which has been adduced. In my view, appreciation of the true nature of legitimate inference as discussed in *Caswell* v. *Powell Duffryn Associated Collieries, Ld., supra,* reveals the fallacy in the argument presented in this aspect on behalf of the appellant.

However, even if what was said by the appellant after warning could come within the rules peculiar to confessions (which I have just held it does not) it might be desirable, in view of the general importance of the question raised, to consider the next objection put forward on behalf of the appellant, *viz.*, that no proper "trial within a trial" was held. It is said two things were not done: (a) that the prosecution did not call Miss Carpenter and Elliott who were temporarily resident in the cabin, and (b) the appellant was not given an opportunity to testify in the "trial within the trial."

It is of course the duty of the prosecution to prove affirmatively that a confession is voluntary, and that implies presenting in evidence all related and surrounding circumstances, and calling all relevant witnesses *cf. Rex* v. *Gauthier* (1921), 29 B.C. 401, MARTIN, J.A. at pp. 403-4; *Sankey* v. *Regem,* [1927] S.C.R. 436 (on appeal from this Court 39 B.C. 247); *Thiffault* v. *Regem,* [1933] S.C.R. 509; *Rex* v. *Byers* (1942), 57 B.C. 336, at p. 340, *Rex* v. *Anderson* (1942), 58 B.C. 88, and our recent decision in *Rex* v. *Weighill* (1945), 61 B.C. 140. On the trial within the trial in the present case the prosecution called the two police officers who were present in the room when the statement was made by the appellant. They told of the circumstances under

which the statement was made and stated that no threat, promise or inducement had been held out to the appellant. The third police officer was not called. But it appears from the testimony given on the "trial within the trial" that neither this third officer nor Miss Carpenter nor Elliott were in the room when the appellant made his statement.

I find nothing in the record to make it appear that the third officer, Miss Carpenter or Elliott heard, or might reasonably be expected to have heard the appellant's statement to the two police officers who gave evidence regarding it. In the circumstances I must conclude the prosecution did not depart in principle from what is laid down in the guiding decisions. Moreover counsel for the appellant did not cross-examine the two police officers on the "trial within the trial" nor did he then apply to have Miss Carpenter and Elliott called for cross-examination as was done in *Rex* v. *Gauthier, supra,* at p. 404. Nor did counsel for the respondent seek to call the appellant in the "trial within the trial."

It is true the learned county judge did not specifically ask counsel for the respondent if he wished to call evidence on the "trial within the trial." But he did not deny counsel the opportunity to do so, and the way the transcript reads, it would appear that the learned judge was led by conduct of defence counsel, to believe that he did not wish to call the appellant or any witnesses on his behalf on the "trial within the trial." It would have read better in the record before a Court of Appeal if the learned judge had specifically asked defence counsel if he wished to call any evidence on the "trial within the trial," as it would also have been better if counsel for the prosecution had then offered to submit the third officer as well as Miss Carpenter and Elliott for cross-examination.

In another case failure to do so might demand a new trial, but in the circumstances of this case, I am unable to see that the appellant suffered any substantial wrong or injustice. It is true as said in *Rex* v. *Stirland* (1943), 30 Cr. App. R. 40 (H.L.), at pp. 55-6, that it is the judge's duty to conduct the trial judicially quite apart from lapses of counsel. But it also appears in the same case at p. 56, that counsel's failure to object at the time is a

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circumstance which an appellate Court may take into serious consideration when the application of Code section 1014, subsection 2 is under deliberation. The purpose of a "trial within the trial" is to determine the admissibility of a confession in evidence. That is the time for counsel to make known his objections. If counsel attempts later to raise on appeal objections not put forward at the time, he can hardly expect to escape easily from the implication that such objections are an afterthought and were of little consequence in fact or in law at the time in determining the voluntary character of the confession and *cf.* on failure to make objections generally, *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100, at pp. 108-9, and 127. As said in *Rex* v. *Stirland, supra,* at p. 56, it is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But each case must be judged on its own facts, for an appellate Court in no circumstances may justify a verdict in which a substantial miscarriage of justice has occurred within Code section 1014, subsection 2, by reason of failure of counsel to take objection at the proper time.

But there is also another aspect of this case which calls for direct mention. After the statement was admitted in evidence, and at the conclusion of the case for the prosecution, the appellant was called in his own defence. He then denied that any warning had been given him at the cabin, and denied as well that he had made the statement in question, at any time or under any conditions. It must be apparent that such evidence, and particularly of the lack of warning at the cabin, ought to have been given by the defence in the "trial within the trial." But it was not given then although there was nothing to stop defence counsel tendering it. At the "trial within the trial" defence counsel did not dispute that the warning was given. He did not even cross-examine the police officers upon the warning which they testified had been given. The only objection then taken was that the police officer "questioned" the appellant. In fact defence counsel appears to have conceded on the "trial within the trial" that the warning was given.

This is disclosed in the transcript as taking place on the "trial within the trial":

Crux: That is what I am objecting to. It was in answer to questions. They proceeded to question him.

THE COURT: Why—they warned him.

Crux: They warned him, and then questioned him.

THE COURT: I understand they can question after the warning is given.

Remnant: They can ask questions to clear up circumstances of this nature.

THE COURT: I am going to allow it [admitting the statement].

I am more inclined to conclude that the appellant's argument on the first branch of the appeal to this Court ought to be interpreted not as directed in substance to the admissibility of the statement in evidence, but rather as an attack upon the learned judge's finding of fact that the appellant did make the statement to the officers.

The last-mentioned conclusion emerges from the circumstances that the appellant testified after the "trial within the trial" that he had made no such statement to the police. That occasioned a direct conflict of testimony on a question of fact involving the credibility of the conflicting witnesses, and after hearing all the testimony at the trial the learned judge rejected the appellant's story. In principle and effect as in *Rex* v. *Gauthier* (1921), 29 B.C. 401, at pp. 406-7, the appellant by giving the evidence he did and when he did, became a party to the reopening of the "trial within the trial." Having taken that course he cannot recede from its consequences and complain that he was not given an opportunity to testify at the "trial within the trial." Nor can I see any grounds upon which the learned judge's finding of fact that the statement was given as testified to by the police officers can be successfully attacked.

The second branch of the appeal was grounded upon insufficiency of evidence of retaining the stolen goods. The argument was divided into three headings, *viz.*, lack of proof of (a) possession by the appellant; (b) knowledge of the appellant of the nature of the goods and (c) knowledge of the appellant that the goods were stolen. *Rex* v. *Parker* (1941), 57 B.C. 117, relied on to support the first heading, was not a case of husband and wife, and control of the stolen sewing machine was proven to have remained not in Parker but in another person. In the case at Bar, the appellant himself gave evidence of his control over the premises, and of the stolen property as well, when he said he

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directed Elliott to remove the latter's bags and trunks to the garage in order to make place under the bed for the property in question, and *cf. Rex* v. *McClellan* (1943), 59 B.C. 401 and decisions there referred to at p. 403. Moreover when husband and wife live together, it is a presumption of law that the husband is in possession and control of the premises in which they reside—*cf. Rex* v. *Lawson* (1943), *ib.* 536, and decisions there cited at p. 542. That is a rebuttable presumption of course, but in my judgment the defence failed to rebut it in this case. The strongest evidence to support it was that the cabin was rented in the wife's name, but I conclude from the wife's evidence and the husband's evidence that in doing so she was acting merely as the agent of her husband and under his directions.

The second and third headings, *viz.*, lack of proof that the appellant knew the nature of the property and that it was stolen, fail to take into consideration that when a person is found in possession of recently stolen goods (in this case slightly under two months) that fact may be regarded as circumstantial evidence of his knowledge (and *cf. Rex* v. *Wilson* (1924), 35 B.C. 64, MARTIN, J.A. at p. 67) that they were stolen, unless he gives a reasonable explanation for his possession of them. In this case the appellant's explanation was the statement he gave the police. But it was found to be untrue. He then attempted to say he did not know what the goods were, that they were brought to the cabin in his absence, and that he had never examined them.

The falsity of the appellant's first explanation weakened his credibility to the point that the learned judge with the background of all the testimony in the case including the nature of the stolen property and the testimony of his brother a naval rating, could not regard that second explanation as true or as an explanation which might reasonably be true, and *cf. Rex* v. *Schama* (1914), 84 L.J.K.B. 396 applied in *Rex* v. *Davis* (1940), 55 B.C. 552 and decisions there examined at pp. 556-7 by SLOAN, J.A., now C.J.B.C. It is observed that the Judicial Committee applied the *Schama* principle in the West African appeal of *Rex* v. *Gfeller* as reported in [1944] 3 W.W.R. 186.

The appellant also appealed against his sentence of two years' imprisonment. Following *Rex* v. *Zimmerman* (1925), 37 B.C.

277, I must hold that no grounds have been shown to justify interference.

I would dismiss both appeals.

ROBERTSON, J.A.: I agree that the appeals should be dismissed.

SIDNEY SMITH, J.A.: The appellant was charged with retaining in his possession stolen goods knowing the same to have been stolen, was tried before BOYD, Co. J., convicted, and sentenced to two years' imprisonment. He now appeals from both conviction and sentence.

Two grounds were argued before us in support of the appeal from conviction, *viz.*, that the learned judge had wrongfully admitted certain statements made by the accused to a police officer, and that there was not sufficient evidence of retaining. On the first ground it was submitted that no proper "trial within a trial" was held for the purpose of ascertaining whether the impeached statements were made voluntarily. In particular that the judge did not indicate that he was holding a "trial within a trial"; that he should have informed the accused of his right to give evidence at such time; that two persons in an adjoining room should have been called by the Crown; and that the judge did not expressly find that the statements were admissible. I think a consideration of the trend of the trial shows this submission to be untenable. The goods in question were found in the bedroom of a house in an auto court. Those present in the bedroom at the relevant time were the appellant and two police officers. The Crown called these officers, one after the other, "on the point of the warning and the charging." They testified that the accused had been properly warned and that his statements were made voluntarily without threat or inducement. Counsel for the accused asked a few perfunctory questions of the first officer and none of the second. No question was put to either officer to indicate that the accused disputed their evidence (which he later did when he gave evidence on the main trial, as to which see *Browne* v. *Dunn* (1893), 6 R. 67). The judge was clearly satisfied with the evidence given, and that the Crown had sustained the *onus* of proving that the statements had been voluntarily made, although he may not have said so, in so many words. The accused

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was not in any way prejudiced. His counsel was experienced in criminal law, and was quite alive to the position. It is undesirable that accused persons should take no objection in the Court below and then, when the day has gone against them there, come here with complaints which should properly have been made upon the trial. Unless there is possibility of a miscarriage of justice such complaints will have little weight (*Rex* v. *Stirland* (1943), 30 Cr. App. R. 40, at p. 56). In this case the matters complained of are not, in my opinion, matters of substance.

With respect to the second ground, I think there was ample evidence from which the learned judge could conclude that the accused was in possession of the goods and was retaining them. For the rest, he found his story "unbelievable." (Compare *Rex* v. *Gfeller,* [1944] 3 W.W.R. 186 (P.C.)). I have independently come to the same conclusion, particularly in view of the nature of the goods in question. We had the benefit of seeing them in Court. In my opinion no person, however simple, could honestly believe they were such as could possibly form part of the baggage of a naval seaman.

I agree with the view expressed by my brother ROBERTSON during the hearing, namely, that when exception is taken to the admission of evidence, the evidence objected to must be set out with particularity in the notice of appeal.

I would dismiss both appeals.

BIRD, J.A.: This appeal by the accused from a conviction for retaining stolen goods, knowing the same to be stolen, is founded upon two grounds, *viz.*: (1) The wrongful admission in evidence of certain statements made by accused to a police officer; (2) that there was no sufficient evidence of retaining.

Police officers while engaged in the investigation of an offence quite separate and distinct from that with which the accused was here charged, discovered in an auto-camp cabin occupied as his home by the accused and his wife, a quantity of motion-picture equipment, contained in several packages. Suspecting that the goods were stolen, and having decided to lay a charge against the accused in that connection, one of the police officers, detective Whalen asked the accused for an explanation as to how and under

what circumstances he had the equipment, to which the accused replied that it was the property of his brother. The following warning was then given to the accused by detective Whalen in the presence of a second police officer, detective Lamont:

> I told him he may be charged with retaining stolen property, over the value of $25 and further, that he was not obliged to say anything in answer to the charge, but anything he did say would be given in evidence.

It then appeared that certain statements subsequently made by the accused were made in response to questions put by detective Whalen, whereupon counsel for the accused objected to the admissibility of evidence as to the accused's answers, on the ground that the statements were made in response to questions.

There followed a somewhat casual investigation in the nature of a trial within a trial to determine the admissibility of the accused's statements. In the course of that investigation detective Whalen said that no threat was made, nor inducement offered to the accused to say anything. He said on cross-examination that after giving the warning he questioned the accused "only in so far as to how long he had the stuff there." Detective Lamont was called and corroborated the evidence of Whalen. The accused was not asked if he wished to testify, nor did his counsel move to call him, which was accused's right if he chose to exercise it. *Rex* v. *Pais* (1941), 56 B.C. 232.

There is nothing in the evidence adduced to suggest that the Crown failed to produce all witnesses who were present at or immediately before the time when the statement was made.

Although in my opinion the safer course for the trial judge to have adopted was to point out to the accused his right to testify on the trial within a trial, I am unable to say that the failure to do so amounts to error, more particularly since accused was represented by experienced counsel. In those circumstances I think the trial judge was justified in assuming that the accused did not wish to give evidence.

Since the learned trial judge had before him all the evidence available at the Crown's command to determine whether or not the statement of the accused was made freely and voluntarily—*Thiffault* v. *Regem*, [1933] S.C.R. 509, at p. 515; and since that evidence shows the statement to have been a "voluntary statement" in the sense that it has not been obtained from him

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(accused) either by fear of prejudice or hope of advantage exercised or held out by a person in authority and since the accused in my opinion had been duly cautioned before the statement complained of was made, I do not think that in the circumstances it has been shown that the discretion of the learned trial judge was improperly exercised—*Rex* v. *Voisin* (1918), 13 Cr. App. R. 89. The language there used by Lawrence, J. in discussing Lord Sumner's statement in *Ibrahim* v. *Regem* (1914), 83 L.J.P.C. 185, at p. 190 of the general principle applicable to admissibility of statements of an accused, appears to me particularly applicable to the circumstances here. I refer to his language at pp. 95-6 as follows:

> He read that case as deciding that the mere fact that a statement is made in answer to a question put by a police-constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion to exclude the evidence, but he should do so only if he thinks that the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made in circumstances that rendered it unreliable, or unfair, for some reason, to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This would be evidence admissible in law, unless it could be fairly inferred from the other circumstances that it was not voluntary.

I am unable to find any circumstances here which suggest to me that the statement was other than voluntary. In my opinion the evidence of detective Whalen shows that the statement was an entirely voluntary and spontaneous answer to the question put to the accused by Whalen and was intended by the accused to show that he was lawfully in possession of the goods, then the lawful property of his brother. Whalen's evidence of this conversation is as follows:

> So far as the accused goes, his first words, as I recall, after I told him he may be charged with keeping stolen property, he said that the stuff was not stolen, that his brother had come from Winnipeg, three months prior, and had brought it with him.

I am of opinion that the statement was properly admitted.

Then as to the second ground of appeal: There was in my opinion evidence upon which the learned judge was justified in finding the accused guilty as charged.

The equipment was shown to have been stolen on October 24th, 1944. The stolen goods were found on December 24th, 1944, in

a cabin then occupied by the accused and his wife as his home. There is a presumption of law that the possession and control of premises so occupied is that of the husband—*Rex* v. *Lawson* (1944), 59 B.C. 536, at p. 542. Moreover it appears from the evidence of the accused himself that he exercised a control over these premises as well as of the stolen goods by causing the removal from the premises of Elliott's baggage, which was stored in the bedroom along with the stolen goods, and further by the accused's acquiescence to leaving the stolen goods on the premises after having made some effort to induce his brother to remove them.

Upon this evidence as well as upon the accused's statement to detective Whalen that the stolen goods had been in the premises for three months prior to December 24th, 1944, coupled with the fact that the goods were of such a character as do not pass readily from hand to hand, I think it was open to the judge to find not only that the possession was recent (*Rex* v. *Wilson* (1924), 35 B.C. 64) but also that the possession was that of the accused. *Rex* v. *Pawlett* (1923), 40 Can. C.C. 321.

The fact that accused claimed to be in possession of the goods only as agent for his brother and not on his own behalf, does not exclude the necessity for an explanation or the application of the doctrine of recent possession if his explanation is not satisfactory. *Rex* v. *Gordon* (1909), 2 Cr. App. R. 52.

Then there being evidence of recent possession of stolen goods, a *prima facie* presumption arises that the accused is either the thief or the retainer of the stolen property, depending on the circumstances—*Langmead's Case* (1864), Le. & Ca. 427, at p. 441 and *Rex* v. *Pawlett, supra.*

Here the circumstances undoubtedly point to the latter.

But the presumption may be rebutted by an explanation which is consistent with innocence and which the trial judge thinks might reasonably be true, though not convinced of its truth (*Rex* v. *Schama* (1914), 84 L.J.K.B. 396); but the trial judge here has wholly rejected the explanation as "unbelievable," no doubt in part in consequence of the conflicting stories told by the accused, first to detective Whalen on December 24th, 1944, that the goods had been in his premises for three months, and his

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statement subsequently made in evidence at the trial, that he told the police that the goods had been there only for four or five days.

In such circumstances I think that the trial judge was entitled to reject the explanation and to convict—*Rex* v. *Gfeller*, [1944] 3 W.W.R. 186, wherein Sir George Rankin, delivering the judgment of the Judicial Committee, said (p. 192):

> . . . it was open to the jury to reject as untrue the story [told by the accused]. . . . The appellant did not have to prove his story but if his story broke down the jury might convict.

I would therefore dismiss the appeal and sustain the conviction.

As to the appeal from sentence, no sufficient ground appears to me to have been advanced for reduction of the sentence. I would refuse the appeal from sentence.

Appeals dismissed.

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July 12, 25.

IN RE LEGAL PROFESSIONS ACT. *IN RE* A SOLICITOR.

Barrister and solicitor—Law Society—Professional misconduct—Suspension from practice by Benchers—Appeal—R.S.B.C. 1936, Cap. 149, Sec. 45, Subsec. (1)—B.C. Stats. 1937, Cap. 39.

A client complained that she had paid a solicitor $125 to bring an action for a divorce from her husband, but he had failed to bring the action to trial. The Benchers of the Law Society found that the solicitor was guilty of professional misconduct and he was suspended from practice for six months. On appeal to the judges of the Supreme Court as visitors of The Law Society under section 45 (1) of the Legal Professions Act:—

Held, that the solicitor was negligent in not bringing the case on for trial and to excuse such negligence he from time to time deceived the client by advising her that the petition was being advertised in a Vancouver paper and that on two occasions her case had been set for trial when investigation proved that the petition had not been advertised, nor had the case been set for trial. The Benchers concluded that the solicitor had not given an honest explanation for the delay, but on the contrary had deceived his client as to the reason for such delay. Such conclusion was open to them upon the evidence and the judgment ought not to be disturbed.

APPEAL to the judges of the Supreme Court by a solicitor from the decision of the Benchers of The Law Society of British Columbia of the 7th of April, 1945, suspending him from practice for six months as a barrister and solicitor of the Supreme Court of British Columbia.

The appeal was argued at Vancouver on the 12th of July, 1945, before FARRIS, C.J.S.C., MANSON, COADY, WILSON and HARPER, JJ.

D. J. McAlpine, for appellant, referred to *In re Legal Professions Act and Alfred Hall* (1917), 24 B.C. 226; *McPherson, C.L.* v. *McPherson, O.L.,* [1936] A.C. 177, at p. 200; *In re a Solicitor,* [1935] 3 W.W.R. 428; *Re Smith, a Solicitor* (1913), 26 W.L.R. 136; Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 297

Bull, K.C., for respondent, referred to *Re Solicitor* (1916), 37 O.L.R. 310; *Hands* v. *Law Society of Upper Canada* (1888), 16 Ont. 625, at pp. 635-6 and on appeal (1889), 17 Ont. 300 and (1890), 17 A.R. 41; Solicitors Act, 1932 (22 & 23 Geo. 5) Imperial, Cap. 37, Secs. 4 to 8; *In re a Solicitor (No. 2)* (1924), 93 L.J.K.B. 761, at p. 762; *In re a Solicitor,* [1934] 2 K.B. 463; *In re a Solicitor. Ex parte Law Society,* [1912] 1 K.B. 302, at p. 312; *In re a Solicitor* (1945), 114 L.J.K.B. 298.

Cur. adv. vult.

On the 25th of July, 1945, the judgment of the Court was delivered by

FARRIS, C.J.S.C.: Pursuant to the power contained in section 45 of the Legal Professions Act, R.S.B.C. 1936, Cap. 149, to suspend from practice any barrister or solicitor "for good cause shown" the appellant on the hearing of a complaint against him by one Alice Sandberg, on the 7th of April, 1945, was found by the Benchers to have been guilty of "unprofessional conduct" and suspended from practice for a period of six months. He now appeals to the judges of the Supreme Court as visitors of the Society, so constituted by said section 45.

Counsel for the appellant contends: First: That the complaint was not prepared in compliance with the Act and the rules thereunder, and that in fact there was no complaint before

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the Benchers upon which the Benchers could act, and secondly, in the alternative, that if the complaint was in form and substance sufficient to give the Benchers jurisdiction, there was no evidence justifying the finding by the Benchers that the appellant was guilty of unprofessional conduct.

As to the first submission we find that the complaint as drawn was sufficient to give the appellant notice of the charges against him, and that it did substantially comply with the Act and the rules.

As to the second submission: The statutory power to suspend is "for good cause shown." That is a power in very general terms, and doubtless was intended to entrust to the Benchers the power and duty of keeping its house in order, and, while an appeal is provided for, the judgment of the Benchers ought not to be disturbed if it has been reasonably exercised and is fairly founded upon the evidence.

In this case the solicitor was clearly negligent in not bringing his client Mrs. Sandberg's case on for trial, and, apparently, to excuse such negligence, he, according to the evidence of Mrs. Sandberg, from time to time deceived her, first, by advising her that the petition was being advertised in one of the Vancouver papers and, secondly, by advising her that on two occasions her case had been set for trial. Mrs. Sandberg further testified that her investigation proved that the petition had not been advertised, nor had the case been set for trial. The Benchers have found the appellant guilty of unprofessional conduct. It is obvious that they accepted the evidence of Mrs. Sandberg. A client has a right to honest explanations for delay on the part of his solicitor, and it is clear that the Benchers while not disclosing their findings as to the particular facts which constituted unprofessional conduct, nevertheless concluded that the solicitor had not given an honest explanation for the delay but on the contrary had deceived his client as to the reason for such a delay. Such a conclusion was open to them upon the evidence. This being so, we find that the judgment ought not to be disturbed.

On the matter of penalty: The language of Lord Hewart, C.J. and of Roche, J. in *In re a Solicitor (No. 2)* (1924), 93 L.J.K.B. 761, is pertinent. Lord Hewart observes at p. 763:

. . . . , it is right that this Court should pay the greatest attention not only to the findings of the committee under this Act, but also, and not least, to the mode in which that experienced body has exercised its discretion. . . . It seems to me that this was pre-eminently a matter in which the committee was well qualified to judge, and I see no ground whatever for interfering.

Roche, J. adds:

I agree, and I only desire to add a very few observations. I approve entirely the report of the committee; I agree entirely with the reasons that my Lord has given for refusing to interfere with it. What I desire to add is this, that in particular I approve of the view which my Lord has expressed as to the undesirability of this Court interfering lightly with the proceedings or judgments of the committee, and I do that perhaps all the more because, unlike my Lord, I think if I had had to pass judgment in this case, while I should have thought the sentence of suspension was imperatively necessary, I think it would not have been for so long a period as the committee would have thought necessary, but none the less I entirely agree that it is not for this Court, with the powers of appeal that are given it, to interfere lightly with the discretion of the committee, or at all, unless it sees that the committee has gone wrong in some matter of high degree, or some matter of principle. It is not for this Court to say a little more or a little less is the measure we should have given or meted out, therefore we will interfere with the proceedings of the committee. The discretion has been in my view conferred upon the committee by Parliament, and is well exercised, and this Court should not readily interfere with it.

The rules laid down in the case just cited are not different from those in Courts of Appeal in criminal matters when sentence is under review. In *Rex* v. *Dunbar* (1928), 21 Cr. App. R. 19, it was said by the Lord Chief Justice, Lord Hewart:

This Court does not make slight reductions of sentences. This Court only interferes on matters of principle and on the ground of substantial miscarriages of justice.

To like effect is the decision of our own Court of Appeal in *Rex* v. *Lim Gim* (1928), 39 B.C. 457.

While, as pointed out, this tribunal does not feel justified in interfering with the penalty, nevertheless it is not unmindful of the facts clearly indicated on the hearing of the appeal as to the real reason for the solicitor's lapse. As visitors, this tribunal suggests to the Benchers that their action in suspending the solicitor may have taught him the needed lesson, and that if his conduct in the meantime has been such as to justify them in so acting, they might well consider a reduction of the time of the period of suspension.

Appeal dismissed.

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IN RE LEGAL PROFESSIONS ACT AND *IN RE* A SOLICITOR.

July 12, 30.

Barrister and solicitor—Professional misconduct—Suspension—Appeal—Bencher appointed to prosecute not to sit in judgment—Series of acts of gross negligence—Effect of—R.S.B.C. 1936, Cap. 149, Sec. 45, Subsec. (1)—B.C. Stats. 1937, Cap. 39.

Under the Legal Professions Act the Benchers may appoint one of their number to prosecute a complaint, but for such Bencher so appointed to both prosecute the complaint and sit as a Bencher in judgment upon such complaint of which he is the prosecutor is bad in practice and should be discontinued.

The words "good cause" in the Legal Professions Act are broad enough to justify the Benchers in suspending a member of the Society who has been guilty of a series of acts of gross negligence, which, taken together, would amount to a course of conduct sufficient to bring the legal profession into disrepute.

APPEAL to the judges of the Supreme Court by a solicitor from the decision of the Benchers of The Law Society of British Columbia of the 7th of April, 1945, suspending him from practice for six months as a barrister and solicitor of the Supreme Court of British Columbia.

The appeal was argued at Vancouver on the 12th of July, 1945, before FARRIS, C.J.S.C., MANSON, COADY, WILSON and HARPER, JJ.

D. J. McAlpine, for appellant.
Bull, K.C., for respondent.

Cur. adv. vult.

On the 30th of July, 1945, the judgment of the Court was delivered by

FARRIS, C.J.S.C.: Pursuant to the power contained in section 45 of the Legal Professions Act, R.S.B.C. 1936, Cap. 149, to suspend from practice any barrister or solicitor "for good cause shown" the appellant on the hearing of a complaint against him by one Jack Baron, on the 7th of April, 1945, was found by the Benchers to have been guilty of "unprofessional conduct" and suspended from practice for a period of six months. He now appeals to the judges of the Supreme Court as visitors of the Society, so constituted by said section 45.

In this matter the chairman of the Benchers delivered the finding of the Benchers, such finding being as follows:

It is a very painful matter for the Benchers. We have again to find you guilty of misconduct, and we feel that Mr. Baron is more to be believed than you with regard to the statement made in this case, and in consequence we have found you guilty of unprofessional conduct.

It is obvious from the above quotation that the Benchers based their finding upon their believing the complainant rather than the appellant. Now, what is the evidence upon which the Benchers make this finding? It is very short. Mr. *Haldane* acted for the Benchers as the prosecutor of the complaint. The following statements summarize Mr. Baron's evidence as Mr. *Haldane* understood it.

Haldane: The difficulty is, Mr. Baron, quite apart from this question of delay, says that you told him definitely this was coming on the 23rd of February, and prior to that you said it would come up in January. Oh, no, I did not.

He has said that. Well, I deny it.

That is your answer? That is my answer. I deny it flatly. How could I?

Mr. *Haldane* in his question or statement to the appellant specifically refers to the 23rd of February as the definite date on which the appellant told Mr. Baron the case would come on for trial. Mr. *Haldane* in the same statement or question also says in a general way "and prior to that you said it would come up in January." It is clear that the serious allegation which Mr. *Haldane* quotes Mr. Baron as giving evidence to, is that "it was coming on the 23rd of February." The evidence of Mr. Baron in respect to the dates in answers to questions put by Mr. *Haldane* do not justify Mr. *Haldane's* summary of Mr. Baron's evidence. The following is the evidence of Mr. Baron in respect thereto:

What next happened? The next I asked him was he ready to put the case through? and he said, "Yes, it is all ready to go through." I said, "Why don't you put it through." and he said, "It will come up at such a date," and when the date came up it didn't come up.

What date was that? I don't remember the date.

What year? The last two dates it was to come up, say in January, and around the 20th of last month. It didn't come up.

January of which year? January, 1945.

Did your case come up? No it didn't.

Then again it was supposed to come up when? Around the 20th.

Of what month? February; no, March.

Of March. Well did it come up then? No.

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Has it yet come up? No.

It is clear from the above-quoted evidence that Mr. Baron did not state that the appellant had told him the case was coming up on the 23rd of February, but on the contrary stated that the appellant told him it was to come up in March. It would seem the Benchers thought Mr. *Haldane* was correctly quoting Mr. Baron's evidence as to the date, and when the appellant denied he had given this particular date the Benchers preferred to accept the alleged statement of Mr. Baron as quoted by Mr. *Haldane* rather than the evidence of the appellant. In this they were clearly in error, as there was in fact no contradiction of evidence between Baron and the appellant on this point.

As to the January incident, it may well have been that this escaped the appellant's notice and that he was directing his answer only to the specific date of February 23rd, but in any case the evidence of Baron as to the January setting down of the case is most vague and no particulars are given as to when such statement was made. It might well have been a statement made in advance, and at a time when the appellant might well have believed he would have the case set down in January.

It is clear that there is not sufficient evidence to justify the drawing of the conclusion beyond a reasonable doubt that if the appellant had made such a statement, it amounted to deceit, or was of such a nature as would justify the Benchers in finding him guilty of professional misconduct. In a matter of this kind the solicitor must be given the benefit of reasonable doubt, as in a criminal case (*Re Harris* (1906), 3 W.L.R. 167—see Sifton, C.J. at p. 170).

For these reasons this appeal must be allowed and the suspension removed.

It might here be pointed out that a minority of this tribunal is of the opinion that a grave doubt exists as to whether or not the Benchers did not divest themselves of jurisdiction when appointing one of their members to act as prosecutor of the complaint, and when he had so prosecuted the complaint, permitting him to join in the deliberations as a Bencher, upon the same complaint in which he had acted as prosecutor. It is true that under the Legal Professions Act the Benchers may appoint one of their

number to prosecute a complaint. With this there can be no fault, but this tribunal is of the unanimous opinion that for such Bencher so appointed to prosecute the complaint and sit as a Bencher in judgment upon such complaint of which he is the prosecutor is bad in practice and should be discontinued (*Allinson* v. *General Council of Medical Education and Registration,* [1894] 1 Q.B. 750; *Banks* v. *Hall,* [1941] 2 W.W.R. 534—see Mackenzie, J. at p. 551; *Gosselin* v. *Bar of Montreal (No. 1)* (1912), 2 D.L.R. 19).

This tribunal is also of the opinion that when a prosecutor has been appointed by the Benchers he should see that the complaint is drawn in such a manner that the person charged will know exactly what he is charged with.

It was argued before us with considerable force and supported by authorities, that gross negligence in itself does not justify the suspension of a solicitor. This tribunal would hesitate in going that far in its finding; but as a future guide to Benchers it expresses the opinion that the words "good cause" in the Legal Professions Act are broad enough in any event to justify the Benchers in suspending a member of the Society who has been guilty of a series of acts of gross negligence, which, taken together, would amount to a course of conduct sufficient to bring the legal profession into disrepute.

This tribunal feels that when a complaint as to course of conduct is being heard by the Benchers, such complaint should be drawn so that the solicitor might have full knowledge of the different acts complained of which taken together would give good cause for his suspension or disbarment.

It is further the opinion of this tribunal that the Benchers should be specific in their findings as to particulars of the guilt of a person charged.

It is interesting to note that in at least the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario, the Legal Professions Act in respect to disciplining a member is in each Province different. It is felt by this tribunal that it would strengthen the legal profession as a whole if the laws respecting the disciplining of a member of the legal profession were made uniform throughout Canada, and this tribunal recommends that

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the Benchers should communicate with the Committee on Uniformity of Laws with the view of seeking a uniform Legal Professions Act in Canada, so far at least as it affects discipline.

Appeal allowed.

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Sept. 25; Oct. 2.

TAYLOR AND TAYLOR v. THE VANCOUVER GENERAL HOSPITAL *ET AL.*

Practice—Application for trial by jury—Issues involved of an intricate and complex character — Scientific investigation—Discretion—Application refused—Appeal—Rules 429 and 430.

In an action for damages arising out of alleged negligence both in the performance upon the female plaintiff of a surgical operation for a bladder condition as well as in the services rendered to her by the individual defendants who are physicians and surgeons and by the defendant hospital, it was alleged that the elements of negligence charged resulted in the onset of an infection of the blood which made necessary the removal of part of the plaintiff's right hand due to the development of a gangrenous condition. The plaintiffs' application for a jury under rule 430 was refused on the ground that the action could not conveniently be tried with a jury as the issues involved were of an intricate and complex character and required scientific investigation.

Held, on appeal, affirming the decision of COADY, J. (O'HALLORAN, J.A. dissenting), that it has been shown that the evidence of physicians and surgeons will attain the height of a scientific investigation which cannot conveniently be tried with a jury and the learned judge properly exercised his discretion.

APPEAL by plaintiffs from the order of COADY, J. of the 26th of June, 1945, dismissing the plaintiffs' application that this action be tried by a judge with a jury at Vancouver.

The appeal was argued at Victoria on the 25th of September, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

G. F. McMaster, for appellants: Rule 430 says an order shall be made for a jury. They contend the case comes under rule 429, being one of an "intricate and complex character." There was bladder trouble that required an operation and hypodermic needles broke off in the plaintiff's arm and they failed to remove

the broken-off portions. The defence of the doctors was only denial, that nothing they did constituted negligence and what happened was beyond their control. There is not sufficient ground disclosed to refuse the application: see *Bell* v. *Wood and Anderson* (1927), 38 B.C. 310; *Jenkins* v. *Bushby,* [1891] 1 Ch. 484, at p. 485; *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56, at pp. 58-9, 63 and 111; *Williams* v. *B.C. Electric Ry. Co.* (1912), 17 B.C. 338; *Whitehead* v. *North Vancouver (City),* [1937] 2 W.W.R. 95; *Campbell* v. *Lennie* (1927), 38 B.C. 422, at p. 423. Under rule 430, it is a matter of right: see *Jocelyn* v. *Sutherland* (1913), 3 W.W.R. 961; *Plowright* v. *Seldon* (1932), 45 B.C. 481; *Alaska* v. *Spencer* (1904), 10 B.C. 473; *Charles Osenton & Co.* v. *Johnston,* [1942] A.C. 130, at p. 235; *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78; *Bank of British North America* v. *Eddy* (1883), 9 Pr. 468, at p. 470.

Bull, K.C., for respondent (The Vancouver General Hospital): The question is whether the case comes within rule 429. The issues are of an intricate and complex character. There was an operation in relation to bladder trouble and the condition of the arm and hand may be brought about by a clot of blood from the other parts of the body. How the gangrenous condition of the arm and hand came about requires consideration of testimony of medical and surgical experts relative to the circulation of the blood. This Court will not interfere with the learned judge below in exercising his discretion: see *Creasey* v. *Sweny et al.* (1942), 57 B.C. 457, at p. 460 *et seq.; Charles Osenton & Co.* v. *Johnston* (1941), 57 T.L.R. 515; *Hopper* v. *Prudential Insurance Co.,* [1944] 3 W.W.R. 24; *Gerbracht* v. *Bingham* (1912), 7 D.L.R. 259, at p. 260; *Sweetman* v. *Law* (1923), 23 O.W.N. 502; *Mercer et al.* v. *Gray,* [1941] O.R. 127, at p. 131; *Toronto General Trusts Corporation (Herbert Estates and Saul Estates)* v. *Winnipeg Electric Co.,* [1942] 3 W.W.R. 484. The *Plowright* v. *Seldon case* [*supra*] is very simple compared with this one.

L. St. M. Du Moulin, for other respondents, agreed with Mr. *Bull's* argument. The condition of the plaintiff is not due to anything the doctors did or neglected to do.

McMaster, replied. *Cur. adv. vult.*

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2nd October, 1945.

O'HALLORAN, J.A.: This appeal is from an order refusing the appellants trial by jury in their action for damages for negligence against the respondent hospital and the several respondent medical practitioners. The appellant wife entered the hospital to undergo an operation for certain bladder disorders. Sometime after the operation it was found she had to have part of her right hand amputated, and she ascribes this to the negligence of the respondents.

Our decision turns upon rule 429 and its application to the circumstances of this case. That rule enables a trial without a jury to be directed where the cause matter or issue requires

> . . . any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot . . . conveniently be made with a jury, or where the issues are of an intricate and complex character.

The last clause reading "or where the issues are of an intricate and complex character," seems to have been construed in *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78, not as a third exception but as qualifying the two exceptions "prolonged examination of documents" and "scientific or local investigation" in the same way they are qualified by the clause "which cannot conveniently be made with a jury."

While no written reasons support the order under appeal, the nature of the argument addressed to us, gives colour to the implication that the learned judge was led to depart from the trend of decisions in this Court, and instead to govern himself in effect by what we are informed is the Ontario practice of refusing a jury in actions of malpractice against medical practitioners. Counsel for the respondents asked this Court to adopt that Ontario practice as a guiding rule in British Columbia. But in my judgment our Rules of Court as construed in reported appellate decisions over a period of years do not permit us to do so, and that being so, restriction of the right to trial by jury ought not to be encouraged by indirection.

In *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56 this Court sustained an order for trial by jury as it did also in *Plowright* v. *Seldon* (1932), 45 B.C. 481. The former case involved the question whether the injured person's singing voice was seriously affected by injuries she received in a collision.

The *Plowright* case alleged professional negligence in setting a dislocated hip. It was plain to the Court in the *Bradshaw* case that it turned upon the effect of shock upon the nervous system, and in consequence might involve scientific questions and issues of an intricate and complex character. The issues related to professional negligence in the *Plowright* case, produced I believe, quite a marked division of opinion in the medical testimony and I understand the jury absolved the medical practitioner of all allegations of professional negligence.

The Court divided three to two in the *Bradshaw* case, but was unanimous in the *Plowright* case in which MARTIN and MCPHILLIPS, JJ.A. expressed themselves as bound by the former decision in which they had dissented. MACDONALD, C.J.A., GALLIHER and MACDONALD, JJ.A. formed the majority in the *Bradshaw* case. MACDONALD, C.J.A. (p. 58) said that every case of personal injury admits of medical testimony, but no decision had been cited to the Court to show that the *Bradshaw* case (involving whether the plaintiff's singing voice had been injuriously affected by the severe shock) was different from other actions for personal injury "except perhaps in degree." By that, I think the learned Chief Justice meant and explained later on p. 58, that although the issue raised appeared to be more intricate and complex than in the ordinary case of personal injury, nevertheless that alone did not except it from the right to a jury in cases of damages for personal injury. GALLIHER, J.A. stated (p. 61) there may be a degree to be considered in each case to determine whether it shall be treated as scientific evidence. But the fact that GALLIHER, J.A. sustained the order for the jury, shows he agreed with MACDONALD, C.J.A. that the testimony in the *Bradshaw* case would not approach that degree of scientific investigation which would justify the denial of trial by jury. MACDONALD, J.A. (p. 63) said much the same but more explicitly. It is to be observed parenthetically that the likelihood of scientific evidence being given does not in itself under rule 429 provide an exception to the right to a jury.

I do not think there is an escape from the conclusion that the *Bradshaw* decision is very strong in the appellants' favour. Moreover, if the true *ratio* of the *Bradshaw* and *Plowright*

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decisions is, as has been suggested, that whether the scientific investigation or scientific evidence justifies the denial of a jury depends on the facts and "is one of degree" (MARTIN, J.A. in the *Plowright* case at p. 487), then I must regard the *Bradshaw* case as conclusive in reason and principle in the appellants' favour as including the right to a jury in all cases of equal or lesser degree and hence in the case now under review. For if we take what MARTIN, J.A. said of the *Bradshaw* case it clearly attained the maximum "degree" in which a jury could be directed. MARTIN, J.A. described it (p. 59) as "a very remarkable case" in which the injuries were alleged to have a "strange effect upon the vocal cords," and observed "it is impossible" to say that the "very unusual examination" necessitated thereby could not be classed as scientific. MARTIN, J.A. said further (pp. 59-60):

> We have the evidence, uncontradicted, of medical men who say that it will be necessary to call in a specialist, and the evidence of the solicitor for the defence who says that their whole defence is based upon the fact that the evidence of expert medical witnesses will be necessary to determine this question.

McPHILLIPS, J.A. (p. 63) was of opinion the jury could not apply its mind to such a question for he believed it was not capable of passing upon the opinions of the specialists who would be called. An examination of all the judgments in the *Bradshaw* case (and particularly the dissenting judgments) indicates to me that the strongest objections raised in this case against a jury were raised also in the *Bradshaw* case and there rejected, despite circumstances pointing to scientific investigation and complexity more convincingly than they do in this case.

Moreover we have something in this case, the Court quite apparently did not have in the *Bradshaw* case, *viz.*, an affidavit of a medical practitioner filed on behalf of the appellants, which averred that the issues (relating to the circulation of the blood in the human body) fell within the ordinary field of medicine and medical testimony and that they

> . . . are each and every one capable by simplification of diagram and of language of being clearly explained to any person of normal intelligence, ...

That affidavit was made in reply to affidavits on behalf of the respondents (upon whom the *onus* lay) and was not subjected to cross-examination. The learned judge would appear to have

made a mistake as to the party on whom lay the burden of proof to displace the right to a jury in an action for negligence, and *cf.* Lindley, L.J. in *In re Martin* (1882), 51 L.J. Ch. 683, at p. 686.

In my judgment with respect there has been a grave underestimation of the intelligence, experience and education of those of our citizens whose duty it is at the present time to sit on juries in this Province. It is in point to observe that we are not concerned with issues, the comprehension whereof necessitates for example a knowledge of metaphysics or higher mathematics. Since the *Bradshaw* case held a jury could understand the effect of shock upon the nervous system, I fail to see why it should be thought a jury may not understand the issues in this case relating to the circulation of the blood in the human body. The strength of the appellants' right to a jury would be better appreciated, perhaps, if the appellant wife had died and a charge of manslaughter was laid. All the medical testimony *pro* and *con.* would then have to be presented to a jury in order to determine whether an even greater degree of negligence occurred than is alleged to have taken place in this civil case.

Apart from other considerations, I would shrink from giving rule 429 a construction which would place the Courts in the anomalous situation of holding an issue in a civil case to be too intricate for a jury to grasp, when that same issue leading to much more serious consequences, would have to be entertained by a jury in a criminal case. It is well known that in criminal cases before juries there is not infrequently a considerable difference of opinion and even direct conflict between medical, psychiatric, or other technical witnesses called on each side. But skilled cross-examination tends to strip testimony of obscurity and seeming complexity. In addition to their own appreciation of the testimony, and the addresses of counsel thereon, the members of the jury have the advantage of the trial judge's summing up of the testimony in its proper relation to the matters requiring their factual decision.

In this Province, the plaintiff in a common-law action for damages for negligence is entitled to a jury as of right under rule 430 subject to that right being displaced by any exception in

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the Rules of Court such as rule 429, and *cf. Wilson* v. *Henderson* (1914), 19 B.C. 46; *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78 and *Plowright* v. *Seldon, supra.* In principle I regard the present case as one for a jury, and no decision has been cited which satisfies me that the appellants' right to a jury has been displaced by any circumstances which have been revealed. No decisions of the English Courts were cited to support the position of the respondents.

I think the foregoing views are fortified by *Alaska* v. *Spencer* (1904), 10 B.C. 473, at pp. 481 and 493 and (1905), 11 B.C. 280, at pp. 284 and 288; *Thompson* v. *Columbia Coast Mission* (1914), 20 B.C. 115; *Richardson* v. *Nugent* (1918), 40 D.L.R. 700 and also *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1882), 51 L.J.Q.B. 348; *Hamilton* v. *Merchants' Marine Insurance Co.* (1889), 58 L.J.Q.B. 544; *Hillyer* v. *St. Bartholomew's Hospital (Governors)* (1909), 78 L.J.K.B. 958, at p. 959; *De Freville* v. *Dill* (1927), 96 L.J.K.B. 1056; *Harnett* v. *Fisher* (1927), *ib.* 856 and *Lindsey (Lincs) County Council* v. *Marshall* (1936), 105 L.J.K.B. 614.

Something was also said in argument about the right to appeal from discretionary orders. As this submission in one form or another is so frequently introduced by counsel upholding interlocutory or discretionary orders under appeal, it may be desirable to recall that section 6 (*a*) of the Court of Appeal Act gives a right of appeal from every judgment, order or decree made by the Supreme Court or a judge thereof,

and whether final or interlocutory, and whether in respect of a matter specified in the Rules of Court or not

and *cf. Ormerod* v. *Todmorden Joint Stock Mill Co., supra,* cited with approval by Lord Wright in *Charles Osenton & Co.* v. *Johnston,* [1942] A.C. 130, at p. 142. There is no restriction upon appeals to this Court from discretionary orders or judgments such as is found in section 38 of the Supreme Court Act, Cap. 35, R.S.C. 1927, relating to appeals to the Supreme Court of Canada.

I would allow the appeal and with respect would direct a trial by jury.

SIDNEY SMITH, J.A.: The facts are stated by my brother BIRD and need not be repeated.

The right of the parties to an action to have the issues therein determined by a jury is one of great antiquity. But in certain circumstances (in this case to be found within Order VI., r. 5 of the Supreme Court Rules) a discretion has been committed to the judge to refuse a jury. He has to ask himself—am I to grant, or am I to withhold, a jury to a plaintiff who under the law is entitled *ex debito justitiæ* to a jury? The decision is no doubt an anxious one. It must be based upon a consideration of relevant and sufficient material. But his decision once made should not be disturbed unless this Court is of opinion that his discretion has been exercised on some wrong principle. That question, in my view, is concluded in this Court by *Creasey* v. *Sweny et al.* (1942), 57 B.C. 457 (*cf. Young* v. *Bristol Aeroplane Co., Ld.*, [1944] K.B. 718).

In the present case I am entirely unable to say that the learned judge's discretion was exercised on a wrong principle, and so would dismiss the appeal.

BIRD, J.A.: This appeal is taken from an order made in Chambers by COADY, J., dismissing the plaintiffs' application for trial of this action by jury. We are told by counsel that reasons for judgment were expressed by the Chamber judge, though not transcribed. Counsel agree substantially that the judge said in effect that in his opinion the action could not conveniently be tried with a jury, since he had reached the conclusion that the issues involved were of an intricate and complex character and required scientific investigation. In the exercise of his discretion he would dismiss the application.

The action is one for damages arising out of alleged negligence, both in the performance upon the female plaintiff of a surgical operation for a bladder condition as well as in the services rendered to her by the individual defendants who are physicians and surgeons and by the defendant hospital.

It is alleged that the elements of negligence charged resulted in the onset of an infection of the blood which made necessary the removal of part of the plaintiff's right hand, due to the development of a gangrenous condition.

Examination of the pleadings and the evidence adduced upon

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affidavit by both plaintiffs and defendants, shows that there are issues to be tried which must be determined upon consideration of testimony of medical and surgical experts relative to the physiology and anatomy of the circulation of the blood in the human body and the sites and causes of the formation in the blood stream of clots or emboli.

The learned Chamber judge had before him sufficient material to permit of a full appreciation of the nature and extent of the evidence which will be adduced at the trial. Upon consideration of that material he has decided that the action cannot conveniently be tried with a jury for the reasons before set out.

I take it to be established that in circumstances such as are found here, an appellate Court will not assume to substitute its own discretion for the discretion already exercised by the judge, or otherwise to interfere with such an order, unless it reaches the clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in injustice. *Creasey* v. *Sweny et al.* (1942), 57 B.C. 457; *Charles Osenton & Co.* v. *Johnston* (1941), 110 L.J.K.B. 420.

In my opinion the submissions of counsel for the respondents fall far short of sustaining the *onus* which is upon the appellants to show that the judge acted on any wrong principle, or that a miscarriage of justice resulted from the order.

Great reliance was placed by counsel for the appellants upon the decision of this Court in *Bradshaw* v. *British Columbia Rapid Transit Co.* (1925), 38 B.C. 56. There this Court sustained an order for trial by jury in a negligence action wherein a substantial issue was raised as to the effect of shock upon the nervous system; the question for determination being whether in the language of rule 429 the issue was one requiring scientific investigation, which could not conveniently be tried before a jury.

I conclude from the language used by GALLIHER, J.A. at p. 61, as well as that of MACDONALD, then J.A., later C.J.B.C., two of the judges who there gave the majority opinion of the Court, that each was of opinion that it had not been shown on the material before the Court that the evidence of medical experts

required to be adduced in that case was so technical or abstruse as to bring it within the rule.

MARTIN, then J.A., later C.J.B.C., in his comment in *Plowright* v. *Seldon* (1932), 45 B.C. 481, made upon the judgments in the *Bradshaw* case, said at p. 488:

> . . . Therefore, we have it established by at least four members of the Court, though they disagree on other questions, that the test to be applied was as to whether or no the examination by medical doctors had not attained the height of scientific investigation within the meaning of the rule.

In my opinion the reasoning of the decisions in both the *Bradshaw* case as well as the *Plowright* case support the view expressed by MARTIN, J.A. that

> the question as to whether or no the element of scientific investigation is present, depends upon the facts in each particular case and is one of degree,

that is to say, whether or no the scientific investigation is of such a nature as to be conveniently tried before a jury.

Then was the material before the judge below sufficient to justify his conclusion that the evidence likely or required to be adduced at the trial was such as to satisfy that test?

Dr. Groves, in his affidavit filed below in support of the motion, after expressing the opinion that the medical testimony on the issues raised is

> capable of simplification of diagram and of language of being clearly explained to any person of normal intelligence,

then goes on to say:

> this is entirely a matter of intensity of preparation on the part of the witnesses in striving to simplify

their evidence.

It is apparent from the language used that this deponent foresaw the necessity for great care and the application of considerable effort to the simplification of the technical or scientific evidence. On the other hand, there was evidence on affidavit by one of the defendants and by another practising physician which supports the position taken by the defendants that the issues are of an intricate, complex and scientific character, such as cannot conveniently be tried before a jury.

I am satisfied that here it has been shown that the evidence of physicians and surgeons will "attain the height of a scientific investigation" (to adopt the language of MARTIN, J.A. in the *Plowright* case) which cannot conveniently be tried with a jury.

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Therein appears to me to lie the distinction between the investigation in this and the *Bradshaw* case.

In my opinion the judge properly exercised his discretion. I would dismiss the appeal.

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

Solicitors for appellants: *Crux, McMaster & Sturdy.*

Solicitor for respondent The Vancouver General Hospital: *E. A. Burnett.*

Solicitors for respondents other than The Vancouver General Hospital: *Tiffin, Russell & Co.*

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Nullity of marriage—Impotency—Domicil and residence of the parties—Jurisdiction—Residence of petitioner alone not sufficient.

The petitioner sued for a decree that the marriage celebrated between her and the respondent be declared null and void on the ground of his impotence. They were married at Edmonton in the Province of Alberta on October 10th, 1942, and lived together in that Province until August, 1943, when they separated. The petitioner then came to British Columbia where she has resided continuously and the respondent remained in Alberta where the petition was duly served upon him, but he did not enter an appearance. The petition was dismissed on the ground that the Court has no right to entertain the action as the respondent is not domiciled within this jurisdiction.

Held, on appeal, affirming the decision of FARRIS, C.J.S.C., that on a petition to have a marriage declared a nullity on the ground of impotence, the fact that the petitioner was at the time the proceedings were instituted and subsequent thereto a resident of the Province is not in itself sufficient to give the Court jurisdiction.

APPEAL by the petitioner from the decision of FARRIS, C.J.S.C., of the 27th of December, 1944 (reported, 61 B.C. 40) in an action for a declaration that a marriage entered into on the 10th of October, 1942, in the Province of Alberta is a nullity. The petitioner (wife) and the respondent lived together in Alberta until August, 1943. The respondent is domiciled in

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Alberta while the petitioner is resident in Vancouver, British Columbia. The action was brought for a nullity on the grounds of the impotency of the respondent. The case was not defended nor was any appearance entered by the respondent. The action was dismissed on the ground that the respondent was not domiciled within British Columbia.

The appeal was argued at Vancouver on the 18th and 21st of May, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Annable, for appellant: The parties were married in Alberta. The wife came to British Columbia in November, 1943. She asks for a declaration of nullity of the marriage on the ground of impotency. She claims her residence is now in British Columbia. He being impotent, they were never married and the fact of the husband being domiciled in Alberta has no application. Residence of the petitioner alone is sufficient: see *Hutter* v. *Hutter,* [1944] 2 All E.R. 368; *Easterbrook* v. *Easterbrook,* [1944] P. 10; *White otherwise Bennett* v. *White,* [1937] P. 111; Rayden on Divorce, 4th Ed., 14; *Roberts* v. *Brennan,* [1902] P. 143; Latey on Divorce, 12th Ed., 37; *Ray* v. *Sherwood and Ray* (1836), 1 Curt. 193, at p. 227; *Harford* v. *Morris* (1776), 2 Hag. Cons. 423; *Pertreis* v. *Tondear* (1790), 1 Hag. Cons. 136; *Hussein* v. *Hussein,* [1938] 2 All E.R. 344; *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259; 60 L.Q.R. 115.

H. Alan Maclean, for the Attorney-General: The action should be brought where the defendant resides: see *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* [1894] A.C. 670. In this case British Columbia is neither the residence nor domicil of the defendant and it is the defendant's residence and domicil that must be considered and not the petitioner's: see *White otherwise Bennett* v. *White,* [1937] P. 111; *Chichester* v. *Donegal* (1822), 1 Addams, Ecc. 5; *Williams* v. *Dormer* (1852), 2 Rob. Ecc. 505; 163 E.R. 1395; *Yelverton* v. *Yelverton* (1859), 29 L.J.P. 34; *Le Mesurier* v. *Le Mesurier,* [1895] A.C. 517; *Salvesen* v. *Administrator of Austrian Property* (1927), 96 L.J.P.C. 105; *Middleton* v. *Janverin* (1802), 161 E.R. 797; *Dasent* v. *Dasent* (1850), 163 E.R. 1218; *Sinclair* v. *Sinclair*

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(1798), 1 Hag. Cons. 294; 161 E.R. 557; English and Empire Digest, Vol. 11, p. 428, par. 926; *Inverclyde (otherwise Tripp)* v. *Inverclyde* (1930), 100 L.J.P. 16; *Armytage* v. *Armytage*, [1898] P. 178; *Hutter* v. *Hutter*, [1944] 2 All E.R. 368; *Wilson* v. *Wilson* (1872), 41 L.J. P. & M. 74; *Hutchings* v. *Hutchings*, [1930] 4 D.L.R. 673; *Fleming* v. *Fleming*, [1934] 4 D.L.R. 90; English and Empire Digest Supplement 1941, Vol. 11, p. 53; *Diachuk* v. *Diachuk*, [1941] 2 D.L.R. 607.

Annable, in reply, referred to *Manning* v. *Manning* (1871), 40 L.J. P. & M. 18.

Cur. adv. vult.

11th September, 1945.

SLOAN, C.J.B.C.: I agree with the reasons for judgment of my brother ROBERTSON, and therefore dismiss the appeal.

O'HALLORAN, J.A.: I would dismiss the appeal.

ROBERTSON, J.A.: On the 24th of July, 1944, the petitioner launched her petition for a decree that the marriage, in fact, celebrated between her and the respondent, be declared null and void. She alleged that they had been married at Edmonton, in the Province of Alberta, on the 10th of October, 1940; that they had lived together in that Province until August, 1943, when they separated and she had not seen him since; that the marriage had not been consummated as the respondent was, at the time of the marriage, and ever since, incapable of consummating it; that she was domiciled and resident in British Columbia and the respondent was domiciled and resident in Alberta. There was nothing in the petition to show that the respondent had ever been in British Columbia. He was served in Alberta. The petitioner's counsel submitted that the Court had power to grant a nullity decree as she *bona fide* resided in British Columbia.

The Chief Justice of the Supreme Court held that a decree annulling a marriage on the ground of impotence could only be pronounced by the court of the litigants' domicil; that in substance it was a decree for the dissolution of the marriage; that such a decree dealt with a marriage which, to the date of the decree was voidable only, and not void; and he distinguished it

from decrees annulling marriages for illegality or informality, which were null and void *ab initio*. The learned Chief Justice preferred to follow *Inverclyde* v. *Inverclyde*, [1931] P. 29 and dismissed the petition, as the respondent was not domiciled within the jurisdiction.

The petitioner's counsel relied upon *White otherwise Bennett* v. *White*, [1937] P. 111 (followed in *Easterbrook* v. *Easterbrook*, [1944] P. 10 and *Hutter* v. *Hutter*, *ib.* 95) in which the learned trial judge had refused to follow the decision of Bateson, J. in *Inverclyde* v. *Inverclyde*, *supra*. Counsel for the Attorney-General, who appeared at the request of the Court, submitted the Court below had no jurisdiction in nullity cases except where the person cited was domiciled or resident within the jurisdiction, or the marriage was celebrated within the jurisdiction; and he submitted the judgment below was right.

The law in force in British Columbia is the Act commonly known as the Divorce Act, R.S.B.C. 1936, Cap. 76, which is the same, with some minor changes, which do not affect the question in this suit, as the Divorce and Matrimonial Causes Act, 1857 (Imperial). See *Watts and Attorney-General for British Columbia* v. *Watts*, [1908] A.C. 573 approving *Sheppard* v. *Sheppard* (1908), 13 B.C. 486.

Section 1 vests all the jurisdiction vested in or exercisable by the Ecclesiastical Courts

> in England in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, . . . in her Majesty,

and provides that

> such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a Court of Record

therein named.

Section 2 provides that there shall be no decree for a divorce *a mensa et thoro*, but in a case in which a decree of this sort might have been pronounced, the Court may pronounce a decree for judicial separation, which shall have the same force and consequences.

The Act distinguishes between a petition for dissolution and a petition "for a sentence or decree of nullity of marriage." See

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sections 4 and 25. Prior to the passage of the Act Parliament alone could dissolve a marriage. Ecclesiastical Courts, when pronouncing a declaration in a suit of nullity, did not consider they were dissolving a marriage "but only proclaiming and declaring a nullity which already existed." See *Napier* v. *Napier,* [1915] P. 184, at p. 189.

Then section 6 provides that:

> In all suits and proceedings, other than proceedings to dissolve a marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief,

but subject to certain provisions, rules and orders not relevant here. So that while jurisdiction to dissolve a marriage depends upon domicil, as has now been established, the jurisdiction to grant a nullity decree depends upon the principles and rules of the Ecclesiastical Courts.

The question then is, would an Ecclesiastical Court grant a nullity decree under the circumstances of this case? In my opinion non-consummated marriages arising from the impotence of one of the spouses at the time of the marriage were regarded in the Ecclesiastical Courts, so far as giving relief was concerned, as voidable, not void. In *Norton v. Seton* (1820), 3 Phillim. 147, at p.161, Sir John Nicholl said, speaking of such marriage:

> . . . this is a voidable marriage, and laid down to be so by Blackstone. Then here the state is ascertained. The marriage exists.

Sir J. P. Wilde in *A.* v. *B.* (1868), L.R. 1 P. & D. 559 said at p. 561, that "impotence does not render a marriage 'void,' but only 'voidable.'" Sir James Hannen said the same thing in *Turner* v. *Thompson* (1888), 13 P.D. 37. See also *Napier* v. *Napier,* [1915] P. 184, at p. 190, where reference is made to Shelford on Marriage and Divorce, in which it was stated nullity on the ground of impotence

> "only makes the marriage voidable, and not *ipso facto* void until sentence of nullity be obtained."

HUNTER, C.J. followed *A.* v. *B., supra,* and *Turner* v. *Thompson, supra,* in *Brown* v. *Brown* (1907), 13 B.C. 73, and held that such marriages were not void *ab initio* but voidable only at the instance of the aggrieved spouse.

In *Adams* v. *Adams,* [1941] 1 All E.R. 334, the Court of

Appeal held that such a marriage was voidable. Scott, L.J. said at p. 338:

However, it does not follow from the history of the jurisdiction that, after decree of nullity, it is legally right to look back and say that the marriage was always and for all purposes void and at no time existed in the eye of the law. That may or may not be true of a bigamous marriage, or where the parties are so related in blood as to fall within the prohibited degrees, but it is not true of a marriage where one spouse is entitled to get a decree of nullity on the ground that the marriage is incapable of consummation. In such a case, the marriage is valid for most purposes. It is not void, but is only voidable, as has been said judicially in several cases, for example, by Sir James Hannen, P., in *Turner* v. *Thompson* (1888), 13 P.D. 37.

See *B.* v. *B.*, [1935] S.C.R. 231 and *J.* v. *J.*, [1940] O.R. 284. See also *Fowke* v. *Fowke*, [1938] 2 All E.R. 638.

Further, Pickford, L.J. pointed out in *Napier* v. *Napier*, *supra*, at p. 189 that the attitude of the Ecclesiastical Courts in declaring absolutely null and void *ab initio* non-consummated marriages owing to a defect existing at the time of the marriage, seemed hardly consistent, logically, with the view that such marriages were held to be voidable. He referred to two cases: *B——n* v. *B——n* (1854), 1 Spinks, 248, in which the Privy Council refused to declare null and void *ab initio* a non-consummated marriage on account of delay, and in which Dr. Lushington, speaking for the Judicial Committee, said at p. 259:

We will address ourselves to the first question. It may be put in this form: whether a party proceeding in a suit to have a marriage declared null and void by reason of malconformation, may not be barred from succeeding in his suit, *personali exceptione;* that, is by his own condition independent of his own conduct, or by his own conduct.

This doctrine is familiar both to the Civil and Canon Law, more especially to the latter, in matrimonial causes, it being a received maxim in such causes, that the party seeking relief, however well founded his ground of complaint may be against his consort, must show that, by his own conduct, by his own sense of injury, and his own vigilance, he is justly entitled to relief from the Court.

And to *Lewis (falsely called Hayward)* v. *Hayward* (1866), 35 L.J. P. & M. 105, at p. 108, where the Lord Chancellor said:

I will advert only for a moment to the objection to the suit upon the ground of delay. It seems, at first sight, extraordinary that any length of time should operate as a bar to a proceeding for the nullity of a marriage. The usual maxim of law is "*quod ab initio non valet in tractu temporis non convalescet.*" But it seems that in cases of this description delay in instituting the suit, not satisfactorily explained, is taken as a personal exception to the petitioner.

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See also *A.* v. *B., supra,* where Sir J. P. Wilde described incapacity to marry (impotence) as being considered in the Ecclesiastical Courts as a matter of "personal complaint" only.

It appears then that while Ecclesiastical Courts regarded *de facto* marriages, not consummated on account of impotencey existing at the time of the marriage, as null and void *ab initio,* they sometimes illogically refused relief, *personali exceptione* and in that sense the marriage was regarded as voidable. But when the Ecclesiastical Courts did give relief, they declared such a *de facto* marriage to be null and void *ab initio* (see *Lewis (falsely called Hayward)* v. *Hayward, supra,* at p. 109). In my opinion, so far as jurisdiction over the parties to a marriage, void on account of illegality, or, void on account of impotency existing at the time of the marriage, but voidable, in this respect, that a declaration might be refused under certain circumstances, is concerned, there was no difference in the principles and rules applied in the Ecclesiastical Courts.

Prior to the Divorce Act of 1857, only Parliament could dissolve a marriage and all suits relating to matrimonial matters came before the Ecclesiastical Courts. Where the marriage was valid the Courts entertained suits, *inter alia,* for divorce *a mensa et thoro* and restitution of conjugal rights; decrees which did not affect the marriage tie. Where the marriage was a nullity, either because of bigamy or impotence they likewise exercised jurisdiction, but in such cases, except when impotence was the ground upon which the petition was based, and a declaration refused, *personali exceptione,* the *de facto* marriage was affected in that it was declared to be null and void *ab initio.* It was declared *esse et fuisse nullum.* Then the question is: Did the Ecclesiastical Courts exercise jurisdiction and make a declaration that a *de facto* marriage was null and void *ab initio* on the ground of impotence where the parties lived in the jurisdiction, or only where the parties were domiciled in England? It was held in the *Inverclyde* case, *supra,* that domicil was the test of jurisdiction. Bateson, J. held that the matter was covered precisely by what was said by their Lordships in *Salvesen or von Lorang* v. *Administrator of Austrian Property,* [1927] A.C. 641, but he said at pp. 45-6:

> . . . From these materials I deduce that the Ecclesiastical Courts did in fact exercise judgment in suits of nullity for impotence when the parties reside in England if they were English and came within the limits of the jurisdiction of the Court.

Hodson, J. refused to follow the *Inverclyde* decision in *Easterbrook* v. *Easterbrook,* [1944] P. 10 and Pilcher, J. in *Hutter* v. *Hutter, ib.* 95 followed *Easterbrook* v. *Easterbrook.* Pilcher, J. pointed out that the jurisdiction of the Ecclesiastical Courts had been transferred to the Divorce Court and that in suits for nullity the principles and rules of the Ecclesiastical Courts were to be applied. He referred to the fact that the jurisdiction of each of the Ecclesiastical Courts was based upon residence, within the area, of each of the persons against whom relief was sought, and said that any doubt which might have existed on this point was set at rest by the Statute of Citations (1531), 23 Hen. 8, c. 9, which provided (pp. 99-100):

> . . . no manner [of] person shall be from henceforth cited or summoned, . . . to appear . . . before any . . . judge spiritual, out of the diocese, or peculiar jurisdiction where the person . . . , shall be inhabiting and dwelling, at the time of awarding, or going forth of the same citation or summons.

and then found that in nullity cases, residence was sufficient to confer the jurisdiction. He referred to the cases bearing upon this subject. He also discussed the *Salvesen* case and was of the opinion, with great respect for what Lord Phillimore had said in that case, that he had not intended to lay down any general proposition which would have the effect of ousting the jurisdiction of the Courts of England to entertain a nullity suit where the parties, although resident, were not domiciled within the jurisdiction, and that any such proposition would be manifestly too wide, and, if accurate, would mean that a whole line of cases whose authority had not been questioned, had been wrongly decided. I agree, if I may say so, with the judgment of Pilcher, J.

In *Roberts* v. *Brennan,* [1902] P. 143, a petition to have declared null and void a bigamous marriage, Jeune, P. said residence—not domicil—was the test in a nullity case and that the jurisdiction of the Ecclesiastical Courts was based on residence of the parties and in suits for nullity the Court followed the practice of the Ecclesiastical Courts.

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In *Eustace* v. *Eustace,* [1924] P. 45 the President said at p. 48 that every Ecclesiastical Court in England was restricted by the common law to the prescribed area of operations; and that the Statute of Citations, *supra,* had been enacted for the prevention of such abuses which it was said had grown up in usurpation of power in the provincial Courts.

The parties to the petitions in the *Inverclyde, Easterbrook* and *Hutter* cases resided in England and the marriages took place there. In the case at Bar the only fact to support jurisdiction is the residence of the petitioner in British Columbia. I am of the opinion that the Ecclesiastical Courts did not exercise jurisdiction in nullity cases unless the person cited was either resident or domiciled in the jurisdiction or the *de facto* marriage was performed there.

In *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574 the petition was by the wife for the restitution of conjugal rights. The parties had married at Edinburgh, Scotland, and later the marriage was celebrated in Ireland according to the rules of the Roman Catholic Church. The husband deserted his wife at Bordeaux and since that time had been stationed with his regiment at Edinburgh. The respondent's domicil of origin was in Ireland and he had never acquired a domicil in England. The petitioner described herself as a resident in England. The respondent appeared under protest, pleading that at the commencement of the suit he was and had since continued to be and still was at Edinburgh, and his domicil was Ireland. The suit was dismissed. At p. 589 the Judge Ordinary referred to *Carden* v. *Carden, infra,* as showing that the jurisdiction was only exercised there after it was shown that the party cited had his residence in London.

Another case referred to in *Yelverton* v. *Yelverton, supra,* was the case of *Collett* v. *Collett* (1843), 3 Curt. 726. A citation in a suit for divorce *a mensa et thoro* was issued by the wife. Three days after the issue of the citation, the husband who was residing in England, left the jurisdiction. He was served abroad. He appeared under protest to the citation. It was held that the Court had jurisdiction.

In *Anghinelli* v. *Anghinelli,* [1918] P. 247, at p. 254, a suit for judicial separation, Swinfen-Eady, M.R. said:

> . . . There is a case of *Carden* v. *Carden* (1837), 1 Curt. 558, in which, as appears from the judgment, what the Court was considering was the question of residence and not domicil, and it was held that it was residence within the diocese before the issue of the citation which gave the Court jurisdiction.

In *Graham* v. *Graham,* [1923] P. 31, a suit for judicial separation, Horridge, J. held that according to the practice of the Ecclesiastical Courts, a suit for judicial separation could be entertained in a case where both parties were resident but not domiciled within the jurisdiction. But the Court had no jurisdiction where the respondent at the time of the institution of the suit or at the time of the citation was resident outside the jurisdiction; and he said at p. 36, referring to *Carden* v. *Carden* (a petition for divorce *a mensa et thoro* on the grounds of adultery and cruelty), that

> it [seemed] clear that the Court considered the residence or non-residence of the party proceeded against as vital.

In *Eustace* v. *Eustace, supra,* the President distinguished *Graham* v. *Graham, supra,* on the ground that the respondent, although not resident in England at the institution of the suit was then domiciled there. He said at p. 49:

> No Ecclesiastical Court in England could have entertained a suit of the petitioner for a decree of divorce *a mensa et thoro* while her husband was resident in Ireland, and this is demonstrated in various decisions of dates before and since 1857, which were cited in *Graham* v. *Graham,* [1923] P. 31.

In *Raeburn* v. *Raeburn* (1928), 44 T.L.R. 384, a suit for judicial separation, it was held that personal presence of the respondent in England at the date of the filing of the petition for judicial separation was not essential for the founding of such a suit, although the proceedings were governed by the principles and rules of the Ecclesiastical Courts. It was held that the real question was whether at the time when the petition, endorsed with the citation, was issued for service the respondent was resident within the jurisdiction. It is important to notice that in the Ecclesiastical Courts proceedings were commenced not by petition but by citation. Lord Merrivale, P. said at p. 385:

> What is clear on the words of the Statute of Citations and in the proceedings of the Ecclesiastical Courts is that residence was the condition precedent of jurisdiction.

Although the issue was directed to determine whether there was

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residence of the parties or either of them within the jurisdiction of the Court at the material time or times so as to found a petition for judicial separation, Lord Merrivale said at p. 385 that the material question was whether on the date when the petition was filed or the date when personal service was made on the respondent in England, he was resident in England so as to give jurisdiction there.

In *Sim* v. *Sim*, [1944] P. 87 Pilcher, J. said at p. 94:

> . . . I am satisfied . . . that, while the residence of the party against whom relief was sought was regarded by the Ecclesiastical Courts as all important . . .

The only case with facts similar to the case at Bar is *White otherwise Bennett* v. *White, supra.* The facts were as follow: The petitioner had gone through a form of marriage in Australia with the respondent. The petitioner alleged she was domiciled and resident in England and that the respondent was domiciled and resident out of England. The marriage was never consummated owing to the man's impotence at the time of marriage. It was held that domicil was not essential in the case of a voidable marriage. The respondent had not appeared. However, he had acknowledged service of the petition, and long prior to the issue of the petition had signed a written admission that when he went through the form of marriage with the petitioner he was already married to another woman. Bucknill, J. held that the petitioner had never acquired the domicil of the respondent. He followed *Roberts* v. *Brennan, supra.* As I read the case, the learned judge thought the Court had jurisdiction under the special circumstances, because of the respondent's conduct, and that by such conduct he had submitted to the jurisdiction, because he says at p. 125 that if the respondent had entered an appearance under protest against the exercise of the jurisdiction he would have had serious doubts as to the Court's jurisdiction.

I think the Court had no jurisdiction in this case. I think the appeal should be dismissed.

SIDNEY SMITH, J.A.: This appeal has to do with the difficult and important question of the jurisdiction of the Supreme Court of British Columbia in suits for declarations of nullity of mar-

riage. The facts giving rise to the appeal are simple and are as follow: On the 10th of October, 1942, the petitioner, then a spinster, went through a form of marriage with the respondent, then a bachelor, at the city of Edmonton, in the Province of Alberta, Canada, the domicil and residence of both being in Alberta. Thereafter the parties lived together as husband and wife at various places in the said Province, at different times and for short periods, until the month of August, 1943, when they separated. The marriage was never consummated and the respondent was at the time of the marriage, and has remained, incapable of consummating the same. At some subsequent date the petitioner came to the Province of British Columbia and is now both resident and domiciled in this Province. (That is to say that she has acquired in this Province a domicil of choice upon the footing that her marriage to the respondent was null and void *ab initio,* and that she derived no legal domicil therefrom). The respondent who is a labourer, continues to reside at Edmonton aforesaid, and to be domiciled in the Province of Alberta.

On the 24th of May, 1944, the petitioner commenced proceedings in the Supreme Court of British Columbia for a decree declaring the aforesaid marriage null and void. The petition was duly served upon the respondent at Edmonton, but he entered no appearance. In the month of October, 1944, the matter came on for hearing before the Chief Justice of the Supreme Court, who dismissed the proceedings (without going into the merits), upon the ground that the respondent was not subject to the jurisdiction of the Court. The petitioner now appeals from this judgment.

I have taken the narrative of the facts which occasioned these proceedings from the petition filed herein. For the purposes of our judgment we must accept the facts so stated as accurate. Upon the hearing before us, however, counsel for the petitioner requested that we deal in our judgment with the question of jurisdiction on the assumption that the petitioner was only resident, but *bona fide* resident, within the Province, and the argument before us was largely based on that supposition. The sole question before us therefore is one of jurisdiction. As this was

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an important question, we directed that the papers be forwarded to the Attorney-General of the Province. He appointed counsel from whom we heard argument in support of the view that the Court, in the circumstances, was without jurisdiction.

The Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, Sec. 6, provides that in all matrimonial suits including suits for nullity of marriage, but excluding suits for dissolution, the Court shall proceed and act and give relief on principles and rules which shall conform as closely as possible to the principles and rules acted upon by the Ecclesiastical Courts in England. In the consideration of these principles and rules it should be remembered that marriage is more than a simple contract. It is a *status* involving other interests. A decree of dissolution or a decree declaring it void, is a decree *in rem*. It is clear from the authorities that the Ecclesiastical Courts had no power to dissolve a marriage—they could only declare it void. It is also clear that for the purposes of their jurisdiction no distinction was drawn between void and voidable marriages. And it is further clear that for the purpose of the exercise of that jurisdiction all that was required was the *bona fide* residence of the party cited within the appropriate territorial jurisdiction. The question of domicil (in its technical sense) was therefore irrelevant. But when in 1857 the Divorce and Matrimonial Causes Act gave the Court power to dissolve a marriage the conception of domicil slowly developed and became established 38 years later in *Le Mesurier* v. *Le Mesurier,* [1895] A.C. 517 as being fundamental to the Court's jurisdiction in suits, but only in suits, for dissolution of marriage.

We are fortunate in that these general principles have been re-examined by the Courts in England, during the last few years, in the following cases: *Inverclyde* v. *Inverclyde,* [1931] P. 29; *White otherwise Bennett* v. *White,* [1937] P. 111; *Easterbrook* v. *Easterbrook,* [1944] P. 10; and *Hutter* v. *Hutter, ib.* 95.

The decisions in these cases are of course not binding upon us, and this Court will not follow them unless in its opinion they correctly express the law. Counsel for the petitioner says that the last three do: and says further that the question whether the residence of the petitioner within the Province is alone sufficient

to give the Court jurisdiction, must be answered in the affirmative, by reason of the combined effect of the decisions in the *White* case and in the *Hutter* case. He says that the *White* case is authority for the proposition that in a suit for nullity upon the ground of bigamy, residence of the petitioner within the jurisdiction is sufficient; while the *Hutter* case decides that for the purpose of founding the Court's jurisdiction there is no difference between nullity upon the ground of bigamy and nullity upon any other ground, including impotence; and that therefore the result of the two cases is to give the Court jurisdiction where, as here, the petitioner resides within the Province and asks for a declaration upon the ground of impotence.

It is important to notice what these cases actually decided, and upon what grounds their decisions turned. In the *Inverclyde* case Bateson, J. was of opinion that a distinction must be drawn between void and voidable marriages with respect to jurisdiction in annulment proceedings. Adopting as sound the argument for the respondent in that case, he said this (p. 41):

> A suit for nullity on the ground of impotence is quite different from other suits for nullity, *e.g.*, on the ground of informality or illegality, such as bigamy, absence of parental consent, or some requirement in the ceremony. Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. The marriage is voidable and not void, as in other cases of nullity. The marriage remains a marriage until one of the spouses seeks to get rid of the tie. In other cases such as bigamy there has never been a marriage at all.

He accordingly held that a decree annulling a marriage on the ground of impotence was a decree concerning a marriage which was voidable only, and not void *ab initio,* and was in effect a decree for the dissolution of that marriage. Applying the principle that in a suit for dissolution of marriage in divorce, jurisdiction depends on domicil, he was of opinion that it must equally so depend in a suit for dissolution of marriage upon the ground of impotence. In the result, in the case before him, he refused the decree because the parties were not domiciled within the jurisdiction of the Court.

In the undefended case of *Easterbrook,* Hodson, J. at p. 11 was unable

> with all respect to Bateson, J., to see the distinction for the purpose of jurisdiction which he appears to have drawn in *Inverclyde (otherwise Tripp)* v. *Inverclyde,* [1931] P. 29 between voidable and void marriages.

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In view of this difference of judicial opinion when the same point came for discussion before Pilcher, J. in the *Hutter* case, he caused the papers to be forwarded to the King's Proctor and subsequently he had

> the advantage of listening to a full analysis of all the relevant authorities by the Attorney-General

(p. 99). In the result he refused to follow Bateson, J. and held that with respect to the Court's jurisdiction there was no difference between void and voidable marriages. The case before him was one in which a decree was sought on the ground that the marriage had never been consummated owing to the wilful refusal of the respondent. The marriage had been celebrated, and both parties resided, in England. He found that the Court had jurisdiction. Giving the matter the best consideration I can, I think the conclusion of Pilcher, J. is correct and so also is the reasoning upon which it is founded. And it is perhaps noteworthy that in one respect the case at Bar is *a fortiori* the *Hutter* case; for there the ground of nullity was statutory only, *viz.*, wilful refusal (see Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6), Cap. 57, Sec. 7 (1) (*a*)), while here the ground alleged, *viz.*, impotence, was a ground recognized in the Ecclesiastical Courts as being sufficient for the grant of a decree (see *Napier* v. *Napier,* [1915] P. 184, at p. 186). I therefore agree with the petitioner's counsel as to the correctness of the judgment in the *Hutter* case.

But I am unable to come to the same conclusion with respect to the *White* case. That was a case in which a decree was sought upon the ground of bigamy. The petitioner, until then domiciled and resident in England, had gone through a form of marriage with a man in Australia, whose wife was living at the time. The man was domiciled, either in Malta or in Australia, and had never resided in England. Bucknill, J. held that the woman did not acquire the domicil of the man, that she remained domiciled and resident in England, and that the Court had jurisdiction. He relied on the case of *Roberts* v. *Brennan,* [1902] P. 143, in which Sir Francis Jeune, as he then was, granted a decree of nullity for bigamy on the ground that the parties had resided within the jurisdiction since the marriage ceremony (although it does not appear whether the respondent-husband was resident

within the jurisdiction when the proceedings were commenced). As pointed out by the Court of Appeal in England in *Ogden* v. *Ogden,* [1908] P. 46, at p. 80, this case is authority for the principle

> that residence, and not domicil, is the test of jurisdiction in nullity cases.

But this means residence of both parties—or at least residence of the respondent. It does not mean residence of the petitioner alone. The *Roberts* case is therefore no good authority for the decision in the *White* case, since the respondent in the latter had never resided within the jurisdiction at any time.

In both the *White* and *Easterbrook* cases mention is made of no appearance having been entered and no protest to the jurisdiction having been made. This has reference, no doubt, to the practice of the Ecclesiastical Courts which is referred to in the following passage from the judgment of Pilcher, J. in *Sim* v. *Sim,* [1944] P. 87, at pp. 90-1:

> . . . It is well recognized that in suits for judicial separation it is the duty of this court to act and grant relief on principles which conform as closely as possible to the principles acted on by the ecclesiastical courts. In suits for divorce *a mensa et thoro* [my note—and so also in suits for nullity] instituted in the ecclesiastical courts the residence of the party against whom relief was sought within the geographical area of the particular ecclesiastical court was a *sine qua non* to found jurisdiction. Such a party had to be described in the citation as resident within the jurisdiction of the ecclesiastical court in which the suit was instituted. If the party cited was not in fact so resident and took no point on jurisdiction it seems that the suit proceeded. If, however, such a party wished to question the jurisdiction of the court to entertain the suit on the ground of residence an appearance was entered under protest and the matter was gone into and determined.

This practice is reflected in rule 16 of the British Columbia Divorce Rules, 1943.

In the *Hutter* case Pilcher, J. said that the fact that the respondent in that case had not entered an appearance in the suit did not affect the matter. This was because there was no doubt in that case that the respondent had always been resident in England and had probably never lost her English domicil of origin. And so in this case the fact of the respondent not having appeared is of no importance as admittedly he remains domiciled and resident in Alberta.

From the foregoing considerations there would appear to be no authority in English law that residence of the petitioner alone

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is sufficient to found jurisdiction in suits for nullity. In my judgment it cannot be held to do so in the present case.

Moreover, I am of opinion that even if the petitioner had acquired a domicil of choice in the Province of British Columbia, upon the assumption that her marriage was void *ab initio* and that therefore no matrimonial domicil had ever existed, the Court would still be without jurisdiction. The authorities seem to be clear that while the Court of the residence of the party cited has jurisdiction, it has not exclusive jurisdiction; that there may also be jurisdiction in the Court where the marriage was celebrated and also in the Court of the domicil of both parties. (See Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 640; Dicey's Conflict of Laws, 5th Ed., 294 and Rayden on Divorce, 4th Ed., 14). But the facts in this case are not such as to bring them within either of these other categories. Putting the matter in the best light possible for the petitioner, we are here asked to declare void, upon the ground of impotence, a marriage celebrated in Alberta between the petitioner and the respondent, who were then both domiciled, and also both resident in Alberta, and where the respondent continues to be domiciled and resident. The petitioner has obtained a domicil of choice in British Columbia and on this sole ground submits that the British Columbia Court (a tribunal to which the respondent has never been subjected by any act of his own) has jurisdiction. It seems to me these facts are far away from those of any authority referred to us on the hearing, or that I can find anywhere in the books. The appeal must therefore be dismissed.

BIRD, J.A.: The question raised for determination in this appeal is whether the jurisdiction of the Supreme Court of this Province to decree nullity of a marriage on the ground of the impotence of the respondent (husband) can be founded solely upon residence of the wife (petitioner) within the jurisdiction at and subsequent to the date of the institution of the proceedings.

The wife alleged in her petition that the marriage was performed outside the jurisdiction, *i.e.*, in the Province of Alberta, where the parties resided at and prior to the marriage, and where the husband then was and now is domiciled.

It is clear that the parties had not at any time a matrimonial home within British Columbia, since it is alleged that at intervals over a period of ten months following the solemnization of the marriage the parties lived together at various places in the Province of Alberta, and thereafter the respondent remained in Alberta when the petitioner moved to British Columbia where she resided and, as she alleges, was domiciled at the date of the petition.

The respondent, who was personally served with the petition in the Province of Alberta, did not appear thereto or otherwise take any part in the proceedings.

The cause came on for hearing before the learned Chief Justice of the Supreme Court, who, after consideration of the allegations in the petition and the argument of counsel for the petitioner, but without hearing any evidence, dismissed the petition for want of jurisdiction, upon the ground that the petition showed that the respondent was not domiciled in British Columbia.

When this appeal from that judgment first came on for hearing there was again no appearance by or on behalf of the respondent. Consequently, the Court directed that notice be given to the Attorney-General pursuant to the Divorce and Matrimonial Causes Act Amendment Act, 1945, since the Court was of opinion that the question of jurisdiction raised was one of sufficient public importance to make it undesirable that the question be determined without full argument.

Subsequently the Attorney-General intervened and we have had the benefit of full and able argument by Mr. *Maclean* on behalf of the Attorney-General.

The jurisdiction of the Supreme Court of British Columbia in divorce and matrimonial causes is derived from the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict., Cap. 85), and is substantially the jurisdiction exercised by the Court of Probate and Divorce in England as at November 19th, 1858.

The Act now commonly referred to as the Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, provides that:

1. All jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, except in

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respect of marriage licences, shall belong to and be vested in Her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a Court of Record, to be called the "Court for Divorce and Matrimonial Causes."

The jurisdiction of the Supreme Court of British Columbia has been held to include power to decree nullity of marriage on the ground of impotence—*Walker* v. *Walker* (1919), 88 L.J.P.C. 156, as well as dissolution of marriage for adultery—*Watts* v. *Watts* (1908), 77 L.J.P.C. 121.

By section 6 of the Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, the Court is required in all matrimonial suits, including suits for nullity of marriage, but exclusive of proceedings for dissolution, to proceed and act and give relief on principles and rules as nearly as may be conformable to the principles and rules acted upon by the Ecclesiastical Courts in England prior to the enactment of the Matrimonial Causes Act, 1857.

Consideration of decisions in the Ecclesiastical Courts in England as well as of the Courts exercising jurisdiction under the Matrimonial Causes Act, 1857, indicates that the Ecclesiastical Courts, prior to 1857, and the Divorce Courts, subsequent thereto, have entertained matrimonial suits including suits for nullity in three instances: (1) Where the party cited resided within the jurisdiction at the date of institution of the proceedings; (2) where the parties were domiciled within the jurisdiction; and (3) where the marriage had taken place within the jurisdiction.

It is, I think, abundantly clear that subsequent to the passing of the Statute of Citations (1531), the jurisdiction of the several Ecclesiastical Courts depended primarily, though not exclusively, upon residence of the party cited, within the jurisdiction of the particular Ecclesiastical Court, at the date of commencement of the proceedings.

By that statute it is provided: [already set out in the judgment of ROBERTSON, J.A. at p. 59].

It was held in *Carden* v. *Carden* (1837), 1 Curt. 558; 163 E.R. 196, that residence within the jurisdiction was sufficient to found jurisdiction in a divorce cause (presumably nullity, since the Ecclesiastical Courts did not dissolve marriages), such resi-

dence being at the time of or immediately before service of the citation at the place of residence within the jurisdiction.

In *Mitford* v. *Mitford,* [1923] P. 130, a nullity suit, Sir Henry Duke said at p. 135:

> . . . This Court also, by virtue of the jurisdiction conferred by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), Sec. 6, [R.S.B.C. 1936, Cap. 76, s. 1] is empowered to adjudicate upon an allegation of nullity of marriage in the case of persons within its jurisdiction and to pronounce finally thereon by a decree which concludes the matter between the parties here.

And again:

> . . . "The jurisdiction of the Ecclesiastical Courts was based on the residence of the parties, and in suits for nullity this Court follows the practice of the Ecclesiastical Courts, as prescribed by s. 22 of the Matrimonial Causes Act, 1857" [*i.e.*, R.S.B.C. 1936, Cap. 76, Sec. 6].

But it is said that the Statute of Citations did not restrict the exercise of jurisdiction of the Ecclesiastical Courts to residence of the party cited, within the territorial jurisdiction of the Court. Compare *Eustace* v. *Eustace,* [1924] P. 45, a decision of the Court of Appeal in a proceeding for judicial separation, wherein Sir Henry Duke said at p. 50, referring to section 22 of the Matrimonial Causes Act, *supra,*

> . . . That this section restricts the jurisdiction of the Court over persons to the jurisdiction which the Ecclesiastical Courts possessed is an impossible contention.

Warrington, L.J., in referring to the limited jurisdiction of the Ecclesiastical Courts, said (p. 53):

> . . . this arose not from any rule or principle acted upon by those Courts, but from the provisions of the general law of the land restricting their jurisdiction.

In the *Eustace* case the Court of Appeal held that although the respondent was resident outside the jurisdiction at the time of commencement of the proceedings, the fact that the domicil of the parties was within the jurisdiction was sufficient to give jurisdiction to decree judicial separation.

Domicil of the parties within the jurisdiction was held by the House of Lords to be sufficient to give jurisdiction in a nullity suit.

In *Salveson* v. *Administrator of Austrian Property* (1927), 96 L.J.P.C. 105 Viscount Haldane, referring to the limited scope of the only question there under consideration, said at p. 113:

> . . . It is simply whether, when the Court of the domicil of both the

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parties has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a Court here where they are not domiciled can review that decision. The reasons given by Lindley, M.R., in *Pemberton* v. *Hughes* [68 L.J. Ch. 281; [1899] 1 Ch. 781] are, in my opinion, conclusive against any attempt to reopen any such case on the footing of supposed irregularity of procedure.

That the Courts of a country wherein a marriage was celebrated is a proper forum for deciding its validity, was the basis of the judgment in *Scrimshire* v. *Scrimshire* (1752), 2 Hagg. Cons. 395), a suit for nullity of marriage; and *cf. Sottomayor* v. *De Barros* (1877), 3 P.D. 1, wherein the Court of Appeal declared null and void a marriage performed in England between persons then domiciled in Portugal, both of whom were resident in Portugal at the time the petition was filed. See also *Simonin (falsely called Mallac)* v. *Mallac* (1860), 2 Sw. & Tr. 67 and *Ogden* v. *Ogden,* [1908] P. 46, at p. 80.

In *Turner* v. *Thompson* (1888), 13 P.D. 37, at pp. 40-1, Sir James Hannen, then President of the Probate, Divorce and Admiralty Division, said:

> The marriage, though it took place in England, must, no doubt, according to the decision in *Harvey* v. *Fernie,* [(1882)] 8 App. Cas. 43, which went up to the House of Lords, be taken to be *prima facie* an American marriage, because the husband was domiciled in the United States, and, *prima facie,* the Courts of the place of his domicil had jurisdiction in the matter.

The cause was one for nullity on the ground of impotence. He held that as the domicil of the husband as well as of the wife (petitioner) was in fact and in law in the United States, the Courts of the United States had jurisdiction.

However, none of the decisions here examined provides support for the submission of counsel for the petitioner that residence and domicil of the wife *solus* within the jurisdiction is sufficient to give jurisdiction. For support of this proposition he relies upon *Roberts* v. *Brennan,* [1902] P. 143, a decision of Jeune, P., in the Probate Division, wherein the learned President said:

> . . . In my view, residence—not domicil—is the test of jurisdiction in a nullity case.

I take it from the reference there made to *Niboyet* v. *Niboyet* (1878), 4 P.D. 1, that the residence to which he then referred was the residence not of the petitioner alone, but either that of both parties or of the respondent, for in the *Niboyet* case James,

L.J. refers at p. 4 to the fact that the respondent who appeared under protest

> had resided in England . . . from the year 1875 to the commencement of the suit.

However, even if that be not so, I do not think that the decision can be taken as authority for the proposition that residence of the wife alone is sufficient to found jurisdiction.

The *Roberts* case was referred to by Horridge, J. in *Graham* v. *Graham*, [1923] P. 31, at p. 37, in these words:

> . . . The report in this case is not to my mind satisfactory as to the evidence of residence before the Court, and I cannot think I ought to rely on it if it is inconsistent with the authorities I have already referred to.

Reference is there made to the *Niboyet* case and to *Donegal* v. *Donegal* (1821), 3 Phillim. 597 as supporting the opinion

> that where residence is relied upon to found jurisdiction it must be shown that the respondent is resident in the jurisdiction at the time . . . the proceedings commenced.

Counsel relied strongly upon *White otherwise Bennett* v. *White*, [1937] P. 111, a decision of Bucknill, J. in the Probate Division, in a suit for nullity of marriage wherein counsel submits it was held that the residence and domicil of the wife was sufficient to give jurisdiction, notwithstanding the fact that the residence and domicil of the husband was in Australia and the marriage performed there, the respondent not having resided in England at the time. I do not think that the judgment of Bucknill, J. goes so far as was contended for by counsel for the petitioner; for he says at p. 125:

> . . . 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.

This conclusion that the respondent had no objection to the exercise of jurisdiction no doubt related to the fact that upon service of the petition the respondent had signed an acknowl-

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edgment that he was the person referred to in the petition and that the respondent had, six months before such service, signed an acknowledgment that at the time of his marriage to the petitioner, his wife by a former marriage was then living.

In these circumstances, I would not be prepared to accept the decision in the *White* case as authority for counsel's submission, even though it were binding upon this Court, which it is not.

Reference was made to two decisions of single judges in the Probate and Divorce Division in *Hutter* v. *Hutter,* [1944] 2 All E.R. 368 and *Easterbrook* v. *Easterbrook,* [1944] P. 10. In each of these cases the respondent, at and prior to commencement of the proceeding, was resident in England, *i.e.,* within the jurisdiction of the Court, though temporarily as a soldier in the Canadian and United States armies, respectively, on active service, and in both instances the marriage was performed in England.

Consequently I have reached the conclusion that none of the decisions relied upon by counsel does in fact support his submission. On the other hand, it has been held in matrimonial suits, both for restitution of conjugal rights and for judicial separation, that residence alone of the wife petitioner within the jurisdiction is not sufficient to give jurisdiction to grant a decree.

In *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574, a suit for restitution of conjugal rights, the Judge Ordinary, Sir Cresswell Cresswell, said at pp. 590-1:

> . . . Major Yelverton is not an Englishman, he never had a residence in England, nor was he ever guilty of any misconduct towards the plaintiff in England; and from the passage which I have read from the report of *Carden* v. *Carden,* [*supra*] I infer that Dr. Lushington would have held that there was no jurisdiction, unless evidence had been given of some residence in England. That foundation was laid in every case that was cited, and I cannot treat any one of them as an authority for overruling Major Yelverton's protest.

And again at p. 591:

> . . . There is nothing, then, in this American decision to get rid of the maxim relied on by the counsel for the respondent, *Actor sequitur forum rei.*

In *Firebrace* v. *Firebrace* (1878), 4 P.D. 63, a petition for restitution of conjugal rights was dismissed for want of jurisdiction, since the marriage was performed beyond the jurisdiction

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and the party cited was not shown either to be resident or domiciled therein, though the wife was resident but not domiciled within the jurisdiction. Sir James Hannen there followed the *Yelverton* case.

Again in *Graham* v. *Graham, supra,* Horridge, J. refused a petition for judicial separation, holding that residence of the petitioner alone was not sufficient to found jurisdiction.

To quote the words of the Earl of Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* [1894] A.C. 670, at p. 683, there is here

> nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit (*"Actor sequitur forum rei"*).

In these circumstances I do not find it necessary to deal with the question raised in the course of argument and founded upon the decisions in *Inverclyde (otherwise Tripp)* v. *Inverclyde* (1930), 100 L.J. P. 16, followed in *Fleming* v. *Fleming et al.,* [1934] O.R. 592, as to whether in a suit for nullity upon the ground of impotence, jurisdiction does or does not depend solely upon domicil, since here there is neither domicil nor residence of the respondent.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *G. R. Annable.*

McKNIGHT v. RUDD MITCHELL & CO. LTD. *ET AL.*

C. A.
1945
Oct. 11, 12.

Pleadings—Statement of claim—Amendment to conform with evidence—Granted ex mero — No application by plaintiff for amendment — No opportunity for defendant to be heard—Appeal—New trial—R.S.B.C. 1936, Cap. 148, Sec. 2 (7).

At the trial on April 19th, 1945, judgment was given for the plaintiff with brief oral reasons. On April 27th following, the learned judge handed down extended written reasons and gave leave to the plaintiff to amend his statement of claim. Leave to amend was granted *ex mero,* apparently to make the pleadings conform to the evidence adduced at the trial. Counsel for the plaintiff did not apply for such amendment nor had counsel for defendant an opportunity to be heard. The amendment was

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not made within the 14-day period stipulated in rule 311 and no extension of time was granted. On the appeal counsel for appellants brought to the attention of the Court that rule 311 declares the amendment to be "*ipso facto* void," and submitted that without the amendment the judgment could not be supported on the pleadings. Counsel for the respondent then moved that the Court direct an amendment in order that the pleadings conform with the facts established in evidence.

Held, that the motion be refused and in the unusual circumstances of this case the learned judge ought not to have directed the amendment without first having given counsel an opportunity to be heard thereon. There was a mistrial and in deciding upon a new trial, the Court is guided by the provisions of section 2 (7) of the Laws Declaratory Act requiring that in any cause pending before the Court all remedies shall be given to determine "completely and finally" the questions in controversy between the parties in order to avoid multiplicity of legal proceedings.

King v. *Wilson* (1904), 11 B.C. 109, distinguished.

APPEAL by defendants from the decision of WILSON, J. of the 19th of April, 1945, in an action for the return of $2,700 and the return of a cheque for $10,300 given by the plaintiff to the defendant company as a down payment on the contemplated purchase of the Europe Hotel business in Ladysmith, B.C. In September, 1944, the plaintiff, having $13,000, enquired of the defendant company what hotels they had for sale and after one Enright, on behalf of the company, had made enquiries, he submitted a proposal to the plaintiff that he could purchase the contents of the Europe Hotel, the business and beer licence separate and apart from the land and building for $27,000, the vendors requiring a cash payment of $17,000. The plaintiff then endeavoured to obtain a loan of $4,000 with the assistance of Enright and while endeavouring to do so he gave Enright a cheque for $2,700 as a deposit on the purchase price and Enright then received the signatures of the vendors to an agreement for the sale of the Europe Hotel business and licence for $27,000. Then the plaintiff gave Enright a cheque for $10,300 payable to the defendant company. After further attempts to raise the $4,000, they failed to obtain a loan and the plaintiff demanded his money back which was refused. The plaintiff then brought this action against the company only. The company then made an interpleader application, notice of which was served on Giovando and Doumont, the owners of the Europe Hotel. An order was made by HARPER, J. adding Giovando and Doumont as

defendants, giving leave to the plaintiff to amend his statement of claim and ordering that the sum of $2,700 be paid into Court and the cheque for $10,300 be deposited in Court.

The appeal was argued at Victoria on the 11th and 12th of October, 1945, before O'HALLORAN, ROBERTSON and BIRD, J.J.A.

Cunliffe, for appellant.

V. B. Harrison, for respondent.

O'HALLORAN, J.A. (*per curiam*): In granting a new trial at the conclusion of the hearing of the appeal, the Court intimated written reasons would be handed down.

Judgment was given in favour of the respondent plaintiff at the trial on 19th April last with brief oral reasons in support. Later, on 27th April the learned judge saw fit to amplify those reasons, and in the course of extended written reasons then handed down, gave leave to the plaintiff to amend his statement of claim by alleging that the defendant Rudd Mitchell & Co. Ltd., was the agent of the plaintiff. Leave to amend was granted *ex mero,* apparently to make the pleadings conform to the evidence adduced at the trial. No application was made for such an amendment by counsel for the plaintiff, nor had counsel for the defendant an opportunity to be heard.

The direction for that amendment was not embodied in the formal order for judgment. The amendment was not made within the 14-day period stipulated in rule 311, and no extension of time was obtained. In these circumstances counsel for the appellants brought to our attention that rule 311 declares the amendment to be "*ipso facto* void," and submitted that without the amendment the judgment could not be supported on the pleadings. Counsel for the respondent then moved that this Court direct the amendment in order that the pleadings conform to the facts established in evidence as was done in *Wilkinson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 161.

After listening to an extended argument thereon the Court refused that motion on the ground stated at the time, that although there is a great deal of evidence in the appeal book relating to the question of agency, it seems clear the parties did not anticipate the inferences the learned judge would derive

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from that evidence, and owing to the state of the pleadings counsel did not direct their minds to that phase as a determining factor in the case.

It is the view of the Court in the unusual circumstances of this case that the learned judge ought not to have directed the amendment without first having given counsel an opportunity to be heard thereon. If the learned judge had done so, we think it would have appeared to him, as it has appeared to this Court that the appellant defendants would be prejudiced thereby unless their counsel was afforded the opportunity of further cross-examination and of bringing forward additional evidence. In our judgment there was a mistrial.

In deciding upon a new trial we are guided by the provisions of section 2 (7) of the Laws Declaratory Act, Cap. 148, R.S.B.C. 1936, requiring that in any cause pending before the Court all remedies shall be given to determine "completely and finally" the questions in controversy between the parties in order to avoid multiplicity of legal proceedings. Nor are we unmindful that although the learned judge directed the amendment (prejudicially as we find) nevertheless it became void by lapse of time under rule 311.

King v. *Wilson* (1904), 11 B.C. 109, was a case in which an amendment essential to support the judgment was not asked for in the Court below and the case proceeded to judgment without it. On appeal to the Full Court, counsel stated that if the amendment had been made at the trial he would have called evidence to meet it (p. 113). The Court said it appreciated that evidence "might have been called" in respect thereto. The Full Court then adopted the course of giving leave to make the amendment which ought to have been made below and directed a new trial.

We might have adopted the same course pursued in *King* v. *Wilson*, but the different and more complex circumstances in this case (some of them appearing on the motion to strike out the reasons for judgment of 27th April, which we refused for reasons stated during the hearing of the appeal), has led us to confine our direction to a new trial, thus leaving it open to the parties to apply to the Court below for such amendment or amendments as

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may appear advisable in all the circumstances which have emerged.

A new trial is directed and the appeal allowed accordingly. Costs as ordered orally at the conclusion of the appeal.

Appeal allowed; new trial directed.

Solicitor for appellants: *F. S. Cunliffe.*
Solicitor for respondent: *V. B. Harrison.*

TAYLOR AND TAYLOR v. THE VANCOUVER GENERAL HOSPITAL *ET AL.*

C. A.
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Oct. 22.

Practice — Appeal to Privy Council — Application for leave — Discretion — "Great general or public importance or otherwise" — Privy Council rule 2 (b).

A motion to the Court of Appeal for leave to appeal to the Privy Council from the decision of the Court of Appeal dismissing an appeal from an order refusing a trial by jury in this action was dismissed.

Bradshaw v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 111, followed.

MOTION to the Court of Appeal for leave to appeal to the Privy Council from the decision of the Court of Appeal (reported, *ante,* p. 42) dismissing an appeal from an order of COADY, J. of the 26th of June, 1945, dismissing the plaintiffs' application that the action be tried by a judge with a jury.

The motion was heard at Victoria on the 22nd of October, 1945, by O'HALLORAN, ROBERTSON and BIRD, JJ.A.

G. F. McMaster, for the motion, referred to *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 111; *Creasey* v. *Sweny* (1942), 57 B.C. 457; *Reid* v. *Reid,* [1941] N.Z.L.R. 966; *Phillips* v. *A. Lloyd & Sons, Ld.,* [1938] 2 K.B. 282; *Charles Osenton & Co.* v. *Johnston* (1941), 57 T.L.R. 515; *Evans* v. *Bartlam,* [1937] A.C. 473, at p. 480.

Bull, K.C., contra, referred to *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 111; *Ice Delivery Co.* v.

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Peers (1926), 36 B.C. 559; *Van Hemelryck* v. *William Lyall Shipbuilding Co.* (1921), 90 L.J.P.C. 96.

L. St. M. Du Moulin, for other defendants.

O'HALLORAN, J.A. (*per curiam*): This is a motion for leave to appeal to the Judicial Committee from a judgment of this Court rendered on 2nd October, 1945, dismissing an appeal from an order refusing a trial by jury in this case.

We have to decide whether the question involved is

> one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision,

and see rule 2 (*b*) relating to appeals to the Privy Council. The matter seems to be concluded by the decision of this Court in *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 111, in which leave to appeal to the Judicial Committee was refused in a case wherein an order for trial by jury had been sustained in this Court. It appears that the Judicial Committee also refused to grant leave in the *Bradshaw* case—see [1927] W.N. 47.

Counsel supporting the motion submitted that a question of "great general or public importance" existed here because he thought that this Court, contrary to *Evans* v. *Bartlam,* [1937] A.C. 473 and the true *ratio* of *Charles Osenton & Co.* v. *Johnston,* [1942] A.C. 130, had decided it could not interfere with a discretionary order on appeal unless the Court below had acted on a wrong principle.

This Court did not go that far. Our brother BIRD (with whom we agree in that respect) expressed himself in his reasons for judgment on the appeal in language almost identical with that which Viscount Simon, L.C. (with whom Lord Thankerton, Lord Macmillan, Lord Romer, and Lord Clauson concurred) used in *Blunt* v. *Blunt,* [1943] A.C. 517, at p. 527 in referring to *Charles Osenton & Co.* v. *Johnston*:

> " . . . , appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified."

The motion is dismissed.

Motion dismissed.

SMITH v. HALL.

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1945
Sept. 26;
Oct. 12.

Contract—Sale of automobile—Ceiling price—Statement of defendant that ceiling price was $750—Later found that ceiling price was $603.49—Refusal of defendant to accept $603.49—Action for specific performance—Dismissed—Appeal.

The defendant advertised in a newspaper for the sale of her motor-car "not over ceiling price." The plaintiff saw her and in the course of negotiating she told him the ceiling price was $750. He agreed to purchase the car and paid her $125 on account. The next day he found that the ceiling price was $603.49 and on seeing the defendant he offered her the balance of the purchase price on the ceiling-price basis but she refused to accept, claiming that the contract price was $750. In an action for specific performance, it was found by the trial judge that when the plaintiff paid $125 on account he thought the ceiling price was $750 and contracted to purchase for that sum and he dismissed the action.

Held, on appeal, affirming the decision of SARGENT, Co. J., that the evidence supported the findings of the trial judge and the appeal should be dismissed.

APPEAL by plaintiff from the decision of SARGENT, Co. J. of the 28th of March, 1945, in an action for specific performance of an agreement for the purchase of an automobile and damages. On the 23rd of January, 1945, the defendant advertised in the Vancouver Sun for the sale of a Chevrolet coach "not over ceiling price. No agents." On the same day the plaintiff agreed with the defendant to purchase the car at a price not above the lawful ceiling price and paid her $125 on account of the purchase price and the defendant gave the plaintiff a transfer of the licence of the automobile and the key to the same. The defendant then told the plaintiff that the ceiling price was $750. Three days later the plaintiff, finding that the ceiling price for the car was $603.49, tendered the defendant $478.45, being the balance of the ceiling price. She refused to accept this sum claiming that the purchase price agreed upon was $750. It was held on the trial that the plaintiff contracted for the purchase of the car for $750, that the ceiling price was $603.49, that there was a mutual mistake and the action failed.

The appeal was argued at Victoria on the 26th of September, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

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Bull, K.C., for appellant: This is an action for specific performance of an agreement for the purchase of a motor-car. The agreement was that the price was the ceiling price under the regulations. It is unlawful to buy at a price higher than the ceiling price. The defendant told the plaintiff that the ceiling price was $750. She was wrong in this as the plaintiff later found the ceiling price was $603.49. The words "no agent" in the advertisement was found by the learned judge to apply to the plaintiff because he is a dealer in cars. The words have no relevancy to this case at all: see *Liversidge* v. *Sir John Anderson,* [1942] A.C. 206, at p. 244. The defendant said "By agent I mean dealer." This should not be accepted. On the question of "mutual mistake" as found below, mistake was never pleaded: see Kerr on Fraud and Mistake, 5th Ed., 632; Benjamin on Sale, 7th Ed., 105. There was a contract at the ceiling price: see Anson's Law of Contract, 17th Ed., 45. The whole basis of Smith's acceptance was the ceiling price. He contracted on the ceiling price.

C. C. Bell, for respondent: The price of $750 was agreed to by the parties. The contract cannot be performed without a violation of the law and is void: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 150, par. 213. The moment the defendant found that the ceiling price was $603.49, she withdrew her offer: *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202. The defendant pleads the Wartime regulations. The evidence completely negatives the statement that the ceiling price was the contract price. No contract was entered into.

Bull, in reply: The contract was made on the ceiling price, the amount to be ascertained.

Cur. adv. vult.

12th October, 1945.

O'HALLORAN, J.A.: In my judgment the learned trial judge reached the right conclusion. I would dismiss the appeal.

ROBERTSON, J.A.: The defendant inserted an advertisement to sell her car at "not over ceiling price." The plaintiff saw her. She told him the ceiling price was $750, and he accepted her statement. He says that his agreement with her was to pay the

ceiling price. She says the agreement was that if the ceiling price was $750 she would sell; if not, she would return the $125 which the plaintiff had paid on account. The next day he returned and stated the ceiling price was really $603.49. She said she would not take less than $750. Then he said he did not want to do business on that basis, meaning by that he was not going to get himself into trouble as he would have done had he paid more than the ceiling price. He refused to pay the $750.

The learned judge has found that

when the plaintiff paid the sum of $125 on account of the purchase of this car he thought the ceiling price was $750 and contracted for the purchase of the car for that sum.

The appellant's counsel admitted that if this finding were sustained the appeal must fail. I think the evidence supports it.

The appeal is dismissed.

SIDNEY SMITH, J.A.: The judge has found that the contract herein was for the purchase of the car for the sum of $750 and there was ample evidence on which to base this conclusion. At the time the contract was entered into both parties thought this sum represented the ceiling price set by the appropriate governmental regulations. In this they were both mistaken. It transpired later that the ceiling price was $603.49. The contract therefore fell to the ground. Thereafter the plaintiff endeavoured to enter into another contract with the defendant for the purchase of the car for the sum of $603.49. In this he failed.

The appeal must therefore be dismissed with costs.

Appeal dismissed.

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

Solicitors for respondent: *Bell & Munn.*

C. A.
1945
Oct. 2, 3, 4, 12.

REX v. YOUNG AND McQUEEN.

Criminal law—Conspiracy—In possession of morphine—Conviction—Appeal from sentence by Crown—Sentence increased from three to five years.

The defendants were convicted on a charge of conspiring to commit an indictable offence, namely, to have in their possession a drug, to wit, morphine, and were sentenced to a term of three years in the penitentiary. They appealed from conviction and the Crown appealed from sentence on the ground that the sentence was not commensurate with the gravity of the offence and was not in uniformity with sentences passed on other prisoners for similar offences.

Held, that the appeal from conviction be dismissed, but the Crown appeals be allowed by increasing the sentences from three years to five years' imprisonment in each case.

APPEAL by accused from their conviction by MACFARLANE, J. and the verdict of a jury at the Spring Assize at Vancouver on the 26th of June, 1945, on a charge that they did

conspire, combine, confederate and agree together and with a person or persons unknown to commit an indictable offence, to wit, to have in their possession a drug, to wit, morphine,

and appeal by the Crown from sentence on the grounds that

The sentence is not commensurate with the gravity of the offence . . . and is not in uniformity with sentences passed under similar circumstances on other prisoners for similar offences.

McQueen and Young with one Posner were tried together. On January 9th, 1945, Posner went to Toronto by airplane. On the next day he went to the jewellery store of one Grodsky and put in a long distance call to Vancouver to a Mrs. Woodward at 1178 Davie Street, evidence of the conversation being given by Grodsky. Through information received two officers of the Royal Canadian Mounted Police went to the Canadian National Express office on the 14th of January where they examined a parcel addressed to accused Young at 1178 Davie Street. In the toe of a slipper which was in the parcel they found an ounce of morphine and after taking a sample they tied up the parcel to look as it was before and left it at the express office. From there it was delivered at 1178 Davie Street on January 15th, a number of police officers being stationed in the house. On that day Posner and McQueen came to the premises, had a conversation with Mrs. Woodward and then Posner took possession of this

parcel containing the slippers and morphine and as he with McQueen came out, the police officers apprehended them. While Posner was being apprehended, he threw the parcel to McQueen who was ahead of him going out of the house. McQueen tried to catch it, but was unable to do so and it landed in a hedge in front of the house. They were both arrested, Young being arrested at 751 Seymour Street where he lived with Posner.

The appeal was argued at Victoria on the 2nd, 3rd and 4th of October, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Lorne H. Jackson, for appellant Young: This is a conspiracy charge. The evidence is entirely circumstantial. The principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227 has not been fulfilled: see *Sweeney* v. *Coote,* [1907] A.C. 221. The Crown should not have charged conspiracy: see Tremeear's Criminal Code, 5th Ed., 639; *Reg.* v. *Boulton* (1871), 12 Cox, C.C. 87; *Rex* v. *Goodfellow* (1906), 11 O.L.R. 359. Young suffered from evidence that was not against him. There was no evidence of guilty knowledge by Young. That the facts are consistent with innocence see *Rex* v. *Dawley* (1943), 58 B.C. 525; *Fraser* v. *Regem,* [1936] S.C.R. 296; *Rex* v. *Comba,* [1938] S.C.R. 396; *Rex* v. *Anderson* (1938), 70 Can. C.C. 275, at p. 305; *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491; *Rex* v. *Epstein* (1925), 43 Can. C.C. 348. Posner was an addict and wanted the morphine for himself: see *Dozois* v. *Pure Spring Co. Ltd. and Ottawa Gas Co.,* [1935] S.C.R. 319, at p. 322. On the doctrine of reasonable doubt see *Rex* v. *Hutchinson* (1904), 11 B.C. 24, at p. 32; *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491. There is a defect on the face of the indictment: see *Brodie* v. *Regem,* [1936] S.C.R. 188; *Rex* v. *Imperial Tobacco Co.,* [1940] 1 D.L.R. 148, at p. 153. There is no evidence of possession by Young: see *Rex* v. *McCutcheon* (1916), 25 Can. C.C. 310; *Paradis* v. *Regem,* [1934] S.C.R. 165. There was no warning to the jury as to evidence against Young: see Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 564, par. 637; *Hill* v. *The Manchester and Salford Water Works Company* (1833), 5 B. & Ad. 866; *Rex* v. *West* (1925), 44 Can. C.C. 109; *Rex* v. *Segal* (1925), 45 Can. C.C. 32. Overhearing a telephone con-

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versation is hearsay: see *Stein* v. *Regem* (1928), 50 Can. C.C. 311. On the insufficiency of the evidence to involve Young see *Reg.* v. *Blake* (1844), 6 Q.B. 126, at pp. 137-8; Archbold's Criminal Pleading, Evidence & Practice, 31st Ed., 330; *United States* v. *Ross* (1875), 92 U.S. 281, at p. 283; *Rex* v. *Beadon* (1933), 24 Cr. App. R. 59, at p. 63; *MacAskill* v. *Regem,* [1931] S.C.R. 330. That it is not an indictable offence see *Rex* v. *Kakelo,* [1923] 2 K.B. 793, at p. 797; *Rex* v. *Scott and Killick,* [1932] 2 W.W.R. 124, at p. 128.

McAlpine, K.C., for McQueen, adopted the argument of *Jackson* on misdirection and non-direction.

Wismer, K.C., for the Crown: This is an indictable offence. The police examined the parcel sent by Posner to Young and found the morphine and they were in possession of it when arrested by the police. *Hodge's Case* (1838), 2 Lewin, C.C. 227 applies here. The evidence is circumstantial: see *Rex* v. *Macchione* (1936), 51 B.C. 272; *McLean* v. *Regem,* [1933] S.C.R. 688. On conspiracy see Tremeear's Criminal Code, 5th Ed., 636 and cases there cited on circumstantial evidence. As to proof of no licence or other lawful authority see *Rex* v. *Oliver* (1943), 29 Cr. App. R. 137, at p. 142. They were guilty of conspiracy whether they had possession or not. On credibility see *Rex* v. *Melyniuk and Humeniuk* (1930), 53 Can. C.C. 296. On appeal against sentence they are guilty of conspiracy and had in their possession an ounce of morphine. The sentence of three years is inadequate and not in conformity with sentences in similar cases: see *Rex* v. *Lim Gim* (1928), 39 B.C. 457.

McAlpine, in reply on sentence, referred to *Rex* v. *Zimmerman* (1925), 37 B.C. 277, at pp. 278-9; *Rex* v. *Carr,* [1937] 3 D.L.R. 537, at p. 540; *Rex* v. *Gallagher,* [1924] 4 D.L.R. 1059, at p. 1069; *Rex* v. *Tews* (1926), 45 Can. C.C. 116; *Rex* v. *Pavalini* (1941), 56 B.C. 444, at p. 447; *Rex* v. *Jung Quon Chong* (1937), 52 B.C. 317, at p. 320.

Cur. adv. vult.

12th October, 1945.

Per curiam (O'HALLORAN, J.A.): We are all of opinion that the appeals of these two men against their conviction for conspiracy to have possession of narcotic drugs must be dismissed.

The case against the appellant Young was entirely circumstantial and his counsel based an elaborate argument on that foundation. The Court is satisfied, however, after an examination of the evidence, that the inculpatory facts are incompatible with his innocence and are incapable of any other reasonable hypothesis than that of his guilt. In view of the objections taken to the charge to the jury it is in point to add also that it was not demonstrated that the learned judge failed in his duty when instructing the jury upon that important aspect of the case.

In the witness box Young volunteered an explanation which the jury, after listening to his cross-examination by counsel for the Crown in the light of all the evidence could not rationally accept as true, or as reasonable if it were not true. The collapse of that explanation left no other hypothesis of innocence open. The only legitimate inferences which remain point to his guilt with such a compelling degree of practical certainty that he must be held guilty of conspiracy as charged.

The Crown appealed against the sentences of three years' imprisonment imposed on Young and McQueen. It was submitted that the sentences are inadequate in the circumstances disclosed in the evidence and that the learned judge did not attach the weight that conditions on this coast demand to the fact that these men were found guilty of planning to import a narcotic drug in such quantity that the only reasonable inference is that it was intended for distribution in defiance of the laws which seek to curb this demoralizing traffic. It was urged on behalf of the two men that they had not been previously convicted.

This Court has long recognized that the public interest calls for a much more severe sentence in the case of distributors of narcotic drugs than in the case of their victims the addicts and users as such. And obviously the importation of narcotic drugs has wider ramifications than distribution *solus*.

In our judgment a sentence of five years' imprisonment more adequately reflects the flagrancy of the crime for which the two men have been convicted. The sentences are increased from three years to five years' imprisonment in each case, and the Crown appeals against sentence are allowed to that extent.

Appeals from conviction dismissed; appeals from sentence allowed.

C. A.
1945
Oct. 15, 18.

REX v. CAREY.

Criminal law—Charge of attempting to break and enter a shop with intent to steal—Circumstantial evidence only—Facts not inconsistent with accused's innocence—Appeal—Conviction quashed.

The accused with one Reynolds was charged with an attempt to break and enter a shop with intent to commit the indictable offence of theft. Between 3 p.m. and 11.30 p.m. on the 24th of June, 1945, a window in the shop in question had been broken and the glass removed therefrom. At about 11.30 on the same night Carey and Reynolds were seen by police officers coming out of the alley which led past the rear of the shop premises. The officers questioned them and Reynolds was found to have a screwdriver in his possession, but there was no evidence of Carey being in possession of anything of an incriminating nature. Reynolds was sentenced to two years' imprisonment and Carey one year.

Held, on appeal, reversing the conviction by deputy police magistrate McInnes, that the circumstances of Carey's discovery in the vicinity of the premises in question and in the company of Reynolds, whose finger-prints were found on the broken glass, though highly suspicious, nevertheless are not so conclusive of guilt as to justify conviction upon the proper application of the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136.

APPEAL by accused from his conviction by W. W. B. McInnes, Esquire, deputy police magistrate, Vancouver, on a charge of unlawfully attempting to break and enter the shop of Crown Cartage Company Limited, Homer Street, Vancouver, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels of said company. The facts are sufficiently set out in the head-note and reasons for judgment.

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

Hurley, for appellant: The evidence against the accused was that of the manager of the shop in question and two police officers. The evidence was entirely circumstantial, the finger-prints found only applying to the man with whom the accused was found. There is not that certainty which the law requires and does not come within *Hodge's Case* (1838), 2 Lewin, C.C. 227, at p. 228.

Martin, K.C., for the Crown: The two men were found together in the alley close to the shop where the window had

recently been broken. The other man had a screwdriver in his pocket. There was evidence of common design.

Hurley, replied.

Cur. adv. vult.

18th October, 1945.

Per curiam (BIRD, J.A.): The accused Carey, a youth of about 18 years of age, was convicted jointly with one Reynolds, before deputy police magistrate McInnes, at Vancouver, B.C., under sections 460 and 570 of the Criminal Code, of an attempt to break and enter a shop with intent to commit the indictable offence of theft.

Counsel for the accused founds this appeal from conviction upon two grounds: (1) That upon the evidence there was reasonable doubt of the guilt of the accused, the benefit of which was not given, and (2) the case for the Crown depended wholly upon circumstantial evidence and the learned magistrate failed properly to apply the principles of law applicable to circumstantial evidence.

The evidence against the accused men showed that on Sunday, June 24th, 1945, between 3 p.m. and 11.30 p.m., a window in the premises of the Crown Cartage Company, 1293 Seymour Street, Vancouver, B.C., had been broken and the glass removed therefrom. About 11.30 p.m. on the same night Carey and Reynolds were seen by police officers coming out of the alley which led past the rear of the Crown Cartage Company's premises. The officers stopped the two men and questioned them. Reynolds was found to have a screwdriver in his possession, but the evidence does not disclose whether Carey was searched or that he was found to be in possession of anything of an incriminating nature. The officers took the men up the alley to the rear of the Crown Cartage Company's premises. Broken pieces of glass were then found on the ground nearby, some of which, it was later discovered, bore the finger-prints of the accused Reynolds. The evidence did not disclose that any finger-prints of the accused Carey were found on the broken glass or elsewhere in the vicinity. Following an examination made of the window by the police officers, they swore that in response to questions then put to the men they said "they knew nothing about it. They had gone up

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the alley to relieve themselves." Evidence in support of this statement was found. Carey, who was not represented by counsel in the Court below, did not give evidence, although Reynolds testified to the same effect as the statements which were reported by the police to have been made by the men to them when at the rear of the Cartage Company premises. Reynolds said on cross-examination that he did not think that he had touched the broken glass, though he might have done so.

The Crown's case against Carey depends for the most part, if not wholly, upon circumstantial evidence. The circumstances of Carey's discovery in the vicinity of the Cartage Company's premises and in the company of Reynolds, whose finger-prints were found on the broken glass, though highly suspicious, nevertheless are not, in our opinion, so conclusive of guilt as to justify conviction upon the proper application of the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136. In our judgment the circumstances cannot be said to lead irresistibly to a conclusion of Carey's guilt, to the exclusion of any other rational hypothesis, *cf.* the judgment of this Court delivered March 26th, 1945, in *Rex* v. *MacAvity and Breen* (unreported) and *Rex* v. *Comba,* [1938] S.C.R. 396.

The appeal from conviction is therefore allowed and the conviction set aside.

Appeal allowed.

C. A. 1945

Nov. 29.

REX v. CAPELLO. REX v. GORDON. REX v. CRAWFORD.

Criminal law—Summary trial—Consent to—Compliance with statute—Evidence of—Official transcript—Criminal Code, Secs. 774 and 781.

The accused were convicted on charges of stealing an automobile. On appeal, objection to the jurisdiction of the magistrate was raised on the ground that the official transcript of the proceedings in the Court below disclosed that the learned magistrate failed to comply with section 781 of the Criminal Code in that he did not ask the appellants if they consented to trial summarily by him. Counsel for the Crown contended that failure to observe the jurisdictional requirements in question was cured because the formal conviction in each case states the accused consented to be tried summarily.

Held, that the formal conviction is something which is drawn up after judgment convicting accused. The official transcript of what took place discloses that jurisdictional requirements were not complied with and there can be no proper conviction. A formal document drawn up afterwards cannot displace the accepted official transcript of what actually took place. No proper trial took place and the convictions must be quashed.

APPEAL by accused from their conviction by deputy police magistrate Mackenzie Matheson at Vancouver on the 21st of August, 1945, on a charge of stealing an automobile, the property of one Gustave H. Sward. The relevant portion of the official transcript of the proceedings before the magistrate reads as follows:

COURT: You have the option to be forthwith tried by me without the intervention of a jury or to remain in custody or under bail as the Court decides to be tried in the ordinary way by the Court having criminal jurisdiction. Do you understand what that means?

Accused: Yes, sir.

COURT: All of you?

Accused: Yes, sir.

COURT: How do you plead?

Gordon, Capello and Crawford plead not guilty.

The appeal was argued at Vancouver on the 29th of November, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Wismer, K.C., for defendant Capello: The learned magistrate acted without jurisdiction in not complying with sections 774 and 781 of the Criminal Code. The accused must consent to be tried by the magistrate. The official transcript shows that their consent was not given. The Court is bound by the official transcript: see *Rex* v. *James* (1918), 31 Can. C.C. 4; *Rex* v. *McGregor* (1905), 10 Can. C.C. 313; *Rex* v. *Bonnis* (1927), 47 Can. C.C. 193, at p. 195; *Baron* v. *Regem*, [1930] S.C.R. 194; *Rex* v. *Crooks* (1911), 19 Can. C.C. 150.

Gill, for defendant Crawford.

Hurley, for defendant Gordon.

G. W. Scott, for the Crown, referred to *Rex* v. *Sciarrone* (1910), 1 O.W.N. 416. The cases cited are distinguishable as they deal with other grounds of appeal. There was a substantial compliance with the section and the formal conviction shows there was consent by accused to be summarily tried.

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Wismer, in reply: Consent cannot be implied: see *Rex* v. *Crooks* (1911), 19 Can. C.C. 150.

Per curiam (O'HALLORAN, J.A.): In quashing the convictions at the conclusion of the hearing of the appeals the Court intimated brief written reasons would be handed down.

Counsel for the appellants took the jurisdictional point that the learned magistrate failed to comply with Code section 781, subsections 2 and 3, inasmuch as he did not ask the appellants if they consented to trial summarily by him. The official transcript of what took place in the Court below discloses that the jurisdictional objection is well taken; and *cf. Rex* v. *Bonnis* (1927), 47 Can. C.C. 193; *Rex* v. *James* (1918), 31 Can. C.C. 4 and *Rex* v. *Dauphinee* (1934), 63 Can. C.C. 90.

Counsel for the Crown sought to argue that the failure to observe the jurisdictional requirements in question was cured in effect because the formal conviction in each case states the accused consented to be tried summarily. But the formal conviction is something which is drawn up after the trial Court has given its judgment convicting the accused. It must be manifest that if the official transcript of what took place discloses that jurisdictional requirements were not complied with, then there can be no proper conviction. It follows that no formal document drawn up afterwards can displace the accepted official transcript of what actually took place.

For the foregoing reasons it is held that no proper trial took place and the convictions must be quashed.

Convictions quashed.

CHONG HING WAH KEE COMPANY LIMITED v. G. H. CHEN, OTHERWISE KNOWN AS G. Y. CHEN.

C. A.
1945
Oct. 12.

Practice—Appeal—Jurisdiction—Landlord and Tenant Act—County Courts Act—Leave to appeal—Judge acting as arbitrator by consent of parties —R.S.B.C. 1936, Cap. 58, Secs. 118 and 119; Cap. 143, Sec. 19 et seq.

On appeal from an order made under section 19 of the Landlord and Tenant Act directing the issuance of a writ to the sheriff of the county of Vancouver to place the respondents in possession of designated premises held by the appellant tenant, two jurisdictional objections were advanced, first, that the appellant had not obtained leave from the learned judge below or from this Court as required by section 119 of the County Courts Act and secondly, that no appeal lies because the learned judge acted as a referee or arbitrator between the parties, the learned judge below having stated "The matter having been left to me by arrangements between counsel, it seemed to me I was acting more in the capacity of a referee than as a judge."

Held, that having consented to a determination of the matter in a manner which required the judge to depart from the course of Court procedure, the parties must be held to have taken his decision as that of an arbitrator, and hence his decision must be regarded as extracurial and without appeal.

APPEAL by the tenant from the decision of BOYD, Co. J. of the 16th of May, 1945, granting an application of the landlord Chong Hing Wah Kee Company Limited that the tenant G. H. Chen, otherwise known as G. Y. Chen, do deliver up possession of the lands and premises known as 540 Gore Avenue in the city of Vancouver to the landlord and that a writ do issue to the sheriff of the County Court of Vancouver to place the landlord in possession of said premises.

The appeal was argued at Victoria on the 12th of October, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Maguire, for appellant: An order for possession of the premises in question was granted as the premises have been condemned by the authorities. It is submitted there is no power to make the order.

Pratt, for respondent: The appellant has not received leave of the county court or of this Court to appeal as required by section 119 of the County Courts Act: see *Yue Shan Society* v.

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Chinese Workers Protective Association (1943), 60 B.C. 121. Until leave is given he cannot be heard.

Maguire: Section 118 of the County Courts Act gives us the right of appeal. The hearing of the appeal should be allowed.

Pratt: In fact the learned judge acted as arbitrator in this matter by consent and there is no appeal: see *Harris* v. *Harris* (1901), 8 B.C. 307; *Loane* v. *The Hastings Shingle Mfg. Co.* (1925), 35 B.C. 485; *Eade* v. *Winser & Son* (1878), 47 L.J.C.P. 584.

Maguire: By reason of the rental regulations, the learned county court judge has no jurisdiction.

Per curiam (O'HALLORAN, J.A.): Counsel for the respondent landlords submitted that the Court is without jurisdiction to entertain the appeal now before us from an order of BOYD, Co. J., and made under section 19 *et seq.* of the Landlord and Tenant Act, Cap. 143, R.S.B.C. 1936, directing the issuance of a writ to the sheriff of the county of Vancouver to place the respondents in possession of designated premises held by the appellant tenant.

Two jurisdictional objections were advanced; first that the appellant has not obtained leave from the learned judge below or from this Court to appeal as required by section 119 of the County Courts Act. And secondly that no appeal lies because the learned judge acted as a referee or arbitrator between the parties. Counsel for the appellant stated he had not invoked the supervisory jurisdiction of section 23 of the Landlord and Tenant Act.

Counsel for the appellant at first argued that section 118 of the County Courts Act rendered section 119 inapplicable. But section 118 confines its operation to "actions," which by the interpretation section (section 2) of the County Courts Act are restricted to civil proceedings commenced in manner prescribed by rules of Court. The impugned proceedings cannot be so described, for they are commenced in the manner prescribed by the Landlord and Tenant Act, *supra*. Appellant's counsel then sought the exercise of this Court's jurisdiction to grant leave under section 119 which relates to a "cause or matter." I do not doubt that the proceedings under review are "matter" within section 119 and *cf.* the reference in *Royal Typewriter Agency* v.

Perry & Fowler (1928), 40 B.C. 222 by MARTIN, J.A. at p. 224.

But counsel for the respondent countered by urging this was not a case in which it was "reasonable and proper" (repeating the language of section 119), to grant leave, since no appeal lies because the learned judge had acted as a referee or arbitrator between the parties, as appears in more than one place in his reasons for judgment. The learned judge observed there amongst other things:

> The matter having been left to me by arrangement between counsel it seemed to me I was acting more in the capacity of a referee than as a judge.

It is the judgment of the Court that having consented to a determination of the matter in a manner which required the judge to depart from the course of Court procedure, the parties must be held to have taken his decision as that of an arbitrator, and hence his decision must be regarded as extracurial and without appeal, and *cf. Harris* v. *Harris* (1901), 8 B.C. 307 which applied *Eade* v. *Winser & Son* (1878), 47 L.J.C.P. 584; and *cf.* also *Loane* v. *The Hastings Shingle Mfg. Co.* (1925), 35 B.C. 485 in which MACDONALD, C.J.A. referred to *The Canadian Pacific Railway Company* v. *Fleming* (1893), 22 S.C.R. 33 and quoted the observation of Lord Halsbury, L.C. in *Burgess* v. *Morton,* [1896] A.C. 136, at p. 138:

> . . . that where with the acquiescence of both parties a judge departs from the ordinary course of procedure . . . , it is incompetent for the parties afterwards to . . . treat the matter as if it had been heard in due course.

In the circumstances the appeal must be quashed and with costs of the appeal to the respondents and *cf. In re Vancouver Incorporation Act* (1902), 9 B.C. 373.

Appeal quashed.

Solicitor for appellant: *D. W. F. McDonald.*
Solicitor for respondent: *F. D. Pratt.*

S. C.
1945
June 20;
July 6.

IN THE MATTER OF THE EXCISE ACT, 1934, CANADA STATUTES 1934, CAP. 52 AND AMENDMENTS AND IN THE MATTER OF A CERTAIN 1940 DE LUXE FORD TUDOR MODEL 85 HP. SERIAL No. 1A7117 AND MOTOR No. 1A7117 THE PROPERTY OF HAZEL HELEN GORDON KNOWN AS HAZEL HELEN GORDON RYCER.

Excise Act, 1934, The — Automobile illegally used by owner — Forfeiture under Act—Claim by innocent holder of interest under a conditional sale contract—"All reasonable care"—Construction—Can. Stats. 1934, Cap. 52, Sec. 169A (2) (b).

A motor-car was sold to the purchaser under a conditional sale contract and the contract was discounted by the Traders Finance Corporation Ltd. The motor-car was subsequently seized for a violation of The Excise Act, 1934, by the purchaser. The discounting company then applied under section 169A of said Act for an order that its interest in the motor-car was not affected by such seizure. The discounting company relied on the representations made to it by the vendor company as appearing on the assignment of the conditional sale contract and on the answers given by the purchaser to questions appearing on the back of the contract and it had confidence in the vendor as a reliable, dependable company with whom it had done business of a similar nature for seven years. The only question arising was whether the applicant, under the circumstances, exercised "all reasonable care" within the meaning of the Act before discounting the conditional sale contract.

Held, that "all reasonable care" in a business transaction of this nature may fairly be confined to the care regarded as reasonably necessary by a business man in a business transaction. Under all the circumstances of this case, the interest of the applicant is not affected by the seizure.

APPLICATION by the Traders Finance Corporation Ltd. under section 169A of The Excise Act, 1934, for an order that its interest in a motor-car seized for a violation of said Act by the purchaser of the car, is not affected by such seizure. The facts are set out in the reasons for judgment. Heard by COADY, J. at Vancouver on the 20th of June, 1945.

Pelton, for plaintiff.
Sheppard, for defendant.

Cur. adv. vult.

6th July, 1945.

S. C. 1945

IN RE THE EXCISE ACT, 1934

COADY, J.: This is an application under section 169A of The Excise Act, 1934, made by the Traders Finance Corporation Ltd. for an order that its interest in a motor-car seized for some violation of the Act by the purchaser of the car is not affected by such seizure. The motor-car was sold to the purchaser by Moynes Motors and Transfer Ltd. of Trail, B.C., under a conditional sale contract which contract was discounted by the applicant at Vancouver, B.C. The discounting company, it would appear, relied on the representations made by the vendor company as appearing on the assignment of the conditional sale contract to the finance company and on the answers given by the purchaser to certain questions appearing on the back of the contract. It had confidence, too, in the vendor company with which it had done business of a similar nature over a period of seven years or more, and considered it a reliable dependable company. In fact there is no suggestion to the contrary. The only question arising on this application is: Did the applicant under the circumstances here existing exercise "all reasonable care" within the meaning of the Act, before discounting the conditional sale contract?

In the assignment of the contract executed by the selling company appear the following questions and answers:

Have you any reason to believe the purchaser violates any laws concerning liquor or narcotics? No.

Was this purchaser's name ever (to your knowledge) rejected by any other finance company, bank or banker? No.

Was the finance company under the circumstances here therefore entitled to rely on this and on the other information appearing on the contract signed by the purchaser wherein it is indicated that the car is purchased for private use?

A reading of the cases under this section discloses a great diversity of judicial opinion as to what constitutes "all reasonable care." That is not surprising since it seems to me what is "all reasonable care" must depend on the facts and circumstances disclosed in each case. The legislation is not intended to place an unreasonable burden upon the lienholder or mortgagee of a motor-car. The burden is satisfied, it seems to me, if reasonable precaution which must depend on the circumstances of each case

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has been taken. It must be recognized, I think, that enquiry cannot in all cases be made in the locality of the purchaser since this is practically impossible in many cases, particularly in this Province, for in addition to the cost it would necessitate such delay and inconvenience as to make it extremely difficult for many of these finance and mortgage companies to carry on business, and render it impossible too for motor-car dealers to give prompt service to customers and would in many cases cause an unwarranted delay in the completion of a transaction involving the sale or mortgage of a motor-car. And while the particular hardship involved in any case is not to be taken as a guide to the interpretation of the Act, it is nevertheless an element, I think, to be taken into consideration in coming to a conclusion as to whether "all reasonable care" has been exercised under all the circumstances of any particular case. What was said by Dysart, J. in *Northwest Mortgage Co.* v. *Commissioner of Excise,* [1944] 2 W.W.R. 90, at p. 94, appeals to me as a fair statement of what Parliament intended:

> For these reasons I am of the opinion that "all reasonable care" does not necessarily involve or imply that the mortgagee must get a clearance from the police that the mortgagor is not likely to lapse into breaches of penal laws. I think "all reasonable care," in a business transaction of this nature, may fairly be confined to the care regarded as reasonably necessary by a business man in a business transaction. The interpretation placed upon this clause by some of the decisions would make it mean, "all possible care" or, "all conceivable care." That I think is going much too far.

Moreover, in this particular case, if greater enquiry had been made it would not have disclosed anything against the purchaser, from which a conclusion could reasonably be drawn that she was a person likely to use this motor-car in violation of The Excise Act, 1934. It would have disclosed that she had not been guilty of any breach of The Excise Act, 1934, or of any other crime, and it would probably have disclosed too that she was not the wife of the man with whom she was living and that this man had a criminal record but not a record involving any breach of The Excise Act, 1934. But even if this knowledge had been secured upon enquiry before the contract was entered into, I would still hesitate to hold that the applicant was disentitled to relief under section 169A.

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Under all the circumstances of this case it is my opinion that the interest of the applicant is not affected by the seizure.

The Chief Justice of this Court advises me that he expressed similar views as to the construction of this term, "all reasonable care" in an application that came before him for consideration some time ago. He has read my reasons for judgment herein, and he has authorized me to say that he concurs.

Application granted.

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Sept. 17;
Oct. 1;
Nov. 6.

Criminal law—Murder—Adjournment to ascertain whether further evidence for defence available—Circumstantial evidence—Interpreting at trial—Charge—Criminal Code, Sec. 1041, Subsec. 2.

On an application by counsel for appellant briefed by the Minister of Justice for the Indian Department for an adjournment for two weeks in order to ascertain if fresh evidence may be available:—

Held, that applications of this nature should, generally speaking, be supported by some material on affidavit and were it not for the peculiar aspects and circumstances herein the Court would regard the motion with disfavour, but counsel's statement is accepted that there is a possibility of further evidence in favour of the appellant being brought to the Court's attention. As this is a murder case in a distant area of the Province and because of the special circumstances of this case, including the fact that it is supported by the Department of Justice and in order to avoid any possible miscarriage of justice, the adjournment is granted.

On March 13th, 1944, the body of one Mesmer (a trapper) was found by police officers frozen in the ice with face down at a point about 800 yards up the Finlay River from deceased's cabin. He died from the effect of two gunshot wounds, having points of entry in his back. A *post mortem* examination showed that one shot entered deceased when he was standing and the other when he was prone on his face. A 30-30 calibre bullet was found in his body. The accused, an Indian 23 years old, lived with his foster-father and mother in a cabin at Finlay Forks about ten miles from Mesmer's cabin, and upon police officers searching the cabin, they found various articles, including a 300 Savage rifle all of which were proved to have been the property of deceased. When searching, accused handed one of the officers a 30-30 rifle and a buck-skin case containing shells for a 30-30 rifle, accused saying they belonged

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to himself. Tests by a police ballistics expert showed that the rifling marks on the bullet casing found on deceased's body were identical with the rifling marks found on the bullets discharged from accused's rifle. In Mesmer's cabin the police found four or five bottles of lemon extract partly full, one of which was half full containing alcoholic content, the others being non-alcoholic. The accused gave evidence on his own behalf without an interpreter although one was present. He swore that he was in Mesmer's cabin, that Mesmer gave him a drink and after that he got crazy and knew nothing, that he may have gone up the Finlay River, he did not know, that he stayed in Mesmer's cabin all night and the next morning Mesmer's partner Hans Fifer returned to the cabin and he told him "He gave me drunk too much. Maybe I shot him. I don't know nothing, I don't know nothing about it." He then asked Fifer to go down to McDougall's cabin and send a wire for a policeman. On cross-examination he was asked the question "I am asking you and I am suggesting that he was 14 paces ahead of you when you shot him, what do you say to that? What?" Answer: "Yes." Accused was convicted of murder. Counsel bases his appeal on two main grounds: (1) That the trial was unsatisfactory in that the evidence of accused, who is an Indian, and not given through an interpreter, prejudice occurred to him because he only spoke broken English and did not, in his evidence, put his case properly to the jury and this was shown on his cross-examination; (2) that the learned Chief Justice did not charge the jury in accordance with the rule as to circumstantial evidence laid down in *Hodge's Case* (1838), 2 Lewin, C.C. 227.

Held, that in view of the accused's evidence in chief he was not prejudiced by his evidence on cross-examination and there is no single formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language in *Hodge's Case*, but the formula used by the Chief Justice was sufficient. This is a case where section 1014, subsection 2 of the Criminal Code should be applied and the appeal is dismissed.

APPEAL by accused from his conviction by FARRIS, C.J.S.C. and the verdict of a jury at the Spring Assize at Prince George on the 5th of June, 1945, on a charge of murder. On March 13th, 1944, the body of the deceased Mesmer (a trapper and packer) was found lying on his face and frozen in the ice about 800 yards up the Finlay River from Mesmer's cabin. He had been shot twice in the back and a *post mortem* showed that he had been shot first when standing up and the second time when lying on his face. A 30-30 calibre bullet was found in his body. Police officers made a search of a cabin at Finlay Forks about ten miles from Mesmer's cabin where accused lived with his foster-father and mother where they found various articles,

including a watch, a camera and a briefcase as well as a 300 Savage rifle hidden behind a cupboard in the cabin. These articles all belonged to the deceased man. On this occasion the accused handed to one of the officers a 30-30 rifle which accused said belonged to himself with a buckskin case containing shells for a 30-30 rifle. Tests by an expert showed that the rifling marks on the bullet casing found on deceased's body were identical with the rifling marks found upon bullets discharged from the accused's rifle. In Mesmer's cabin the police found four or five partly full bottles of lemon extract, one of which was half full, containing alcoholic content, the contents of the other bottles being non-alcoholic. The accused was an illiterate Indian who spoke very broken English and although an interpreter was present, he gave his evidence without the use of the interpreter. He stated he was in Mesmer's cabin, that Mesmer gave him a drink and after that he got crazy and knew nothing, that he may have gone up the Finlay River, he did not know. He further stated he stayed in Mesmer's cabin all night and on the following morning Mesmer's partner Hans Fifer returned to the cabin and in the course of conversation he said to Fifer:

He gave me drunk too much. Maybe I shot him, I don't know nothing. I don't know nothing about it.

He further said that he asked Fifer to go down to McDougall's cabin to send a wire for a policeman.

The appeal was argued at Victoria on the 17th of September, and the 1st of October, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Wismer, K.C., for accused, applied for an adjournment for two weeks in order to ascertain if fresh evidence may be available.

Maitland, K.C., A.-G., for the Crown: There are no substantial grounds submitted why an adjournment should be granted.

The judgment of the Court on the application was delivered by

SLOAN, C.J.B.C.: Mr. *Wismer*, counsel for appellant and briefed by the Minister of Justice for the Indian Department, requests an adjournment for two weeks in order to ascertain if fresh evidence may be available. The effect of this possible

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evidence has not been disclosed although he indicated the nature of it would be directed to a possible verdict of manslaughter. No material has been filed in support of the adjournment, but Mr. *Wismer* as counsel for the Minister of Justice, states he has been informed by Mr. *Henry Castillou,* solicitor for the appellant, that some aspects of this case require further investigation and Mr. *Wismer* accepts the responsibility of stating to us he is of the opinion that the information received from Mr. *Castillou* is not without foundation and that the Crown is willing to finance this investigation if we are willing to stand this case down.

Applications of this nature should generally speaking be supported by some material on affidavit and were it not for the peculiar aspects and circumstances herein we would regard this motion with disfavour but we accept counsel's statement that there is a possibility of further evidence in favour of the appellant being brought to our attention. The admissibility of such evidence, if and when forthcoming, will, of course, be decided when application is made for its reception.

Mr. *Maitland* opposes the motion but we feel that as this is a murder case in a distant area of the Province and because of the special circumstances of this case, including therein the fact that Mr. *Wismer's* application is supported by the Department of Justice, we would grant the adjournment. We cannot see how the Crown would be prejudiced by a further delay of two weeks, while on the other hand in a murder case special considerations apply in order to avoid any possible miscarriage of justice.

1st October, 1945.

Wismer, on the merits: The evidence was largely circumstantial and there was no proper direction on circumstantial evidence. The word "but" at the end of the learned judge's direction on circumstantial evidence was changed to "of" by the stenographer. The stenographer has no right to change the transcript. If the word "but" is used the charge is wrong: see *McLean* v. *Regem* (1933), 61 Can. C.C. 9, at p. 10; *Rex* v. *Lillian Elliott* (1942), 58 B.C. 96. The language used by the Chief Justice is not clear in any case. The charge was unsatisfactory on the defence raised that he was so drunk he was unable to form an intention to kill. The accused was illiterate and

unable to express himself in English or understand properly the questions put to him. An interpreter was present, but took no part in the proceedings: see *Rex* v. *Meceklette* (1909), 15 Can. C.C. 17, at p. 20.

Maitland: On the evidence there is no doubt that the accused is guilty of the crime charged and is a case where section 1014, subsection 2 of the Code should be applied.

Wismer, in reply, referred to *Rex* v. *Meade* (1909), 2 Cr. App. R. 47; *Rex* v. *Turner* (1944), 30 Cr. App. R. 9, at p. 13

Cur. adv. vult.

6th November, 1945.

SLOAN, C.J.B.C.: I agree with the reasons for judgment of my brother BIRD.

O'HALLORAN, J.A.: In agreeing that the appeal must be dismissed, I take occasion to refer to that part of the appellant's argument in which the sufficiency of the learned judge's charge upon circumstantial evidence was questioned. The jury was instructed that the completed picture of the evidence must point conclusively in only one direction and that is in the direction of the guilt of the accused, because, not only must those circumstances which are proved in evidence be consistent with the accused having committed the act, but they must be of such a nature that they are inconsistent with any rational view of the innocence of the accused.

In my judgment that direction does not offend the principle enunciated in *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136. I regard its language as equivalent to that used in *Hodge's Case.* It is not couched in exactly the same words, but, as I read those words, they convey the same meaning, *cf. McLean* v. *Regem,* [1933] S.C.R. 688, at p. 690, and contain nothing that could mislead a jury acting rationally. In *Rex* v. *Macchione* (1936), 51 B.C. 272, to which counsel for the appellant referred, MARTIN and MACDONALD, JJ.A. were governed, as I understand their judgments, by what they regarded as the confusion inevitably created in the minds of the jury by combining and intermingling the instructions thereon with the direction upon reasonable doubt, when no reference was made to *Hodge's*

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principle in that part of the charge dealing with circumstantial evidence as an independent subject-matter.

I would dismiss the appeal.

ROBERTSON, J.A.: The accused was convicted of murdering Eugene Mesmer. At the trial evidence was given by an expert that one of the bullets found in Mesmer's body came from the accused's rifle; and that at the time of his arrest he had in his possession Mesmer's rifle, watches, cameras, briefcase and other personal property. The accused gave evidence in his own behalf. He admitted being at Mesmer's cabin on February 22nd, 1944; he said that Mesmer gave him one drink. Then he said:

> Then after, I don't know nothing. I got crazy, so I don't know nothing.

That he remembers nothing more until he awoke and found himself lying in the snow holding his rifle. He returned to Mesmer's house and went to sleep. The next day he found Mesmer's body about half a mile from Mesmer's cabin, with his (Mesmer's) rifle beside him, and it was then he took the deceased's rifle. He said that he did not know what had happened, but he returned to Mesmer's cabin, where he found Hans, Mesmer's partner, who had returned. He said to Hans:

> So Eugene; he give me drunk too much. Maybe I shot him. I don't know nothing. I don't know nothing about it.

Then he asked Hans to send a wire for a policeman and Hans then said: "You kill Eugene, you says?" and the accused answered:

> Maybe I killed him. I don't know. He lay in the snow up at Finlay River. He give me drunk too much.

The accused was arrested on 13th March. He had not informed the police of what had taken place.

Accused's counsel bases his appeal on two grounds: (1) He submits that the trial was unsatisfactory in that the evidence of the accused, who is an Indian, was not given through an interpreter, and that through this, prejudice occurred to the accused, because he only spoke broken English and did not, in his evidence, put his case properly to the jury. It was submitted that this was shown by cross-examination. First of all, it must be noted that counsel for the accused said before he called him:

> My Lord, I would like, if possible, to have the interpreter. I am going to

try and get along with this Indian, without going through the interpreter, for every question, but his English is somewhat primitive, and he may have to revert from the English language.

In cross-examination he was asked this question:

How far away was it that you shot Mesmer? Where was his body? From up his home, up the Finlay River, about half a mile.

With respect, this question should not have been allowed. It is well described by counsel for accused as a "double-barrelled question," and although, obviously, the answer was as to the enquiry where the body was, it is submitted the jury might have taken it as an admission that the accused shot Mesmer. The learned judge did not refer to this in his summing-up.

Again the question was asked:

Never mind the drink. I am asking you, and I am suggesting that he was 14 paces, about, ahead of you, when you shot him. What do you say to that—What? Yes.

The learned judge said, with reference to this, in his summing-up:

In cross-examination by the Attorney-General he admitted that he was about 15 paces behind the deceased when he shot him. Now, gentlemen of the jury, in respect to that, while he answered that very clearly, and, of course, if he fully understood that question that would be most significant, but I want to draw your attention to the fact that he is an Indian and there is a possibility that he might not have understood that question and might have been agreeing that it was only 15 paces rather than making the admission. I think, gentlemen, that was the way it rather impressed me, rather than admitting that he actually remembered being 15 paces behind, because I do not think that was consistent with his story, but, nevertheless, that was what he said and it is for you to draw your own conclusion.

In view of the accused's evidence in chief I do not think he was prejudiced by the cross-examination, *supra,* but if necessary I would apply section 1014 of the Code.

It was also urged that the learned Chief Justice did not charge the jury in accordance with the rule as to circumstantial evidence laid down by Baron Alderson in *Hodge's Case* (1838), 2 Lewin, C.C. 227 (see *McLean* v. *Regem,* [1933] S.C.R. 688, at p. 690) when he said:

Circumstantial evidence is the evidence made up of a number of different parts of evidence. It is very much like a picture puzzle; you pick up a piece here, and you pick up a piece there, no one piece in itself being sufficient, but when you get all those pieces together there is a completed picture. But that picture must be, when a completed picture, pointing conclusively in only one direction and that is in the direction of the guilt of the accused, because, not only must those circumstances which are proved in evidence be

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consistent with the accused having committed the act, but they must be of such a nature that they are inconsistent with any rational view of the innocence of the accused.

As was said in *McLean* v. *Regem, supra,* there is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

I think the formula used by the Chief Justice was sufficient. Compare the summing up in the *McLean* case, which was held by the Supreme Court to be sufficient, and that in *Rex* v. *Jenkins* (1908), 14 B.C. 61, which was upheld by the Court of Appeal.

For these reasons I think the appeal should be dismissed.

SIDNEY SMITH, J.A.: I would dismiss this appeal.

BIRD, J.A.: The appellant Alex Prince an illiterate Indian, was convicted of the murder of a trapper, one Mesmer, at a point on the Finlay River, in a remote and sparsely inhabited part of British Columbia, which lies north of the town of Prince George.

The Crown's case, which was founded largely upon circumstantial evidence, showed that on March 13th, 1944, the body of the deceased was found "lying flat on his face," and frozen in the ice at a point some 800 yards up the Finlay River from Mesmer's cabin. He had died from the effect of two gun-shot wounds having points of entry in the deceased's back. The evidence of Dr. Ewart, who performed a *post-mortem* examination, showed that one such wound had been inflicted when the deceased was standing upright, the other when the deceased was in a prone position, lying on his face. In the course of the *post-mortem* examination a 30-30 calibre bullet was found in the body.

Upon a search being made by police officers in a cabin situate at Finlay Forks, some miles from Mesmer's cabin, and then occupied by the accused, his father and mother, there were found various articles, including a watch, a camera and a briefcase, as well as a 300 Savage rifle, the latter having been found hidden behind a cupboard in the cabin. All these articles were proved to have been the property of the deceased man.

At the time the search was made the accused handed to one of the officers a 30-30 rifle, which accused said belonged to himself.

He also identified as his property a buckskin case containing shells for a 30-30 rifle.

In Mesmer's cabin police found four or five partly full bottles containing lemon extract, one of which was about half full of extract, which had an alcoholic content; the contents of the other bottles being non-alcoholic. The accused's father Joe Pierre identified the briefcase as one which the accused had brought to the cabin about March 7th, and which the accused had told him he obtained from one Roy McDougall. MacDougall, called by the Crown, denied that he had either given or sold the briefcase to the accused.

Sergeant Young, a police ballistics expert, gave evidence relative to tests which he had made with the 30-30 shells found in the buckskin case, fired from the accused's 30-30 Winchester rifle. He swore that the rifling marks on the bullet casing found in the deceased's body were identical with the rifling marks found upon bullets discharged from the accused's rifle, in the course of his tests. He expressed the positive opinion that the bullet casing found in the deceased's body had been fired from the accused's rifle. He said there was no possibility of error in this conclusion in view of the number of identical characteristics found in marks on the bullet recovered from the body and the bullets discharged by himself in the course of his tests.

The accused gave evidence in his own defence. He said that he arrived at Mesmer's cabin to stay over night on the evening of February 22nd, 1944, where he got drunk and after that remembered nothing. The following portions of his evidence describe the incidents which led up to his becoming drunk:

He give me a cup of tea. Then he asked me for drunk. He want some drunk, he said.

He wants some drink? Yes, and I say no. He asked me twice: "Just a little one won't hurt you," he says, so he give me a drunk. Then after, I don't know nothing. I got crazy, so I don't know nothing. I don't know. Maybe went up the Finlay River, I don't know.

The accused says that he stayed in Mesmer's cabin over night. The following morning Mesmer's partner Hans Fifer returned to the cabin. The accused gave evidence in regard to his meeting with Fifer as follows:

Did you [the accused] say anything to him [Fifer]? Then I says, "Hans, you make your partner for a long time. I make you friend all the

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time, so Eugene, [Mesmer] he give me drunk too much. Maybe I shot him. I don't know nothing. I don't know nothing about it."

The accused said further that he asked Fifer to go down to McDougall's cabin to send a wire for a policeman. It appeared that accused had had no communication with the police between February 22nd and March 13th, when the deceased's body was discovered by police officers; nor did accused tell anyone else of the death of Mesmer during that period.

Counsel for the accused founded the appeal on four grounds: 1. That the trial was unsatisfactory in that the evidence of the accused was not given through an interpreter and the accused was thereby prejudiced. 2. That the charge was unsatisfactory and insufficient on the principal defence raised below, namely, that the accused was so drunk he could not form the intent. 3. That that portion of the judge's charge to the jury relating to circumstantial evidence as transcribed in the appeal book at p. 71 is not in the form in which the charge was delivered to the jury, an alteration having been made subsequent thereto, in consequence whereof the accused is prejudiced. 4. That the direction upon circumstantial evidence was inadequate and prejudicial to the accused.

Counsel submits before us that it is obvious from a perusal of the transcript that the accused did not understand a vital question put to him in cross-examination relating to the shooting of Mesmer by the accused, due to failure to put the question through the interpreter; the question referred to being the last question in the following extract from the cross-examination, *viz.*:

In any event, did you shoot him? I don't know. I couldn't remember.

You know now, don't you—you know how many times he was shot? He was shot—he got shot about two times.

Yes. And he was shot in the back, wasn't he? Yes.

You heard yesterday that he had mitts on, didn't you? Yes.

So he must have been ahead of you—walking ahead of you? Yes, I think so.

Now, you know, don't you? But he give me too much drunk.

Never mind the drink. I am asking you, and I am suggesting that he was 14 paces, about, ahead of you, when you shot him. What do you say to that—What? Yes.

On the trial an interpreter was sworn, but at the request of defence counsel was not used other than to assist the accused by

sitting with him and interpreting to him any evidence he might fail to comprehend.

The accused is an Indian 23 years of age, who has lived throughout his lifetime in the bush and until his arrest on this charge, had never visited a settled area of this country. He had not attended school at any time. I think it is apparent from a perusal of the transcript of his evidence that he had a reasonable, though somewhat imperfect, knowledge of and capacity to understand and speak English. Before calling the accused to the witness stand his counsel addressed the Court in these words:

> I am going to try and get along with this Indian, without going through the interpreter, for every question, but his English is somewhat primitive, and he may have to revert from the English language.

The examination and cross-examination then appear to have been conducted in English with the interpreter present, but it does not appear from the transcript that any question was put to the witness through the interpreter. I have no doubt that the learned judge would have directed that such a course be followed had any request been made by or on behalf of the accused, or had it appeared to the judge at any time that there was likelihood of a misunderstanding by the accused of any question which could be remedied by use of the interpreter's services. The fact that no such request was made either by the accused or his counsel and that the presiding judge did not deem it necessary to direct translation of any question from English into the Indian dialect understood by the accused, appears to me to negative counsel's submission that any such misunderstanding arose.

The Court of Criminal Appeal in England examined the situation arising out of conduct of a criminal proceeding wherein an accused person ignorant of or insufficiently acquainted with English, is charged, in *Rex* v. *Lee Kun* (1915), 11 Cr. App. R. 293. There Reading, L.C.J., speaking for the Court, said at pp. 301-2, relative to an accused foreigner, ignorant of the English language, but defended by counsel, as follows:

> . . . .
>
> . . . There is no rule of law to be found in the books on the subject, We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him, except when he or counsel on his behalf

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expresses a wish to dispense with the translation, and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that by reason of what has passed before the trial, the accused substantially understands the evidence to be given and the case to be made against him at the trial . . .; but such a procedure is more in consonance with that scrupulous care of the accused's interests which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it. No injustice will be caused by permitting the exception above mentioned.

Here the wish to dispense with the translation was expressed by counsel, and it is clear that the presiding judge thought fit to permit the omission, and, with respect, upon grounds sufficient within the principle laid down by Lord Reading.

The accused was not, in my opinion, prejudiced in any respect by the procedure adopted.

It is true that the learned Chief Justice in his charge to the jury, when referring to the accused's answer to the question before mentioned, put by Crown counsel on cross-examination, said:

In cross-examination by the Attorney-General he admitted that he was about 15 paces behind the deceased when he shot him. Now, gentlemen of the jury, in respect to that, while he answered that very clearly, and, of course, if he fully understood that question that would be most significant, but I want to draw your attention to the fact that he is an Indian and there is a possibility that he might not have understood that question and might have been agreeing that it was only 15 paces rather than making the admission. I think, gentlemen, that was the way it rather impressed me, rather than admitting that he actually remembered being 15 paces behind, because I do not think that was consistent with his story.

The possible misunderstanding there mentioned did not arise, in my opinion, from the fact that the question was put in English direct to the accused rather than through the interpreter, but arose from the form of the question and the fact that the accused is an illiterate person; that is to say, it is a double-barrelled question, and, with respect, one which should not have been put or allowed to be put in that form to this accused or any witness. The answer appears to me to be open to the construction that the accused did not thereby intend to acknowledge that he had shot Mesmer. He had said but a short time earlier that "he didn't know, he couldn't remember." The misunderstanding on the part of the accused, if there was any, I think, arose from its double nature and would not have been resolved by translation

of the question from English into the Indian dialect. The judge, in my opinion, very properly pointed out to the jury that the affirmative answer should not be taken as an admission that he shot Mesmer.

Then objection was taken to insufficiency of the charge in relation to accused's incapacity to form an intent to kill due to drunkenness. The charge on the defence of drunkenness reads in part as follows:

> The defence, however, have in the testimony of the accused and by his counsel, relied on what might be termed the defence of drunkenness. So, therefore, I shall deal with drunkenness. Drunkenness, in law, is not an excuse; but, as I have already intimated to you, the intention to kill is an element necessary to be proved by the Crown, either by direct evidence or by implication, before that can be murder. You will remember that I analyzed that in the beginning, that in order that there be murder there must be an intention. If a man be so drunk that under all the circumstances he is incapable of forming an intention, then, of course, he cannot have that intention which is required before a murder charge can be sustained. I repeat, that intention is necessary to be proved, by implication or otherwise, in order to establish murder. If a man, therefore, is in such a state of intoxication that he is incapable of having any intent you can see he cannot be guilty, as it is necessary to find intent under murder. But this does not excuse him from liability, and if, therefore, you should determine that under all the circumstances the accused was so drunk from the use of this lemon extract as not to be capable of forming an intention, then your verdict must be manslaughter and not murder.

And again:

> Whether that is the act of a man who did this as a result of a brainstorm brought about by having this one drink of lemon extract, because that is the only evidence of what he did have, even on his own evidence—counsel for the defence suggests that might have been the start, but the accused himself only tells of one drink of lemon extract—the question of whether or not he was honest in his statement he had just borrowed these things, where he gives no explanation, as I recollect it for taking these afterwards, but they are all things for you to consider. If you believe the story of the accused that he was given this drink of lemon extract, and the result of it was he was so incapable of forming an intention then it is your duty to bring in a verdict of manslaughter and not of murder.

In *MacAskill* v. *Regem*, [1931] S.C.R. 330, Duff, J., as he then was, said at p. 334:

> The intent necessary to bring a given offence under the definition in subsection (*b*) involves a knowledge by the offender of the "likely" consequences of his act; and a direction to the jury that, in examining a defence based upon incapacity alleged to have been produced by drunkenness, they should not consider the capacity of the accused to "foresee or measure the consequences of his act" would hardly be a direction in conformity with the

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criteria formulated in section 259. The right direction in cases involving the application of subsection (*b*) is that evidence of drunkenness rendering the accused incapable of the state of mind defined by that subsection may be taken into account with the other facts of the case for the purpose of determining whether or not, in fact, the accused had the intent necessary to bring the case within that subsection; but that the existence of drunkenness not involving such incapacity is not a defence.

The principle here enunciated I take it applies equally to an offence under section 259 (*a*) and the evidence here brings the offence within one or other of those subsections.

I think the direction under review falls short of compliance with the "right direction" as there laid down, in that the direction upon the defence of drunkenness appears to be limited to incapacity to form the intent brought about by the extent of the accused's intoxication. No reference is thereby made to the requirement that the evidence of drunkenness be taken into account with the other facts of the case. The omission of this latter factor in my view made the charge in this respect more favourable to the accused than if the "right direction" had been given. In my opinion there was advantage rather than prejudice to the accused, in these circumstances.

A question was raised by counsel for the accused at the opening of the appeal in regard to an alteration which he said had been made in the charge on circumstantial evidence, after it had been approved by the judge presiding at the trial. The Court thereupon gave immediate directions to the registrar to ascertain the facts, and has since been satisfied by a report from the learned Chief Justice of the Supreme Court, who presided at the trial, that the charge as now set out at p. 71 of the appeal book, is the charge delivered to the jury, and as approved by the Chief Justice.

Then it is urged that the direction on circumstantial evidence does not satisfy the formula laid down in *Hodge's Case* (1838), 168 E.R. 1136, in that the language of the learned trial judge does not clearly define the degree of proof required to found a verdict upon circumstantial evidence.

Having made what, with respect, I consider a very clear explanation of the characteristics of and differences between direct and circumstantial evidence in which he described circum-

stantial evidence by applying the analogy of the assembly of a picture puzzle, the learned judge said:

> But that picture must be, when a completed picture, pointing conclusively in only one direction and that is in the direction of the guilt of the accused, because, not only must those circumstances which are proved in evidence be consistent with the accused having committed the act, but they must be of such a nature that they are inconsistent with any rational view of the innocence of the accused.

While this direction does not follow in detail the language used by Baron Alderson in *Hodge's Case,* nevertheless, in my opinion, it contains the essential elements of the principle there laid down. I think that the language used by the learned trial judge must have been understood by the jury to mean

> that they ought not to find a verdict against the accused, [based solely or mainly upon circumstantial evidence] unless convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence,

to adopt the language of the Supreme Court of Canada in *McLean* v. *Regem,* [1933] S.C.R. 688, at p. 690. As was there said,

> there is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

Again, in *Rex* v. *Jenkins* (1908), 14 B.C. 61 the Full Court approved the charge of HUNTER, C.J., in these words:

> " . . . they should satisfy themselves that there was one fact, or set of facts, proved against the accused which, on any reasonable hypothesis, was inconsistent with innocence, and not merely consistent with guilt."

Although MORRISON, J., as he then was, questioned whether the use of the phrase "one fact, or set of facts," was what was meant by Baron Alderson in *Hodge's Case,* he would have interpreted the language of Baron Alderson to mean "that all the facts taken together should be considered"; and on the same point, *cf. Rex* v. *Macchione* (1936), 51 B.C. 272, *per* MACDONALD, then J.A., at p. 278.

But if I am wrong in my conclusions as to the charge on circumstantial evidence and it be held that the charge in this respect was insufficient, whereby the accused was prejudiced, I would apply Code section 1014, subsection 2, as I consider that on all of the evidence there was overwhelming proof of the guilt of the accused, *i.e.,* that upon the evidence a reasonable jury

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after being properly directed would undoubtedly convict; and *cf. Rex* v. *Haddy* (1944), 29 Cr. App. R. 182; *Stirland* v. *Director of Public Prosecutions,* [1944] A.C. 315 and *Schmidt* v. *Regem,* [1945] 2 D.L.R. 598.

For these reasons I would dismiss the appeal.

Appeal dismissed.

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IN RE CONSTITUTIONAL QUESTIONS DETERMINATION ACT AND *IN RE* VANCOUVER INCORPORATION ACT, 1921.

Constitutional Questions Determination Act—Vancouver Incorporation Act, 1921—Milk Act—Power of city Act to prohibit sale of unpasteurized milk—B.C. Stats. 1921 (Second Session), Cap. 55; 1926-27, Cap. 42—R.S.B.C. 1936, Cap. 50, Sec. 8.

Pursuant to section 8 of the Constitutional Questions Determination Act, the following question was referred to the Court of Appeal for hearing and consideration, namely: "Has the city of Vancouver power under the Vancouver Incorporation Act, 1921, and amendments thereto to pass a by-law prohibiting persons from selling unpasteurized milk in the city?"

Held, that the question submitted should be answered in the negative (SLOAN, C.J.B.C. dissenting).

The two enactments (Vancouver Incorporation Act, 1921, and the Milk Act, B.C. Stats. 1926-27) are quite inconsistent and repugnant and the Milk Act of 1926-27 and amendments sufficiently appear to prescribe standards of fitness of milk for human consumption and the necessity for pasteurization of milk. The legislation of the city Act, assuming it extends to prohibition of the sale of unpasteurized milk, must be taken to have been repealed by necessary implication, and this will be so whether the legislation of the city Act is special or general.

"SECTION 8 of the 'Constitutional Questions Determination Act' empowers the Lieutenant-Governor in Council to refer to the Court of Appeal for hearing and consideration any matter which he thinks fit to refer, and the Court of Appeal shall thereupon hear and consider the same: . . . Doubts have arisen as to whether the city of Vancouver has power under its charter to prohibit the sale of unpasteurized milk within the city, and that

it is deemed advisable to refer the question to the Court of Appeal for an opinion thereon: And to recommend that, pursuant to section 8 of the said Act the following question be referred to the Court of Appeal for hearing and consideration, namely:

'Has the city of Vancouver power under the 'Vancouver Incorporation Act, 1921' and amendments thereto to pass a by-law prohibiting persons from selling unpasteurized milk in the city'?"

Heard at Vancouver on the 6th and 7th of November, 1945, by SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

McTaggart, K.C., for the city of Vancouver: The Milk Act of 1926-27 has no reference in it to the city of Vancouver. It therefore includes the city of Vancouver. The Milk Act is subsequent and the Incorporation Act is construed as a public Act: see *City of Ottawa* v. *Town of Eastview et al.*, [1941] S.C.R. 448; *Caponero* v. *Brakenridge and District Registrar of Titles* (1944), 60 B.C. 1, at p. 11; *Re Township of York and Township of North York* (1925), 57 O.L.R. 644, at pp. 646 and 648. On the presumption in favour of a special Act see *Rex* v. *Macdonald*, [1917] 2 W.W.R. 269; *Rex and City of Vancouver* v. *Woods* (1939), 54 B.C. 503; *Lyne* v. *Checker Stage Service Ltd.*, [1932] 1 W.W.R. 335, at p. 342; Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 561, par. 759; *Lancashire Asylums Board* v. *Manchester Corporation* (1900), 69 L.J.Q.B. 234; *Meldrum* v. *District of South Vancouver* (1916), 22 B.C. 574.

Farris, K.C., for Creamland Crescent Dairy Ltd. *et al.*: Where general words are used there is not the intention to take away a particular privilege: see *Garnett* v. *Bradley* (1878), 48 L.J.Q.B. 186, at pp. 196 and 198; *Ashton-under-Lyne Corporation* v. *Pugh* (1897), 67 L.J.Q.B. 32; *Dakins* v. *Seaman* (1842), 9 M. & W. 777. In the case of a special Act and a general Act the special Act operates in its field and the general Acts operate outside the field of the special Act: see *In re Vancouver Incorporation Act, 1921. In re Bent*, [1940] 2 W.W.R. 697, at pp. 709 and 711. The Milk Act applies except where power is especially given the city to act:

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see *Forbes* v. *Attorney-General for Manitoba* (1936), Plaxton's Canadian Constitutional Decisions of Judicial Committee, 259, at p. 271; [1937] A.C. 260, at p. 273; *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*, [1907] A.C. 65, at p. 67; *The City of Vancouver* v. *Bailey* (1895), 25 S.C.R. 62, at p. 67. A general Act dealing with a special subject does not override a special Act unless by express enactment: see *Ashton-under-Lyne Corporation* v. *Pugh* (1897), 67 L.J.Q.B. 32; *Lamontagne* v. *Quebec Railway, Light, Heat and Power Co.* (1914), 50 S.C.R. 423; Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 524, pars. 684-5.

McTaggart, in reply, referred to Craies' Statute Law, 4th Ed., 318; *In re Vancouver Incorporation Act, 1921. In re Bent*, [1940] 2 W.W.R. 697, at p. 710; *Re Morrison and The City of Kingston*, [1938] O.R. 21; *The Great Central Gas Consumers Company* v. *Clarke* (1863), 13 C.B. (N.S.) 838; *Ferguson* v. *Toronto*, [1944] 1 D.L.R. 293; *Ex parte Coleman* (1885), 23 N.B.R. 574.

Cur. adv. vult.

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SLOAN, C.J.B.C.: The Lieutenant-Governor in Council, pursuant to the provisions of the Constitutional Questions Determination Act, has referred the following question to this Court, namely:

> Has the city of Vancouver power under the 'Vancouver Incorporation Act, 1921' and amendments thereto to pass a by-law prohibiting persons from selling unpasteurized milk in the city?

By section 163, subsection (110) of the Vancouver Incorporation Act, 1921, the council of the city of Vancouver is vested with power to pass a by-law

> For licensing, regulating, and controlling . . . all persons selling or dealing in . . . , milk, or cream by retail, . . .

In my opinion this section, standing alone, would empower the council to pass a by-law prohibiting the sale for human consumption of any unpasteurized milk within the city of Vancouver.

It so happens, however, that the Milk Act, R.S.B.C. 1936, Cap. 173, contains the following provision:

> 10. (1.) The Council of each municipality is authorized to pass by-laws

for regulating the supplying of milk for human consumption within the municipality, and such by-laws may make provision:—

. . . .

(*h.*) For prohibiting, except in the case of milk obtained from a dairy-farm classed as Grade A pursuant to certificate under subsection (2) of section 7, the delivery or sale of milk unless the milk is pasteurized within the meaning of subsection (1) of section 17:

By subsection (2) of section 7 of that Act it is provided:

7. (2.) Where the Inspector allots to the dairy-farmer not less than eighty per centum of the total marks obtainable under the prescribed method, the Inspector shall give to the dairy-farmer a certificate showing that the dairy-farm is classed as Grade A under this Act, and stating that the dairy-farmer may supply milk obtained from that dairy-farm for human consumption without previous pasteurization thereof.

The question then arises whether the provisions of the Milk Act above referred to, have by necessary implication, repealed the power conferred upon the city by subsection (110) of section 163 of the Vancouver Incorporation Act, 1921, to prohibit the sale within the city of all unpasteurized milk, by reason of an inconsistency or repugnancy between the relevant provisions of the two statutes; or whether the relevant provisions of the Milk Act and the city charter are complementary and can stand together.

In my view these two statutes can stand together and are complementary, with this one qualification: the Milk Act in my opinion sets a minimum standard of general application and the council cannot pass a by-law permitting the sale of milk within the city of a standard inferior to that fixed by the Milk Act. The city council can, however, in my opinion, set a higher standard of milk purification than that defined by the Milk Act in relation to milk sold for human consumption within the city of Vancouver

It seems to me therefore that a *residuum* of power remains in the city council under subsection (110) to pass a by-law prohibiting the sale within the city of unpasteurized Grade A milk. In so doing it is imposing a higher standard of purification than the minimum fixed by the Milk Act.

To hold that the relevant provisions of the Milk Act have abrogated the powers conferred on the Vancouver city council by subsection (110) would mean that the city of Vancouver would

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be the only municipality in the Province without authority to prohibit the sale of unpasteurized Grade A milk.

All other municipalities under the Municipal Act now have that power (subject to a plebiscite) notwithstanding the provisions of the Milk Act. The provisions of the Municipal Act do not, however, apply to the city of Vancouver by the terms of its charter.

It does not seem reasonable to me therefore to assume that the Legislature, in enacting the Milk Act by necessary intendment repealed by implication subsection (110) of the Vancouver Incorporation Act, 1921, except to the extent I have indicated.

I would, in consequence, answer the question submitted in the affirmative, subject to the qualification hereinbefore expressed.

O'HALLORAN, J.A.: I hereby certify that my reasons for answering the question submitted in the negative are contained in the opinion of my brother BIRD, with whom I concur.

ROBERTSON, J.A.: I hereby certify that I have answered the question submitted in the negative for the reasons which are contained in Mr. Justice BIRD's opinion, with which I concur.

SIDNEY SMITH, J.A.: I have had the advantage of reading the judgment of my brother BIRD and find myself, respectfully, in substantial agreement with what he says. In view of the importance of the topic, however, I think it desirable to state more precisely my own views.

The question which requires decision is this: [already set out in the head-note and in the judgment of SLOAN, C.J.B.C.].

It should first be noted that the council of the city of Vancouver has power under section 163, subsection (110) of the Vancouver Incorporation Act, 1921, to pass by-laws

> For licensing, regulating, and controlling or prohibiting all persons selling or dealing in fish, fruit, milk, or cream by retail, and for inspecting the premises in which the same are offered for sale and the said articles or produce so offered for sale:

The language used here is not that of formality. The words are simple, are of the widest import, and are apt to empower the council, acting in the *bona-fide* discharge of its functions and with a single view to the public interest, to pass a by-law pro-

hibiting the sale of unpasteurized milk. I find nothing in the Incorporation Act to narrow this power. If the matter stood thus, therefore, the answer must, in my opinion, be in the affirmative.

But the dispute arises in consequence of the Milk Act, the provisions of which were first set on foot in 1913 and re-enacted more elaborately in 1926-27. It is therefore with the Milk Act of 1926-27 and amendments to date that we are concerned. The relevant provisions are to be found in section 10 (as amended in 1928) and are as follows: [already set out in the judgment of SLOAN, C.J.B.C.].

It is important to observe that under these provisions municipalities (which by section 24 (28) of the Interpretation Act include the city of Vancouver) may prohibit the sale of unpasteurized milk except such milk as may come from a Grade A dairy. It follows that the short effect of the foregoing quotations from the Incorporation Act and the Milk Act is that under the former Act the city council has power to prohibit the sale of all unpasteurized milk, while under the latter Act it has no power to prohibit the sale of unpasteurized milk from a Grade A dairy. There is here a clear repugnancy. The question at issue is as to which provision is to prevail within the city of Vancouver.

Counsel for the city first contends that some elucidation may be obtained from a consideration of the history of the Milk Act; and directs our attention to section 12 of the 1913 Act reading as follows:

> 12. This Act, except in so far as it may be repugnant to or inconsistent with any of the provisions of the "Vancouver Incorporation Act, 1900," and amending Acts, shall apply to and be in force in the City of Vancouver.

This section does not appear in the 1926-27 Act and I agree that this is some indication that the Legislature intended the provisions of the 1926-27 Act with amendments to have effect within the city of Vancouver.

Both counsel sought some legal principle to elucidate their respective positions and both prayed in aid the common-law maxim to the effect that general legislation is not to be construed so as to derogate from special legislation. But they applied this maxim very differently. Counsel for the milk dealers forcefully argued that the Incorporation Act must be taken as special legis-

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lation in that it applied to a specific area, *viz.*, the city of Vancouver; while the Milk Act must be regarded as general legislation, applying to the Province at large; and that accordingly the powers of the city must prevail. He quoted in support *Garnett* v. *Bradley* (1878), 48 L.J.Q.B. 186, and a number of other authorities. These undoubtedly support his submission, although they also contain observations indicating that this is not a rule of general application; but that the question of what is, and what is not, special legislation (as opposed to general legislation) is itself a matter of construction of the various statutes in the light of all the circumstances.

In the case before us the submission so advanced cannot, in my judgment, be sustained. The principle here is capable of a construction at once simpler and more reasonable. I think there can be no doubt that in 1926-27 the Legislature intended to deal specifically with milk, the pasteurization thereof, the sale thereof, and other kindred matters; and that this legislation, being special as to its subject-matter, must prevail over the powers in the Incorporation Act to prohibit the sale of milk, which are essentially of a wide and general nature.

Authority is not lacking for this aspect of the principle. It may be found in Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 526, expressed thus:

> A statute passed for a particular purpose must so far as that purpose extends override general enactments.

It is also expressed by Lord Hobhouse in *Barker* v. *Edger*, [1898] A.C. 748, at p. 754 as follows:

> . . . When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

In Canada in *Re Township of York and Township of North York* (1925), 57 O.L.R. 644, at pp. 648-9, Riddell, J. states his view in this way:

> It is, of course, elementary that special legislation overrides general legislation in case of a conflict—the general maxim is *Generalia specialibus non derogant*—see *Lancashire Asylums Board* v. *Manchester Corporation*, [1900] 1 Q.B. 458, at p. 470, *per* Smith, L.J.—even where the general legislation is subsequent: *Barker* v. *Edger* [1898], A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the

particular subject and made provision for it, and the presumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: Craies on Statute Law, 3rd ed., p. 317.

Applying this view of the principle, which I take to be well established, I am of opinion that any by-law of the city council prohibiting the sale of milk which is repugnant to the aforesaid provisions of the Milk Act is invalid to the extent of such repugnancy. I think further, however, that if the by-law is not so in conflict it is a good by-law. This point may be academic, because the city council has the appropriate power to pass any such by-law under the powers given to it by the Milk Act. Nevertheless I prefer to state the position as I have done; because it is, I think, undesirable that the powers of the city council should be thought to be reduced more than is necessarily and clearly intended by the legislation under consideration.

It also follows from this that while the question asked must be answered "No"; nevertheless a more comprehensive answer would be "No, unless the by-law in question is in conformity with the power to pass by-laws conferred by section 10 of the Milk Act."

BIRD, J.A.: This Court has been required, pursuant to the Constitutional Questions Determination Act, R.S.B.C. 1936, Cap. 50, to certify to the Lieutenant-Governor in Council its opinion upon the following question: [already set out in the head-note and in the judgment of SLOAN, C.J.B.C.].

The Court was informed by counsel on the opening of the Reference, of communications between counsel and officials of the department of the Attorney-General, from which it was made to appear that the Attorney-General did not desire that the Crown should be represented by counsel.

Counsel for certain milk distributors in the city of Vancouver supports the affirmative side of the question and contends that the city has power to pass such a by-law by virtue of the Vancouver Incorporation Act, 1921, Sec. 163, Subsecs. (44), (110) and (111). On the other hand, counsel for the city of Vancouver takes a contrary position. He submits (1) That the powers conferred by the sections of the city Act so relied upon are limited to persons, *i.e.*, milk dealers, and do not extend to

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authorize the city council to prohibit the sale of unpasteurized milk, nor to deal in any respect with the question of pasteurization of milk. (2) That even though the city Act could be held to give such power, nevertheless the power so conferred must be taken to have been repealed by implication, by enactment of the Milk Act of 1926-27 whereby the whole matter of milk control was codified and no provision was made for reservation of the powers conferred by the city Act. (3) That the Milk Act, being special legislation in respect to its subject-matter, *i.e.*, the regulation and control of milk and the standards thereof for human consumption, must be taken to override the legislation of the city Act, which is general in its terms, relating to regulation and control of persons dealing in a great variety of products, including milk. He would apply the maxim *generalia specialibus non derogant.*

Counsel for the milk distributors, in reply to No. 3 above, while accepting the principle expressed in that maxim, contends that here the general legislation is that of the Milk Act since it has territorial application throughout the Province and the legislation of the city Act being limited in its application to the city of Vancouver is to be considered as special legislation.

Determination of the question requires consideration of the history as well as the provisions of various Acts of the Legislature of the Province of British Columbia, including the Vancouver Incorporation Act, 1900, and amendments thereto, the revision and consolidation of that Act, which is now cited as the Vancouver Incorporation Act, 1921, and the amendments thereto (for convenience referred to as the "city Act"), the Milk Act of 1913 and the Milk Act of 1926-27, whereby the Milk Act of 1913 was repealed and re-enacted, and amendments thereto, as well as certain provisions of the Municipal Act, R.S.B.C. 1936, Cap. 199, and amending Acts.

Prior to the enactment of the Milk Act of 1913, the city of Vancouver, by virtue of the Vancouver Incorporation Act, 1900, Cap. 54, Sec. 125, Subsecs. (55), (59), (66) and (121), had certain powers for licensing, governing and regulating persons selling or dealing in milk or cream by retail, and for regulating, governing and inspecting the keeping and sale of milk and

cream. Municipalities had similar, though less extensive, powers by virtue of the Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 53.

Then by the Milk Act of 1913, the Legislature set up what I would term a code applicable throughout the Province, with the exception hereinafter noted in regard to the city of Vancouver, for the regulation and control of dairy farms, milk and milk products. By that Act the existing powers of municipalities relating to milk regulation were expressly repealed and the provisions of the Act substituted therefor. Section 12 thereof reads as follows: [already set out in the judgment of SIDNEY SMITH, J.A.].

The effect of that section, in my opinion, is to preserve all the powers of the city in relation to milk regulation conferred by the Vancouver Incorporation Act, 1900, and to add to these powers all provisions of the Milk Act which are not repugnant to or inconsistent with the Act of 1900.

There followed in 1921, the Milk Act of 1913 being then in effect, the Vancouver Incorporation Act, 1921, which was a revision and consolidation of the Act of 1900.

Power is thereby given to the council by section 163 to pass by-laws for the following purposes:

Public Health.

(25.) For providing for the health of the city and against the spread of contagious or infectious diseases, and for controlling, restricting, prohibiting, or regulating persons, premises, or conditions in the city, with a view of preventing the spread of infectious diseases:

Inspection of Foods.

(44.) For the appointment of inspectors and for the providing for inspection of milk, meat, bread, poultry, cake, ice-cream, candy, fruit, eggs, fish, and other natural products and all foodstuffs offered for sale in the city; and for regulating, restricting, and controlling the places or premises wherein any such foodstuffs and articles of food are kept, placed, stored, sold, or offered for sale:

Milk and Foodstuff Dealers.

(110.) For licensing, regulating, and controlling or prohibiting all persons selling or dealing in fish, fruit, milk, or cream by retail, and for inspecting the premises in which the same are offered for sale and the said articles or produce so offered for sale:

Then in 1926 the Milk Act of 1913 was repealed and re-enacted by the Milk Act of 1926-27. Under the Act of 1926-27 (hereafter referred to as the "Milk Act") similar though wider

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provisions to those contained in the 1913 Act, effective throughout the Province, are made for regulating, inspecting, grading and classification of milk and the sources of milk supply as well as for establishing standards of fitness of milk for human consumption. In addition similar, though wider powers, than in the 1913 Act are conferred upon municipalities for regulating by by-law the supply of milk for human consumption within the municipality. "Municipality" is defined under the Interpretation Act, R.S.B.C. 1936, Cap. 1, Sec. 24, Subsec. (28) as follows:

24. In every Act of the Legislature, unless the context otherwise requires:—

(28.) "Municipality" includes every municipal area or corporation incorporated as a city, city municipality, district municipality, or township municipality, by or under any general or special Act of the Legislature, . . .

And is further defined in the Milk Act as including a municipality incorporated under the Village Municipalities Act. It is to be observed that the Milk Act of 1926-27 contains no express reference to the city of Vancouver, and further that there is omitted from that Act any such provision as that contained in section 12 of the Milk Act of 1913 before mentioned. Consequently I think those provisions of the Milk Act relating particularly to "municipalities" must be taken as applicable to the city of Vancouver. The general provisions include the following: (1) Sections 5, 6 inspection and prescribing standards for dairy-farms, herds and premises; (2) section 7 (1) the grading and classification of dairy-farms; (3) sections 7 (2) and 7 (3) for milk standards and the question of pasteurization. Section 7 reads in part as follows: [already set out in the judgment of SLOAN, C.J.B.C.].

(4) under sections 9 and 14 provisions forbidding the supply of milk from diseased cows and the employment on dairy farms of diseased persons; (5) sections 16 to 19, provisions setting up standards as to butter fat content, and standards for "certified" and for "pasteurized" milk.

Then by section 10 of the Act power is conferred upon municipal councils, which would include the council of the city of Vancouver, to pass by-laws for regulating milk supplied for human consumption within the municipality, and particularly:

(*a.*) As to the care, . . . , and distribution of milk by vendors . . .

and

(*h.*) As to such other matters regarding the care, treatment, storage, transportation, distribution, and sale of milk . . .

In 1928 the Milk Act was amended to add to the powers of a municipality to pass by-laws, the further power following:

(*i.*) For prohibiting, except in the case of milk obtained from a dairy-farm classed as Grade A . . . , the delivery or sale of milk unless the milk is pasteurized. . . .

In 1944, by an amendment to the Municipal Act, R.S.B.C. 1936, Cap. 199, there was added to the powers of municipal councils to pass by-laws the following:

119*a*. For prohibiting, notwithstanding the provisions of the "Milk Act," the delivery or sale of any milk for use within the municipality unless the milk is pasteurized within the meaning of that Act; Provided that before any by-law is passed hereunder the Council shall submit the question for the opinion of the electors. . . .

But section 326 of the city Act, as amended in 1945, Cap. 83, limits the application to the city of the provisions of the Municipal Act to specific sections thereof, of which (119*a*) of the Municipal Act is not one.

Examination of the powers of the city derived from section 163, subsections (25), (44) and subsection (110) of the city Act satisfies me that the power to prohibit "persons selling or dealing in . . . milk" and "to inspect . . . the said articles" is sufficiently wide to authorize the city council to pass a by-law forbidding the sale within the city of milk which is dangerous to public health and therefore unfit for human consumption.

If that be so it does not necessarily follow, in my opinion, that the powers under the city Act, considered alone, extend to prohibition of the sale of unpasteurized milk within the city, for the exercise of the power involves a determination as to what milk is and what is not dangerous to public health, or otherwise unfit for human consumption. That is to say, either: (1) It must be taken as conclusively established that all raw, *i.e.*, unpasteurized, milk is so unfit for human consumption, or (2) before passing such a by-law the city council must have determined that fact upon proper or judicial considerations. There is nothing before us which can be taken as proof of the fact

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referred to in No. 1 above, nor was any such contention advanced before us. Indeed, counsel for the city indirectly takes a contrary position, for he submits that the city lacks power to pass such a by-law. Then if the powers of the city do extend to prohibit the sale of unpasteurized milk within the city, I think that power must include a power in the city council to make the determination referred to in No. 2 above. But it is to be observed that the legislation under review contains no reference to "treatment" or to "pasteurization" of milk, nor to any method or test of the fitness of milk for human consumption. The absence of any such reference or method therefore makes it necessary that the city council, without any standard of fitness or method of pasteurization having been prescribed by the Act, shall reach a decision that raw milk is unfit for human consumption. Having done so, the council must then prescribe the manner in which pasteurization shall be performed or carried out. In these circumstances I entertain considerable doubt whether, upon consideration solely of the provisions of the city Act, power was conferred or was intended to be conferred to prohibit the sale within the city of unpasteurized milk. However, since for reasons herein expressed, I find it unnecessary to attempt to resolve the doubt, I propose to deal with the question submitted on the assumption that there is such power under the city Act. What then, upon the basis of that assumption, is the effect upon the powers under the city Act of the enactment of those provisions of the Milk Act which relate to milk standards and pasteurization? Counsel for the milk distributors founds his argument on this phase of the question upon alternative propositions: (1) That the provisions of subsection (110) of the city Act are complementary to those of the Milk Act in that the latter legislation prescribes minimum standards. He refers particularly to section 7 dealing with grading of dairy-farms and standards of milk supplied therefrom, and section 17 dealing with pasteurization of milk. He says that although since the enactment of the Milk Act the powers under the city Act are curtailed to the extent of requiring observance of the minimum standards laid down by the Milk Act, *i.e.*, the Milk Act has by implication in part repealed the powers under the said Act, nevertheless there

remains in the city a *residuum* of its powers. He submits therefore that the city, since the enactment of the Milk Act, has power to pass a by-law which requires pasteurization of all milk, including milk supplied from a Grade A farm, and thereby sets a higher standard than that prescribed in the Milk Act. (2) Alternatively, if the provisions of the city Act and those of the Milk Act are repugnant or inconsistent, then the city Act, being special legislation, and the Milk Act general, the former operates within its territorial field and the latter operates outside the territorial field of the special Act.

Considering the first proposition, it appears to me that the intent of the Legislature, as expressed in section 7 of the Milk Act, is to prescribe in positive and affirmative terms standards of fitness of milk for human consumption, applicable throughout the Province. By section 7, subsection (2) milk from a Grade A farm may be supplied for human consumption without previous pasteurization; and by section 7, subsection (3) milk from a Grade B farm may be supplied for human consumption, but only after pasteurization in the manner prescribed by section 7 of the Act. The effect of the language of these sections, in my opinion, is to declare that milk from a Grade A farm without pasteurization is fit for human consumption; and that milk from a Grade B farm is fit for human consumption only after pasteurization, as prescribed by section 17 of the Milk Act. That the standards so prescribed are positive in their application to municipalities, and that municipalities under the powers conferred by the Milk Act have no power to pass by-laws contrary to such standards is, I think, made clearly apparent by the amendment to section 10 of the Milk Act, passed in 1928, whereby power is expressly given to municipal councils to prohibit the sale unpasteurized of all milk except milk from a Grade A farm. It follows, I think, as a necessary inference that raw, *i.e.*, unpasteurized, milk from a Grade A farm is thereby authorized to be sold for human consumption, since no municipality had power to prohibit the sale without pasteurization of milk from a Grade A farm. After some sixteen years of operation under the Milk Act as it stood in 1928, such last-mentioned power was given by the amendment to the Municipal Act in

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1944, but the power is operative only after approval given by the electors of the municipality upon submission to them of the question of pasteurization. Then, if the true intent of sections 7 and 17 of the Milk Act is to prescribe such standards for municipalities, is a different intention expressed or to be implied in relation to milk supplied within the city of Vancouver? No expression of such intention is to be found in the statute, nor, in my opinion, can it be implied from the language there used. Indeed, the contrary appears to me to have been expressed, since by the definition of municipality before mentioned, a city incorporated by special Act, *i.e.,* Vancouver, is included in that term, and the provisions of section 10 of the Milk Act are thereby made applicable to Vancouver. With every respect to contrary opinion, I do not find it possible to subscribe to an interpretation of the legislation as fixing minimum standards applicable either generally in the Province or solely within the city of Vancouver.

In my opinion the necessary intendment of the legislation contained in those sections of the Milk Act, to which I have referred as general provisions, was to prescribe a complete code of standards or tests of fitness of milk for human consumption with and without pasteurization, together with the requirements for pasteurization which were intended to have general application throughout the Province, including the city of Vancouver. Assuming that the sections of the city Act relied upon do give power to require pasteurization of milk before sale or to forbid the sale of raw, *i.e.,* unpasteurized, milk, I think that those powers are repugnant to and inconsistent with the provisions of the Milk Act. In those circumstances, in my opinion, the Milk Act must be taken to have repealed by implication such powers, if any, as the council may have had under the city Act to legislate in respect of pasteurization of milk.

The principles applicable to the question of repeal by implication were exhaustively considered by Chief Railway Commissioner Killam in *Grand Trunk Ry. Co.* v. *Robertson* (1907), 39 S.C.R. 506. On appeal from that decision to the Supreme Court of Canada the appeal was dismissed unanimously, and four of the five judges approved without reservation the reasons given by the commissioner, who, at p. 518 *et seq.,* quoted with

approval principles expressed in numerous decisions there cited, as follows: 1. The Court must be satisfied that the two enactments are inconsistent before they can, from the language of the later, imply the repeal of an express prior enactment. (2) If two inconsistent Acts are passed at different times the last is to be obeyed and if obedience cannot be observed without derogating from the first, it is the first which must give way, but a repeal by implication is never to be favoured. (3) The intention to repeal must appear even more strongly where the first provision is contained in a statute of a private or special nature, in which case the maxim *generalia specialibus non derogant* usually prevails, more particularly if the former be particular and the latter be general. The Commissioner then goes on to say at p. 521:

> But all of these statements admit that, if the intention of Parliament to that effect sufficiently appears, the later Act should be construed as repealing or varying the former Act, whether special or general.

In referring then to cases in which the Courts have adopted this latter construction, he says:

> . . . the decisions turned upon the view taken by the court of particular language or of the scope and intention of the legislation as understood by the court.

He refers to the language of Willes, J. in *Daw* v. *Metropolitan Board of Works* (1862), 12 C.B. (N.S.) 161, at pp. 178-9, *viz.*:

> . . . In the present case, however, that rule [*generalia specialibus non derogant*] cannot apply. . . . The powers conferred by the two [Acts] are substantially, if not strictly, the same. So soon as you find that the legislature is dealing with the same subject-matter in both Acts, so far as the later statute derogates from and is inconsistent with the earlier one, you are under the necessity of saying that the legislature did intend in the later statute to deal with the very case to which the former statute applied.

And again he refers to the words of Pollock, C.B. in *The Great Central Gas Consumers Company* v. *Clarke* (1863), 13 C.B. (N.S.) 838 as follows (p. 522):

> "Although that section is not in terms repealed, yet it becomes a clause in a private Act . . . quite inconsistent with a clause in a subsequent public Act."

Then in *Barker* v. *Edger,* 67 L.J.P.C. 115, at p. 118; [1898] A.C. 748) Lord Hobhouse said:

> . . . When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it

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manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

Since I have reached the conclusion that the two enactments here under consideration are quite inconsistent and repugnant and further that the intention of the Legislature by enactment of the Milk Act of 1926-27 and amendments sufficiently appears to prescribe standards of fitness of milk for human consumption and the necessity for pasteurization of milk, I take it that upon application of the principles expressed, the legislation of the city Act, assuming it extends to prohibition of the sale of unpasteurized milk, must be taken to have been repealed by necessary implication. And this will be so whether the legislation of the city Act is special or general. If it were necessary to determine which of the legislation under review is general and which special (and, in view of the conclusion I have reached, it is not), I would say that the Milk Act is special in that the intention of the Legislature was there to deal with a particular subject; and thereby to prescribe a complete code relating to milk supplied for human consumption; whereas the legislation under the city Act is general, having the intent to give powers of a general nature to the city for regulation and control of a variety of foodstuffs, including milk, *cf. per* Lord Hatherley in *Garnett* v. *Bradley* (1878), 48 L.J.Q.B. 186, at p. 189, who applied the principle laid down in *Stradling* v. *Morgan* (1560), 1 Plowd. 199, at p. 204, that Acts which are general in words are to be regarded as particular where the intent is particular; and whether an Act is to be regarded as special or general depends upon the intent and meaning of the Legislature.

This Court is now required to express its opinion on a question which I take to be limited to the power of the city of Vancouver derived from the Vancouver Incorporation Act, 1921, and amendments thereto, not to power at large nor to power derived under other legislation such as the Milk Act.

Therefore, for the reasons before expressed I would respectfully certify my opinion in the negative on the question submitted.

Question answered in the negative, Sloan, C.J.B.C., dissenting.

THE VETERANS' SIGHTSEEING AND TRANSPORTATION COMPANY LIMITED v. PUBLIC UTILITIES COMMISSION AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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Public utilities—Public Utilities Act—Motor Carrier Act—Two applicants to operate a bus service in same district—Hearing by board of Public Utilities Commission—Order in favour of B.C. Electric Ry. Co.—Appeal from board's order—Questions of law—B.C. Stats. 1938, Cap. 47; 1939, Cap. 36.

On the 8th of August, 1945, the B.C. Electric Ry. Co., Ltd., being a public utility, applied under section 12 of the Public Utilities Act for a "certificate of public convenience and necessity" to operate in Victoria a bus service upon two routes in a district known as the Fairfield-Gonzales district. Since 1909 the B.C. Electric had been giving street-car service in part of this district. The city of Victoria authorized the operation of a bus service on the route in respect of which the B.C. Electric applied for a certificate and consented to the B.C. Electric operating a bus service on it. On the 8th of August, 1945, The Veterans' Sightseeing and Transportation Co. Ltd. (known as the Blue Line), not being a public utility within the meaning of the Act and therefore only able to apply under the Motor Carrier Act, also applied for a licence to operate a bus service in the Fairfield-Gonzales district on two routes. No authorization had been obtained by it from the city of Victoria to operate a bus service on these routes. The administration of the Motor Carrier Act is vested in the Public Utilities Commission under section 33 of the Act. Both applications came on for hearing at the same time before the Commission. The Commission made two separate orders; one granted the B.C. Electric's application and the other refused the Blue Line application. Under section 105 of the Public Utilities Act the Blue Line appealed to the Lieutenant-Governor in Council against the decision giving the B.C. Electric a licence upon a question of fact and pursuant to section 106 of the Act the Lieutenant-Governor in Council referred the appeal to the Court of Appeal. Under section 97 of the Act leave was given by the Chief Justice of British Columbia to appeal on questions of law. Under section 55 of the Motor Carrier Act the Blue Line appealed to the Lieutenant-Governor in Council against the refusal of its application and there it remained pending the disposition of the appeals under sections 97 and 105 of the Public Utilities Act as there is no authority under the Motor Carrier Act to refer it to the Court of Appeal. Under section 12 (*a*) of the Public Utilities Act the Commission could not approve the B.C. Electric's application unless after a hearing it was satisfied that the "privilege, concession, or franchise" proposed be granted was (a) necessary for the

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public convenience and (b) properly conserved the public interest. Section 61 of the Motor Carrier Act contains the same provision. It was common ground that it was necessary for the public convenience that a certificate should be granted. The only question remaining then was: Did the licences for which applications were made properly conserve the public interest? The Blue Line submitted the Commission proceeded upon wrong principles of law in that: (a) It did not consider whether the application of the B.C. Electric properly conserved the public interest; (b) that it had decided it would be unfair to allow the Blue Line to compete in the district in question and thereby violated section 10 of the Motor Carrier Act; (c) in basing its decision in part on the theory that the consent of the city was necessary before a licence could be granted; (d) in proceeding on a "consistent" policy, for which there was no rule or principle laid down in either Act to support any such policy; (e) in taking into consideration the statement that the various municipal councils in greater Victoria had under discussion a unified transportation system for the area as a whole; (f) in finding that at the time of the application the B.C. Electric was giving transportation to the area in question by No. 6 tram-line whereas the Commission should have found the contrary and that the B.C. Electric was only serving a fringe of the area in question with that line.

Held, on appeal (O'HALLORAN, J.A. dissenting), that the decision of the Commission should be affirmed. The two Acts, generally speaking, impose administrative and not judicial duties upon the Commission. There are some sections under which the Commission must act as a judicial body, but they are not relevant in the case at Bar. The Board as an administrative body exercises its discretion according to policy and expediency. It does not decide between the legal rights of the parties; neither of the parties here had any except the right to apply under the respective Acts.

Upon an application to the Commission for a licence, the consent of the municipality is necessary under both Acts and as the Blue Line did not have the necessary consent, it could not operate its proposed bus service.

As it was admitted that the service was necessary and there was only one applicant to which the licence could be granted, the Commission, in granting the licence to the B.C. Electric, would be properly conserving the public interest.

As to the unified transportation system argument, the decisions quoted support the position of the Commission in adopting a policy.

On the submission that the Commission did not consider the public interest as it was not mentioned in the reasons or order, it should be presumed, in the absence of evidence to the contrary, that the Commission considered all matters which the Act directed it to do, although no mention of them was made in their reasons or order.

As to questions of fact, the Court would not be justified in reversing the Commission unless it were demonstrated that there was no proof before the Commission upon which, assuming it was acting judicially, it could regard as reasonably sufficient to support the B.C. Electric application.

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APPEAL from the decision of the Public Utilities Commission to grant the respondent a certificate of public convenience and necessity under section 12 (*a*) of the Public Utilities Act. This certificate approved the respondent's application for leave to open a bus service in the Fairfield-Gonzales district in Victoria already served to some extent by respondent's tramway.

The appeal was taken both on facts and law, but the respondent denied that the substantial questions involved were questions of either fact or law and contended that they were nothing but questions of policy and expediency. Under section 105 of the Public Utilities Act, appeal on facts lies to the Lieutenant-Governor in Council and under section 106 the Lieutenant-Governor in Council may refer the appeal to the Court of Appeal which he did. Under section 97 of the same Act, an appeal lies to the Court direct on questions of law by leave of a judge, and the Chief Justice of British Columbia had given such leave by order of the 20th of September, 1945. The appellant appealed as a rival applicant, it having applied to the Commission for leave to begin a bus service in the same district. The rival applications were made under different Acts. Respondent as a "public utility" under section 2 of the Public Utilities Act was required to obtain a certificate of "public convenience and necessity" under section 12 (*a*) of that Act, whereas the appellant, not being a public utility under the definition as amended in 1939, but a "motor carrier" under the definition in section 2 of the Motor Carrier Act, had to obtain from the Commission a licence under section 5 of the latter Act in order to operate the proposed bus service. The appellant's application was refused by the Commission, but that was not before the Court, since appeal on facts can only be taken to the Lieutenant-Governor in Council under section 55 (1) of the Motor Carrier Act, as amended in 1944. The appellant appealed on the facts from the dismissal of its application, but the appeal could not be referred to the Court of Appeal. So the Court had before it only the Commission's approval of the respondent's application and not its rejection of the appellant's, although both were dealt with at the same time. Respondent is a tramway company and has served the Fairfield-Gonzales district with tram service since

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1909. The appellant is purely a bus company, its service hitherto being confined to Oak Bay and the northern part of the city. In 1938 the respondent's franchise ran out. The city had a plebiscite as to continuance of the tramway. There was a majority in favour, but not a two-thirds' majority needed for renewal. The respondent then continued to run its tram-cars under arrangement with the city officials, by which it was to be given consideration before any change was made. On May 25th, 1945, the appellant applied to the city for leave to begin a bus-line through Fairfield-Gonzales area; and the city adopted the recommendation of the transportation committee of the council that "no action be taken at present." The transportation committee then advertised for tenders and both the appellant and respondent submitted tenders. On August 13th, 1945, the council finally passed by-law amendments legalizing the respondent's proposed bus routes. On the 6th of September, 1945, the Commission granted the respondent's application and refused the appellant's.

The appeal was argued at Victoria on the 29th to the 31st of October, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Harvey, K.C., for appellant: The B.C. Electric Ry. Co., being a "public utility" applies under the Public Utilities Act and the appellant applies under the Motor Carrier Act. The Commission must apply both Acts and deal with each application as required by the public interest. Conservation of the public interest is the guiding consideration. The Commission acted not only on wrong principles, but actually contravened what was manifestly the public interest in granting the B.C. Electric application. The Commission based its decision in favour of the B.C. Electric upon the premise that it was at the time serving the areas in question with its No. 6 car-line. This car-line traverses only a fringe along the western and southern boundaries of the area and by its own decision the Commission found that only part of the area in question was served and acted on an entirely wrong basis. The Commission erred in finding "it would be unwise and unfair" to give authority to any other

transportation company than the B.C. Electric until the whole matter of transportation service in Greater Victoria had been settled. In making such a finding the Commission followed a wrong principle, allowing its judgment to be coerced by the *post facto* assertion of the transportation committee of the city council shown in a minute of the city council of August 10th, 1945. The minute was not properly before the Commission at all, and in any event did not justify the Commission's action. There is no proper basis for finding that it would be "unwise and unfair" to do other than grant the B.C. Electric application and in so finding the Commission could not have had in mind the "conservation of public interest." In favouring the B.C. Electric the Commission felt itself bound by the consent of the city council; but it still must act "pursuant to section 12 of the Act and decide the matter on the basis of whether or not the privilege or franchise proposed is (a) necessary for the public convenience and (b) properly conserves the public interest. There is no evidence that the granting of a licence to the Blue Line would result in seriously affecting the business of No. 6 street-car line. The Commission erred in entering upon a consideration of such a suggested factor and clearly showed that it was motivated to protect the interests of the B.C. Electric. There was error in taking into consideration that the various municipalities have under discussion the provisions of a unified transportation system for the area as a whole. The applications before it were to provide a temporary service. The Commission should have held on the evidence that it was not in the public interest to grant the application of the B.C. Electric. There is no appeal to this Court under the Motor Carrier Act from the refusal of the Blue Line application, but there is a clear right of appeal in the Blue Line as an "adverse party" under the Public Utilities Act. The Commission should be reversed on the grounds that the evidence shows that the Blue Line proposals were more advantageous to the public. The Blue Line offered two separate routes, a five-cent fare, 80-cent weekly pass and transfer privileges over its own lines; and as against this the B.C. Electric required a six-cent fare and one dollar weekly pass.

Davey, K.C. (*Manzer,* with him), for respondent: The

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appeal must fail because the appellant can only succeed on questions of law or fact and the Commission's decision dealt with neither, but dealt wholly with questions of policy and expediency. The decision did not decide anyone's "rights," but simply that it was more politic and more expedient to grant the respondent's application than the appellant's. The tribunal's functions are administrative and not judicial: see *Re Ashby et al.*, [1934] O.R. 421, at p. 428; *Minister of National Defence for Naval Services* v. *Pantelidis* (1942), 58 B.C. 321, at pp. 328-9; *Re Brown and Brock et al.*, [1945] O.R. 554, at p. 563; *Re Silverberg and Board of Commissioners of Police for the City of Toronto*, [1937] O.R. 528, at p. 531. A judicial tribunal in general deals with private rights and liabilities, but an administrative tribunal, being concerned with policy and expediency, is always concerned with the public; it is only what is politic and expedient in the public interest that it can consider. Upon an application for a certificate of public convenience and necessity, which was the kind of application here made by the respondent, the Commission's function is defined by section 12 (*a*) of the Public Utilities Act. The clearest possible indication that the Commission acted in the present case administratively and not judicially lies in the very nature of the applications. The Alberta board has been held to be an administrative and not a judicial body: see *Northwestern Utilities Ltd.* v. *City of Edmonton*, [1929] S.C.R. 186; *Board of Public Utility Commissioners* v. *Model Dairies*, [1936] 3 W.W.R. 601. This case has no resemblance to *Corporation of City of Victoria* v. *Corporation of District of Oak Bay* (1941), 56 B.C. 345. There no question of policy or expediency arose and the Commission exercised judicial functions. An authority in point is *In re Grey Goose Bus Lines Ltd. and Liederbach Bus Lines Inc.*, [1936] 1 W.W.R. 221. When a tribunal is given a complete discretion no Court can reverse its decisions even though an appeal is given in the most general terms: see *Mulvilhill* v. *Regem* (1914), 49 S.C.R. 587; *The Queen* v. *Churchwardens of All Saints, Wigan* (1876), 1 App. Cas. 611, at p. 622; *The Queen* v. *Justices of Roscommon*, [1894] 2 I.R. 158. The decision is attacked as based on improper or insufficient evi-

dence. There is little force in this objection as against an administrative decision: see *In re Grey Goose Bus Lines Ltd. and Liederbach Bus Lines Inc.*, [1936] 1 W.W.R. 221, at p. 224; *Northwestern Utilities Ltd.* v. *City of Edmonton*, [1929] S.C.R. 186; *Local Government Board* v. *Arlidge*, [1915] A.C. 120. The complaint of the Commission's deciding that "it would be unwise and unfair" to let another company into the area is a complaint against the Commission's ideas of policy and expediency: see the *Grey Goose* case, *supra*. The objection to holding it unwise to let any other than the respondent operate until the Greater Victoria transportation problem had been dealt with is answered by the *Grey Goose* case, *supra*. Then it is said that there was error in the Commission's giving weight to the city's granting the respondent's application. This was a factor to which the Commission could and should give weight. Similarly the Commission was rightly influenced by the "gentleman's agreement" between the city and the respondent. The appellant complains that the Commission refused to compel production of minutes and evidence of the proceedings before the council and transportation committee. Section 13 of the Act makes consent of the city material, but there is no suggestion of any obligation to go behind the fact that it was given. The Commission had the council's decision and that was enough to satisfy the statute. Appellant complains that there was error in the Commission's view that the proposed bus service would affect the No. 6 tramcar line and there was no evidence in point. The answer to that is the reasoning of Lamont, J. in *Northwestern Utilities Ltd.* v. *City of Edmonton*, [1929] S.C.R. 186. On the complaint that the Commission should have adopted the policy of allowing competition in the same area, and in so doing failed to regard the merits and justice of the case and public interest see *In re Grey Goose Bus Lines Ltd. and Liederbach Bus Lines Inc.*, [1936] 1 W.W.R. 221. As to the complaint that the Commission failed to give effect to a petition of 3,000 residents supporting the appellant, the Commission knew that the petitions had failed to convince the city council. There is nothing to show that they did not give the petitions consideration, and they had to exercise their own discretion.

Harvey, replied. *Cur. adv. vult.*

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23rd November, 1945.

SLOAN, C.J.B.C.: I would dismiss the appeal for the reasons given by my brother ROBERTSON.

O'HALLORAN, J.A.: This Court is asked to decide two appeals taken by the appellant The Veterans' Sightseeing and Transportation Company Limited (commonly known and herein referred to as the "Blue Line") from the decision of the Public Utilities Commission rendered on 6th September last. Provision for the appeals is contained in the Public Utilities Act, Cap. 47, B.C. Stats. 1938 and amendments. One appeal restricted by the statute to questions of fact lies only to the Lieutenant-Governor in Council, who may, as was done here on 17th September, refer it to the Court of Appeal, which then "shall give such judgment as to it seems proper" (sections 105 and 106 of the Public Utilities Act, *supra*). The other appeal restricted to questions of law is taken direct to the Court of Appeal (section 97 of the Public Utilities Act, *supra*) upon leave obtained from the Chief Justice of this Court on 20th September. Both appeals were heard together by this Court on the 29th to the 31st of October.

The issues arise out of competitive proposals by the "Blue Line" and the B.C. Electric Railway Company, Limited to supply transportation service to the people of that southern interior portion of Greater Victoria, generally known as the Fairfield-Gonzales district, and roughly described as lying south of Fort Street, between Beacon Hill Park and the Oak Bay municipal boundary (Exhibit 9). The two companies are in competition in the municipality of Oak Bay, as they are also in the Spring Ridge, Fernwood, Haultain and upper Hillside areas in the city of Victoria proper (see Exhibit 9), where the "Blue Line" motor-buses tap areas which the B.C. Electric Fernwood and Hillside tram-lines serve in part. The B.C. Electric Foul Bay tram-line serves the Fairfield-Gonzales districts in part, and the "Blue Line" proposed to furnish additional transportation which the residents of these districts unquestionably need.

The "Blue Line" submitted its proposals to the Victoria city council. The B.C. Electric later submitted a proposal to the city council to add a motor-bus "feeder-line" to its existing Foul Bay tram-line. Despite the fact that the "Blue Line" proposed

a faster, more convenient and cheaper service (five-cent fare and 80-cent weekly pass), contrasted with the B.C. Electric proposal of six-cent fare and one dollar weekly pass for a tram-line "feeder" bus service, the Victoria city council rejected the Blue Line proposal and approved the B.C. Electric proposal.

Both companies then applied to the Public Utilities Commission for the necessary approval to operate. The "Blue Line's" application was made under the provisions of the Motor Carrier Act, Cap. 36, B.C. Stats. 1939 and amendments. The B.C. Electric applied under the provisions of the Public Utilities Act, *supra,* because motor-buses operated in connection with a street-railway public utility, are removed from the Motor Carrier Act and are governed by the Public Utilities Act. The B.C. Electric's application as filed with the Commission on 23rd July related only to bus service supplementary to its tram-line. But its amended application on 8th August related to a bus service to the centre of the city. The Public Utilities Commission is the tribunal of original jurisdiction named in both the Motor Carrier Act and the Public Utilities Act, and it heard the applications of the two companies jointly. The evidence and representations then made in each application became part of the proceedings in the other application, and the Commission could not escape consideration of the "Blue Line's" application which it rejected in the course of reaching its decision in respect to the B.C. Electric application which it granted.

The "Blue Line" took the two present appeals from the Commission's decision in favour of the B.C. Electric. No such appeals are available to it from the Commission's refusal of its own application, since the only appeal given by the Motor Carrier Act is an appeal to the Lieutenant-Governor in Council, which the latter has no power to refer to this Court. The "Blue Line" did take the latter appeal, and in the order in council of 17th September referring the present appeal on questions of fact to this Court, it is provided that the appeal of the "Blue Line" under the Motor Carrier Act

> be stood over for decision until the decision of the Court of Appeal is handed down on the said appeal under the Public Utilities Act.

The two appeals from the Commission's decision granting the

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B.C. Electric application (*viz.*, one on fact, the other on law) were argued before us jointly as if they were one appeal. The Commission's decision to grant the B.C. Electric's application and from which both the present appeals spring is supported by these "reasons for decision," which will now be analyzed.

REASONS FOR DECISION

The above application is granted for the following reasons:

1. Public convenience and necessity require or will require the service.

2. The applicant is the only operator now giving public transportation service in the area and the bus-line proposed is to be operated in connection with said transportation service.

3. The application is for a temporary service and it would be unwise and unfair to give authority to any other transportation company to operate at the present time over the area in question until the whole matter of the transportation service in the Greater Victoria area has been settled by the municipalities concerned.

4. The applicant is prepared to give a modern, efficient bus service to the area in question without delay.

5. The municipal council of the city of Victoria has given its consent to the operation by this applicant of the said service, evidence of which consent is required by the Public Utilities Act.

DATED the 6th day of September, 1945.

W. A. CARROTHERS
L. W. PATMORE.

The first thing to notice in the foregoing reasons is that the Commission has failed to find that the B.C. Electric proposal "properly conserves the public interest" as it is required to find under section 12 of the Public Utilities Act. That section reads in material part:

> (*a.*) . . . The Commission shall not give its approval unless, after a hearing, it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest.

The statute thus requires the Commission to find two essentials, first, that the proposal is necessary for the public convenience, and secondly, that it properly conserves the public interest. The statute has drawn a distinction between the two things. In the light of that distinction, it does not follow that because a service may be necessary for the public convenience the grant to a particular applicant of the right to operate that service must also properly conserve the public interest.

It may easily be that a service which is described as necessary for the public convenience, may nevertheless be put forward in

a proposal (particularly if contrasted with a competing proposal) which emphatically does not conserve the public interest. The Commission's approval of the B.C. Electric proposal cannot stand therefore, because the Commission has failed to find an essential which is a jurisdictional condition precedent to that approval. That of course is an error in law and justifies the appeal taken under section 97 of the Public Utilities Act, and that appeal ought to be allowed accordingly in pursuance of the jurisdiction conferred upon this Court by section 102 thereof. While in my judgment the foregoing is sufficient to demand the allowance of the appeal taken under section 97 (as distinct from the appeal under section 105), it is in point to refer to several other errors in law upon which the Commission misdirected itself, and upon which the appeal ought also to be allowed.

It is to be noted that the Commission's first reason is that public convenience and necessity require or will require the "service." But section 12 is silent upon the question of the "service." What it is concerned with is "the privilege, concession, or franchise," which, of course, is quite a different thing. It is the privilege, concession, or franchise to operate a service, and not the service itself, which the Commission must "determine" is necessary for the public convenience and properly conserves the public interest. That distinction is fundamental, and in the view I must take, the Commission's failure to recognize it, is fatal to its decision.

There is no doubt that the districts in question need an efficient bus service, whether it is provided by the "Blue Line" or the B.C. Electric, or by both. But the determining question is, which of the two proposals in evidence before the Commission, properly conserves the public interest, and *cf. State ex rel. Consumers Public Service Co.* v. *Public Service Commission* (1944), 54 P.U.R. (N.S.) 71, at p. 81 (Missouri Supreme Court). The Commission has dealt with the matter in its reasons as if the "Blue Line" proposal was not in the evidence before it. This is confirmed by the Commission's fourth reason, *viz.*, that the B.C. Electric is prepared to furnish an efficient bus service without delay. But the evidence before the Commission makes it clear that the "Blue Line" is also prepared to furnish an efficient bus

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service without delay. In fact, the evidence makes it clear that the "Blue Line" was first in the field with a proposal for an efficient bus service. It appears that it was not until the B.C. Electric filed its amended application to the Commission that the latter proposed to operate a bus service to the city centre in substitution for the bus "feeder" service to its tram-line which it had previously proposed, and *cf. Re Grand Island Transit Corporation* (1938), 27 P.U.R. (N.S.) (N.Y.) 337, at p. 343. The circumstances indicate the B.C. Electric did not propose an adequate service until driven to it by the competing "Blue Line" proposal.

The Commission's second reason, *viz.*, that the B.C. Electric is the only operation now in the area, also shows misdirection upon a question of law. The Commission, with respect, has failed to recognize that its powers to regulate competition do not extend to the prohibition of competition simply because it is competition. The Supreme Court of Utah in *Union Pacific R. Co.* v. *Public Service Commission* (1943), 135 P.2d 915, stated at p. 918 what I think must be a universally recognized principle of public utility law, *viz.*:

> . . . No one can have a vested right to be free from competition, to have a monopoly against the public.

And that principle has more pointed application in a case like the present, where the B.C. Electric had failed to give adequate transportation service to the districts affected.

The Commission's second reason confines itself to the districts immediately affected, and the lack of recognition of the foregoing principle has unfortunately caused rejection of the more favourable "Blue Line" proposal of a five-cent fare and 80-cent weekly pass (which the "Blue Line" carries out in other areas) compared to the less favourable B.C. Electric proposal of a six-cent fare and one dollar weekly pass. Hence I must regard that second reason as one which neglects to consider the public convenience and the public interest of the residents in the areas affected. In *In re Grey Goose Bus Lines Ltd. and Liederbach Bus Lines Inc.*, [1936] 1 W.W.R. 221 (Manitoba Court of Appeal) it appeared that the operating company was giving adequate service and that approval of an additional transportation company would impair the existing service. That does not apply

here, for the B.C. Electric proposal of a bus service to the city centre (and hence the "Blue Line" proposal) is quite a different kind of a service to that furnished by its tram-line. It leads inescapably to the conclusion that the tram-line service is inadequate or does not serve the parts of the districts the bus-line will serve (which I think is plain from other evidence).

The third reason given by the Commission to support its decision is that because the service is of a temporary nature it would be "unwise and unfair" to approve any other transportation service (obviously the "Blue Line") until the whole matter of transportation in Greater Victoria "has been settled by the municipalities concerned." Why it would be "unwise and unfair" is not explained. If the proposed service cannot be otherwise than temporary and the B.C. Electric service has been unsatisfactory and inadequate in the past, it would seem to be plainly in the interests of the people in the area affected as well as in Greater Victoria, to try out the "Blue Line" proposal, so that the efficiency of its service could be truly appreciated when the time does arrive to settle the transportation issue in Greater Victoria. The B.C. Electric had its opportunity in the past and had failed. "Unfair" as used by the Commission certainly cannot be interpreted as unfair to the residents of the area affected. It plainly means unfair to the B.C. Electric. But I cannot understand it being unfair to the B.C. Electric unless it is premised on the assumption (a) that the B.C. Electric will eventually be granted a transportation monopoly in Greater Victoria, or (b) that the B.C. Electric is entitled to preference because of its investment and long continued service in the areas in question and in other portions of Greater Victoria.

I see no ground for the assumption that the B.C. Electric will eventually be granted a transportation monopoly in Greater Victoria. Its franchise expired in 1938. When it then elected to carry on without a franchise, it must have been fully aware it would be subject to competition in the near future. That happened in Oak Bay and in the Fernwood-Haultain areas. It could be expected to happen in the Fairfield-Gonzales area also unless the B.C. Electric gave efficient service. The "Blue Line" proposal was made because of the inadequacy of the B.C. Electric

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service. There was some vague suggestion also of a "gentleman's agreement" that the city of Victoria would not assist any competitor of the B.C. Electric. Apart from the fact an agreement of that nature is unenforceable as such, *cf. Rose and Frank Co.* v. *J. R. Crompton & Bros., Ld.*, [1925] A.C. 445, it is hard to believe any city council could be a party to an arrangement of that kind.

Greater Victoria includes the municipalities of Saanich, Oak Bay and Esquimalt which at present contain nearly half the population. The Vancouver Island Coach Lines Limited operates from Victoria to and in the populous municipality of Saanich under terms which render most improbable that company's elimination from the Greater Victoria transportation picture. If and when a time arrives to reconsider the transportation services of Greater Victoria, it is by no means certain that either the B.C. Electric or the Blue Line proposals will then find favour. Some other company may put forward a proposition much more in the interests of the people of Greater Victoria. Or perhaps it may be in the public interest that the three companies now operating may be permitted to divide the Greater Victoria area among them with interchangeable transfer privileges.

The second assumption that the B.C. Electric is entitled to a preference because of its investment and long service in the area in question invites examination. No testimony was given as to the amount of that investment or as to the amount to which it has now depreciated. Nor do I remember testimony that the area in question is not populous enough to justify the two companies operating in competition as they do in Oak Bay and elsewhere in the city of Victoria. The expression "conserving the public interest" in section 12 of the Public Utilities Act does not include the protection of an applicant's investment at the expense of the public. Impairment of vested property rights is not a factor to govern the Commission's decision as to whether a service conserves the public interest, *cf. Union Pacific R. Co.* v. *Public Service Commission, supra,* at p. 918, particularly where the type of service and its equipment may be obsolete, and no longer furnishes adequate service.

This brings us to the fifth and last reason relied upon by the Commission, *viz.*, that the Victoria city council has given its consent to the B.C. Electric proposal. Considerable attention was directed to this aspect in the argument. As I understand the submission of counsel for the respondents, it is that the city of Victoria having power to say what types of vehicles may operate upon its streets and upon which of its streets, and having sanctioned the proposed bus service of the B.C. Electric and rejected that of the Blue Line, then the Commission must also sanction the service the city has approved. Or to put it as my notes of the argument have it, that the Commission cannot give its approval without the city's consent, or that even if the Commission gave its approval the company could not operate in the city of Victoria without the latter's consent. It seems to me that submission is completely answered in the case of a public utility by sections 39 and 40 of the Public Utilities Act and in the case of a motor carrier by section 40 of the Motor Carrier Act.

Furthermore, it is to be observed that section 13 of the Public Utilities Act provides every applicant

> . . . shall file with the Commission such evidence as shall be required by the Commission to show that the applicant has received the consent, . . . of the proper municipality . . . , if required.

That seems to mean the Commission shall receive evidence of the municipality's consent wherever such consent is required by a municipality. Section 13 continues that upon presentation of satisfactory evidence of the municipality's consent

> . . . , the Commission shall thereupon issue a certificate pursuant to section 12.

"Pursuant to section 12," in my judgment, means subject to compliance with section 12. But section 12 provides as already quoted, that the Commission shall not give its approval until it determines, after a public hearing, that the privilege, concession, or franchise is necessary for the public convenience and properly conserves the public interest. From that I take it the Commission's jurisdiction to grant or refuse an application is unaffected by the city consenting or refusing to consent to a proposal.

The powers of the Commission rise superior to those of any municipality. The Commission is specifically charged with conserving the public interest, and that is the peculiar reason for

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its existence. The duty to preserve and protect the rights of the public is reposed in the Commission and not in the municipalities, and *cf. City of Pittsburgh* v. *Pennsylvania Public Utility Commission* (1943), 33 A.2d 641, at p. 642 (Superior Court of Pennsylvania). As a municipality may unreasonably (in the public interest) reject a proposal, so it may also unreasonably (in the public interest) consent to a proposal. *City of Ottawa* v. *Town of Eastview et al.*, [1941] S.C.R. 448, at pp. 464-5 is an example of a utility commission intervening and varying the exercise of special powers. That occurs when the municipal powers are not exercised in the public interest.

Hence in my judgment the circumstance that a city has consented to or rejected a proposal is not in itself a valid reason for grant or refusal of an application by the Commission unless at the same time the Commission finds that the consent or rejection by the municipality has not been unreasonable. I must conclude that the Commission in giving as a reason for its approval of the B.C. Electric proposal that the city of Victoria consented thereto, misdirected itself as to the legal effect of that consent by attaching a legal significance thereto which the Public Utilities Act denies.

Having reached the conclusion the Commission misdirected itself upon questions of law, it is a short step to find further as I must, that as a result of that misdirection the Commission was led into error in its findings of fact. To illustrate—a jury which is a purely fact-finding body, in finding the facts, must apply the principles of law stated by the presiding judge. If the latter misdirects the jury upon the law, it is almost hopeless to expect the jury to find the facts correctly. Compare *Corporation of City of Victoria* v. *Corporation of District of Oak Bay* (1941), 56 B.C. 345, at pp. 366-7.

I would add, however, that even if it could be said that the Commission had not misdirected itself upon questions of law, and that the issue of whether the B.C. Electric proposal properly conserves the public interest could be treated solely as a question of fact, yet in my judgment the Commission's decision so viewed is irreconcilable with facts upon which the evidence leaves no room for doubt, when that evidence is viewed realistically from

the standpoint of the people in the affected areas who require better transportation than they have now, as well as from the standpoint of the residents of other populous areas in Greater Victoria. The B.C. Electric proposal provided for a six-cent fare and a one dollar weekly pass whereas the Blue Line proposal provided for a five-cent fare and an 80-cent weekly pass. Moreover, the Blue Line proposal (because of its Oak Bay service) provided a short and quick route between the populous areas of the Fairfield-Gonzales and Oak Bay contrasted with the circuitous and correspondingly delayed service proposed by the B.C. Electric, and which would be of little advantage to a large part of Oak Bay.

Counsel for the respondent discussed at some length the *status* of the Public Utilities Commission, in particular as to whether it was an administrative or judicial tribunal, and whether its decision may be based on expediency or law. In my judgment, when a tribunal is called on to make what are in true effect judicial decisions, it makes little difference by what name that tribunal is called or how it is described, and *cf. National Trust Company, Ltd.* v. *The Christian Community of Universal Brotherhood Ltd.* (1940), 55 B.C. 516, at pp. 529-30. The further appeal to the Supreme Court of Canada in [1941] S.C.R. 601 did not question what was there said, and see p. 611 *et seq.* Again when the decisions of that tribunal are made subject to appeal to the Court of Appeal on questions of law and fact, in my judgment, with respect, it would be a departure from the principles of the science of correct thinking to argue that its decisions must be tested by their expediency instead of by their obedience, consistency and harmony with the common and statute law which prevails in this Province. This may be an appropriate place to quote what Lord Wright restated when he wrote in "The Study of Law" (1938) 54 L.Q.R. 185, at p. 197 that the law:

> . . . [pervades] the whole complex tissue of the daily life of each of us. Whether consciously or not we are always regulating our lives by law, just as we are always speaking prose. . . . Without this constant basis of law, civilized life could not go on. It is the basis of our social existence.

In the result I would, with respect, set aside the decision of the Commission and allow both the appeals accordingly. Juris-

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diction to do so is found in section 102 as to the appeal on questions of law and in section 105 as to the appeal on questions of fact. In addition, in view of the provisions of section 103, I hereby certify my opinion as aforesaid to the Commission in respect to the appeal on questions of law.

ROBERTSON, J.A.: For many years prior to the 8th of August, 1945, the British Columbia Electric Railway Company, Limited, a public utility, within the meaning of the Public Utilities Act (later referred to as "the Act") had been operating a street-railway system in the city of Victoria, and in the municipalities of Oak Bay and Esquimalt, and for a shorter period, a bus service in part of Victoria. Transfer privileges were given over its street-car and bus systems. The Veterans' Sightseeing and Transportation Company Limited (referred to later as the "Blue Line") had been operating a bus service in the city of Victoria and Oak Bay municipality for some years; and also extended transfer privileges over its lines.

On the 8th of August, 1945, the British Columbia Electric Railway Company, Limited, being a public utility, and therefore only able to apply under the Act, applied under section 12 for a "certificate of public convenience and necessity" to operate in Victoria a bus service upon a route in two districts known as the Fairfield-Gonzales district. Both of these districts are now thickly populated, having 17½ per cent. of the buildings in Victoria and 15 per cent. of its population. Gonzales district extends a short distance into Oak Bay municipality. Since 1909 the B.C. Electric had been giving street-car service (No. 6 street-car) in part of these districts. At the inception of the service these districts were thinly populated.

The city of Victoria, by by-law 3115, authorized the operation of a bus service on the route in respect of which the B.C. Electric applied for a certificate, as above mentioned, and consented to the B.C. Electric operating a bus service on it. This route is entirely within the city of Victoria. On the 8th of August, 1945, the Blue Line, not being a public utility within the meaning of the Act, and therefore only able to apply under the Motor Carrier Act (to which it will be convenient to refer as the "Carrier

Act"), applied under the Act for a licence to operate a bus service in the Fairfield-Gonzales district on two routes. No authorization had been obtained from the city of Victoria to operate a bus service on these routes.

The administration of the Carrier Act is vested in the Public Utilities Commission (hereinafter called "the Commission") under section 33 of that Act. Both applications came on for hearing at the same time before the Commission. The city of Victoria intervened and supported the application of the B.C. Electric. Oak Bay municipality was represented on the hearing, and it was stated that it was neutral as between the two applicants. The Commission made two separate orders; one granted the B.C. Electric's application for the following reasons, *viz.*: [the reasons for decision are already set out in the judgment of O'HALLORAN, J.A.]

and the other refused the Blue Line's application for these reasons, *viz.*:

REASONS FOR DECISION

In dealing with this application the Public Utilities Commission is governed by the Motor Carrier Act. Section 7 of this Act gives direction with respect to the granting of the licences. In clause (*b*) of subsection (2) of section 7 the Commission is directed to take into consideration in the granting of a licence the general effect on other transportation services and any public interest which may be affected by the issue of such licence. In carrying out this section of the Act, particularly where public passenger transportation is involved, this Commission has followed the policy of refusing to allow one operator to enter the zone of another if the latter were prepared to give as good and efficient service to the public as the former. The granting of this licence to the Blue Line would undoubtedly result in seriously affecting the business of the No. 6 street-car line now serving part of the area in question. The British Columbia Electric Railway Company, Limited is now serving the area and is prepared to give a bus service comparable to that of the applicant.

As stated above, the Motor Carrier Act directs the Commission in the granting of a licence to consider any public interest which may be affected by the issue of such licence. At the present time the various municipal councils in the Greater Victoria area have under discussion the provision of a unified transportation system for the area as a whole. It is indicated that the transportation companies now operating in the Greater Victoria area are interested. Consequently it would be unwise and unfair to the respective positions of the various transportation companies giving service in the city of Victoria and adjacent municipalities at a time when a new transportation service is being considered for the whole Greater Victoria area. In its previous decisions respecting transportation in this area the Commission has consistently followed this policy.

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The Commission also notes that the application of The Veterans' Sightseeing and Transportation Company Limited to the Victoria city council was refused after opportunity had been given to the applicant to present its case. It is also important to note that the report of the transportation committee of the city council, the recommendations of which were accepted by the city council gave the following reasons, *inter alia*, for such recommendations:

"It should not be forgotten that the British Columbia Electric Railway Company agreed to carry on the street-car service for the duration of the war, at a time when buses were not available. There is a direct obligation on the city council to keep conditions regarding transportation services in the city as at present arranged pending a new franchise being granted. It would therefore seem to be unfair to permit the operation of a bus transportation service in the Gonzales and Fairfield districts in the interim, by any other company than the B.C. Electric Railway Company.

The application is consequently refused.

Acting under section 105 of the Act, the Blue Line appealed to the Lieutenant-Governor in Council against the decision giving the B.C. Electric the licence, upon a "question of fact": pursuant to section 106 of the Act the Lieutenant-Governor in Council referred the appeal to this Court.

On the 20th of September, 1945, as authorized by section 97 of the Act, leave was given by the learned Chief Justice of this Court to appeal upon questions of law. Acting under section 55 of the Carrier Act, Blue Line appealed to the Lieutenant-Governor in Council against the refusal of its application and there the appeal remains pending the disposition of the appeals under sections 97 and 105, as apparently there is no authority under the Carrier Act empowering the Lieutenant-Governor in Council to refer the Blue Line appeal to this Court. So that we are concerned only with the appeal under the Act.

Under section 12 (*a*) of the Act the Commission could not approve the B.C. Electric's application unless after a hearing it was satisfied that the "privilege, concession, or franchise" proposed to be granted was (a) necessary for the public convenience, and (b) properly conserved the public interest. Section 61 of the Carrier Act contains the same provision. So that the Blue Line application could not be granted unless the Commission was so satisfied. It was common ground that it was necessary for the public convenience that a certificate should be granted.

The only question remaining then was: Did the licences for

which applications were made, properly conserve the public interest?

Counsel for the Blue Line submitted the Commission proceeded upon wrong principles of law, in that: (a) It did not consider whether the application of the B.C. Electric properly conserved the public interest; (b) that it had decided it would be unfair to allow the Blue Line to compete in the districts in question, and thereby "violated" section 10 of the Carrier Act; (c) in basing its decision, in part, on the theory that the consent of the city was necessary before a licence could be granted; (d) in proceeding upon a "consistent" policy, contending that there was no rule or principle laid down in either Act to support any such policy; (e) in taking into consideration the statement that the various municipal councils in Greater Victoria had under discussion a unified transportation system for the area as a whole; (f) in finding that at the time of the application the B.C. Electric was giving transportation to the area in question by No. 6 line; whereas the Commission should have found the contrary and that the B.C. Electric was only serving a fringe of the area in question with its No. 6 car-line.

He attacked the decision upon questions of fact as follows: (a) The Commission should have found that the Blue Line offer would give cheaper rates to the public than that of the B.C. Electric; (b) that its service if granted, would connect with its Oak Bay lines, thus giving a shorter service to and from Oak Bay to the districts in question, than the existing lines of the B.C. Electric, or as the B.C. Electric lines would operate if its application were granted; (c) that the Blue Line would give a better and more convenient service in these districts because its application provided for two routes; (d) there was no evidence to support the Commission's finding that the granting of a licence to the Blue Line would result in seriously affecting the business of No. 6 street-car line.

Counsel for the appellant submits that while the appeal of the Blue Line against the refusal of their application is not before us, yet as appears from the reasons given for the granting of the B.C. Electric's application and the reasons given for refusing the application of the Blue Line, the Commission, when deter-

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mining whether or not to grant the B.C. Electric's application, considered the facts in connection with both applications, as it was a joint hearing of the two applications, and that we should also consider them. For the purpose of my judgment I shall assume this to be so.

First of all, it is important to determine whether the Commission is a judicial or administrative body. There seems to be no doubt as to its position under the Carrier Act. The title of that Act is "An Act to provide for the Regulation of Motor Carriers." Section 33 of that Act provides that the "administration" of the Act is vested in the Commission constituted under the Public Utilities Act. Generally speaking, the Carrier Act provides, *inter alia*, for the issuance of licences to persons desiring to operate a bus service, and for regulations in connection with the terms of the licence, renewal, transfer, display of licence plates, etc. It provides that motor carriers are to furnish certain information to the Commission; they are to furnish adequate service and extensions of service upon order of the Commission. Rates are to be fixed by the Commission and it is to have general supervision over motor carriers.

The Act is very similar to other Acts of that sort passed by different Provinces. The title of this Act is "An Act to provide for the Regulation of Public Utilities." Generally speaking, its provisions relate to granting of licences and to regulation, supervision, and the fixing of rates of public utilities generally.

I do not propose to refer further to the various sections of these two Acts. In my opinion, generally speaking, they impose administrative and not judicial duties upon the Commission. There are some sections under which the Commission must act as a judicial body: they are not relevant in the case at Bar. I refer to the following authorities: *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, [1931] A.C. 275; *Toronto Corporation* v. *York Corporation*, [1938] A.C. 415; *Board of Public Utilities Commission* v. *Model Dairies*, [1936] 3 W.W.R. 601; *Re Ashby et al.*, [1934] O.R. 421; *Minister of National Defence for Naval Services* v. *Pantelidis* (1942), 58 B.C. 321, at pp. 328-9. Nevertheless, the Commission "must act judicially," that is, "fairly and impartially." See *St. John* v. *Fraser*, [1935] S.C.R. 441, at pp. 452-3.

The board as an administrative body exercises its discretion as a matter of policy and expediency. It does not decide between the legal rights of the parties; neither of the parties here had any except the right to apply under the respective Acts. See *Re Ashby, supra,* at p. 428, and *Re Silverberg and Board of Commissioners of Police for the City of Toronto,* [1937] O.R. 528, at p. 533 and *Re Brown and Brock et al.,* [1945] O.R. 554, at pp. 563 and 568.

Then it is necessary to determine whether or not the consent of the city of Victoria to the B.C. Electric's application was necessary. The Municipal Act, R.S.B.C. 1936, Cap. 199, clause (129*a*) of section 59 (added by section 11, Cap. 44, B.C. Stats. 1938) give power, *inter alia,* to pass by-laws not inconsistent with any law in force in the Province for prohibiting, licensing, regulating or refusing a licence for all motor-vehicles carrying passengers for hire within the municipality.

Section 12 (*a*) of the Act provides that no privilege, concession, or franchise thereafter granted to any public utility by any municipality shall be valid unless approved by the Commission. Section 13 of that Act compels the applicant to

> file with the Commission such evidence as shall be required by the Commission to show that [it] has received the consent, . . . , vote, or other authority of the proper municipality . . . if required;

that is, in my opinion, if its consent is required by the municipality. It seems clear to me that such consent is required under the Act.

Section 17 of the Carrier Act is as follows:

> 17. Notwithstanding the provisions of any public or private Act, where a licensee operates in a municipality a motor-vehicle for which a licence has been issued under the provisions of this Act, if such operation is in accordance with the provisions of his licence and upon arterial or primary highways only, the licensee shall not be required to hold a licence in respect of that motor-vehicle under the provisions of any by-law of the municipality.

Then section 61 of the same Act provides in part as follows:

> 61. No privilege, concession, or franchise hereafter granted by any municipality to any person in respect of his operation of a public passenger-vehicle other than a municipal licence for one year or less shall be valid unless approved by the Commission. . . .

The appellants rely, however, upon section 40 of the Carrier Act, which is as follows:

> 40. Where any dispute arises between a motor carrier and a municipality

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as to the use by the motor carrier of any highway, or where any by-law of a municipality interferes with the operation of any licensed vehicle of a motor carrier on any highway in a municipality, the dispute may be referred to the Commission by either the motor carrier or the municipality, and the Commission may by order, after a hearing, permit the use of such highway by the motor carrier, upon such terms and conditions as it deems proper.

"Motor carrier" is defined to mean, unless the context otherwise requires,

any person operating a public vehicle, . . . , and includes any person who is the holder of a licence

under the Carrier Act. I think in this case the context requires that the motor carrier in section 40 be one which holds a licence. It has no application to an applicant for a licence because there could be no dispute before a licence was issued.

Section 40 may refer to a dispute arising under section 17, or may be an overriding power where the motor carrier has a licence and a dispute arises between it and the municipality as to the use of a highway or a municipal by-law interferes with its operation. In any case, it does not show that a licence can be issued without the consent of the municipality concerned.

It is difficult to see why, upon an application to the Commission under the Act, the consent of the municipality should be necessary and not necessary under an application to the same body under the Carrier Act. I am of the opinion that the consent of the municipality was necessary under both Acts; and that sections 17 and 61 of the Carrier Act, plus the relevant sections of the Municipal Act, to which I have referred, recognize this right in the municipality.

Then as the Blue Line did not have the necessary consent it could not operate its proposed bus service, and therefore it would have been idle for the Commission to grant it a licence, even if it had been disposed to do so. See *Rex* v. *City of Victoria* (1920), 28 B.C. 315 and *Welch* v. *Grant* (1920), *ib.* 367, at p. 372. This would seem to dispose of the matter.

As it was admitted that the service was necessary and there was only one applicant to which the licence could be granted, it would appear that the Commission granting the licence would be properly conserving the public interest, especially in view of the fact that the Commission held that the service proposed by the B.C. Electric was comparable to that which the Blue Line

was willing to give; and further that the Commission has full power to deal with rates, service and other things in which the public might be interested.

As to the unified transportation system argument, the decisions I have quoted support the position of the Commission in adopting a policy. Moreover, subsection (2) (*b*) of section 7 of the Carrier Act requires the Commission in dealing with an application under that Act, to consider

> The general effect on other transport services and any public interest which may be affected by the issue of such licence.

It was also argued that the Commission did not consider the public interest as it was not mentioned in the reasons or order. It is mentioned in the reasons for decision in the Blue Line application. There is nothing in the Act which says that the Commission shall set out in its reasons any particular thing or that it shall give any reasons at all.

Section 82 of the Act provides:

> 82. The Commission, in making any order, need not recite or show upon the face of the order the taking of any proceeding, the giving of any notice, or the existence of any circumstance necessary to give the Commission jurisdiction to make the order.

This, of course, relates to the order and not to the reasons. Furthermore, I think it should be presumed, in the absence of evidence to the contrary, that the Commission considered all matters which the Act directed it to do, although no mention of them was made in their reasons or order.

As to the argument that it would be unfair to allow the Blue Line to compete with the B.C. Electric in the districts in question, reference may be made to the position which the Victoria city council took at the hearing in the matter, *viz.*:

> It must be borne in mind that the B.C. Electric Railway Company only continued its transportation service when its franchise expired in 1938 on the urgent request of the city council and against its declared purpose at that time of getting out of the transportation field in Victoria; otherwise the city would have been left without any transportation system of any kind. In view of that fact it seemed hardly fair play to allow a competing company to go into the most remunerative sections of the Fairfield-Gonzales district and still expect the B.C. Electric Railway Company to continue its street-car service with these most profitable sections of the territory given over to another company.

And also, so far as the Blue Line application is concerned, to subsection (2) (*b*) of section 7 of the Carrier Act, *supra*.

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Turning now to the questions of fact, the rates and routes suggested by the Blue Line could have no bearing as they could not get a licence from the city; and, furthermore, the Commission has full power as to rates and service under Part III. of the Act. Also the Commission might have considered the transfer privileges the B.C. Electric could offer would offset the cheaper rates offered by the Blue Line.

The Blue Line had a second application for a route in part of Oak Bay and this was granted. It was intended to connect up this route with one or other of the proposed routes in the Blue Line application, which had been refused. No doubt this connecting service to Oak Bay had an important bearing upon the matter and was considered by the Commission, but as against that, there was again the much wider transfer privileges which the B.C. Electric could give. Then it was a matter of opinion as to whether the two routes proposed by the Blue Line were more convenient for the public than the B.C. Electric No. 6 line, plus its proposed bus service.

As to there being no evidence that the granting of a licence to the Blue Line would affect the business of No. 6 line, it seems to me it is self-evident, as it would inevitably take away passengers who otherwise would use that line. Further, the Commission can act upon reports of its officers (section 72) and is not bound to follow strict legal precedent (section 69). See *Northwestern Utilities Ltd.* v. *City of Edmonton,* [1929] S.C.R. 186, at p. 194; *In re Grey Goose Bus Lines Ltd. and Liederbach Bus Lines Inc.,* [1936] 1 W.W.R. 221, at p. 224.

I next deal with the objection that the Commission was wrong in finding that the B.C. Electric No. 6 line served the district. While in their reasons for decision upon the B.C. Electric application the Commission said "the applicant is the only operator now giving public service in the area," in their reasons for decision upon the Blue Line application the Commission referred to No. 6 street-car line as "serving part of the area in question" and later "now serving the area." From this it would appear that the Commission did not find the B.C. Electric were giving service to the whole of the area by their No. 6 line.

Finally section 69 of the Act provides as follows:

69. The Commission shall make its decision upon the real merits and justice of the case, and shall not be bound to follow strict legal precedent.

How can this Court say that the Commission did not make its decision upon the real merits and justice of the case where it has found that the B.C. Electric routes are comparable to that suggested in the Blue Line application; and in view of the larger transfer privileges and the permission to take into consideration the things mentioned in subsection (2) (*b*) of section 7 of the Carrier Act and the other matters which I have set out.

In *Canadian National Railways* v. *Canada Steamship Lines, Ld.*, [1945] A.C. 204 the facts were that the Canadian National Railways had made an application to the Board of Transport Commissioners under section 25 of the Transport Act, 1938, for the approval by the board of certain charges agreed between the railways and certain shippers. The application was opposed by the Canadian Steamship Lines, Ltd. and others operating on the lakes, on the ground, mainly, that the agreed charges, if sanctioned, would have the effect of depriving them of the whole or a large part of their share of the traffic, and would prejudicially affect their business and revenues. The railways contended that the board was precluded from considering an objection made on that ground. The Act contained a provision which is set out in the judgment of the Judicial Committee, delivered by Lord Macmillan at p. 211, where he said:

> It would be difficult to conceive a wider discretion than is conferred on the board as to the considerations to which it is to have regard in disposing of an application for the approval of an agreed charge. It is to have regard to "all considerations which appear to it to be relevant." Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the board as to what considerations are relevant would appear to be unchallengeable. The circumstance that the general words are followed by a specific direction to the board to have regard in particular to two specified topics in no way derogates from the generality of their discretion.

This case seems to me to apply to the case at Bar. Under the Act the Commission is to conduct its proceedings in such manner as it may deem most convenient for the proper discharge and speedy dispatch of business, and may make rules and regulations respecting its sittings and for regulating procedure in matters

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before it (section 53). It has power to determine its own procedure (section 55). It may appoint (section 56) and accept and act upon evidence by affidavit or writing, affirmation or by the report of any of its officers (section 72) and finally, as provided in section 69, *supra,* it is directed to make its decision upon the real merits and justice of the case and is not to be bound by strict legal precedent. It may be added that section 79 provides that the enumeration in any provision of the Act of any specific power or authority given to the Commission is not to be held to exclude or limit any power or authority otherwise in the Act conferred on the Commission.

There is a further consideration which I think should be mentioned: The question before the Commission was primarily one of fact, although questions of law might arise. As to the questions of fact, in my opinion, this Court would not be justified in reversing the Commission unless it were demonstrated that there was no proof before the Commission upon which, assuming it was acting judicially, it could regard as reasonably sufficient to support the B.C. Electric application.

In *Wilson* v. *Esquimalt and Nanaimo Ry. Co.,* [1922] 1 A.C. 202 the Judicial Committee had to consider the effect upon the Crown grant a disallowance of an Act pursuant to the terms of which the Crown grant had been issued prior to the disallowance. The Act gave the Lieutenant-Governor in Council authority to issue Crown grants upon "reasonable proof' of certain facts. The Lieutenant-Governor in Council had a hearing and a Crown grant was issued. It was held that while his function was judicial he was not bound to follow the rules regulating proceedings in a court of justice; and if there was before him some proof of the necessary facts it was within his discretion to determine that there was reasonable proof. Duff, J., as he then was, pointed out at p. 212 that the objection was taken that in the material produced before the Lieutenant-Governor there was no "reasonable proof" of certain allegations necessary to support the application for the Crown grant. He said that the majority of the Court of Appeal proceeded on these grounds; and that

> . . . The reasons of the learned Chief Justice are cogent reasons in support of the conclusion that the allegations of the appellants' petition were not supported by complete evidence; but their Lordships do not think

that this, if established to the satisfaction of the Court of Appeal, was necessarily conclusive in favour of the respondent company.

Whether or not the proof advanced was "reasonable proof" was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any Court so long at all events, as it was not demonstrated that there was no "proof" before him which, acting judicially, he could regard as reasonably sufficient.

And at p. 213 he said:

. . . Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received.

I think this Court should certify its opinion to the Commission (section 103) and dismiss the appeal (section 106).

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON. He has dealt with the matter so fully in his judgment that it would only be superfluous for me to add any words of my own.

BIRD, J.A.: I have had the advantage of perusal of the written reasons of my brother ROBERTSON supporting his opinion that the appeals of the appellant herein both upon questions of fact as well as upon questions of law should be dismissed.

I concur in the opinion expressed by him and would dismiss the appeal.

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

Solicitors for appellant: *Harvey & Twining.*

Solicitor for respondent British Columbia Electric Railway Company, Limited: *R. B. Mathews.*

THE KING *EX REL.* JOGINDAR SINGH v. RAM SINGH.

S. C.
1945
1945
Sept. 24;
Oct. 23.

Criminal law—Conviction—Case stated—Jurisdiction—Section 761, subsection 3 (c) of the Criminal Code not complied with.

Section 761, subsection 3 (*c*) of the Criminal Code requires that "the applicant shall within three days after receiving the case transmit it to the court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceedings which is questioned."

On the hearing of the appeal the preliminary objection was raised that there was no jurisdiction as the above section had not been complied with. The case was properly transmitted to the Court on the 5th of

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July, 1945, but the notice of appeal was not served on the magistrate until the 9th of July and on the respondent on the 10th of July.

Held, that by the language of the section the giving of the notice before the transmission of the case is a statutory requirement which must be complied with before the Court acquires jurisdiction.

Atholl (Duke) v. *Read*, [1934] 2 K.B. 92, followed.

APPEAL by way of case stated from a conviction by G. A. Tisdall, Esquire, stipendiary magistrate at Duncan, B.C. Heard by MACFARLANE, J. at Victoria on the 24th of September, 1945.

Sinnott, for appellant.
Davie, K.C., for the Crown.

Cur. adv. vult.
23rd October, 1945.

MACFARLANE, J.: This is a case stated by G. A. Tisdall, Esquire, stipendiary magistrate, at Duncan, B.C. Mr. *Davie* raises the preliminary objection that there is no jurisdiction to hear the case, the statutory requirement of section 761, subsection 3 of the Code not having been complied with. After the case was stated, the case was transmitted to this Court before notice of appeal was given. The case was transmitted on July 5th, 1945, and notice of appeal was served on the magistrate on the 9th of July and on the respondent on the 10th. Section 761, subsection 3 (*c*) requires that

> the applicant shall within three days after receiving the case transmit it to the court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding which is questioned.

It is admitted that there is no rule or order otherwise providing. Rules 11 to 14 of the Criminal Appeal Rules do not deal with this requirement. I think the case of *Atholl (Duke)* v. *Read*, [1934] 2 K.B. 92, and the cases therein cited are in point. I think by the language of the section the giving of the notice before the transmission of the case is a statutory requirement which must be complied with before the Court acquires jurisdiction. A somewhat similar point was decided by MARTIN, J. in *Cooksley* v. *Nakashiba* (1901), 8 B.C. 117, where the failure to transmit the case within the time fixed was under consideration. I may say that I give effect to the objection with reluctance, as the notice of appeal was promptly given, and no one was prejudiced. I do not think, however, that

> the Court has [any] power . . . to give itself a jurisdiction which the statute does not itself give:

Atholl (Duke) v. *Read, supra*, p. 100.

Objection sustained; appeal quashed.

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Mar. 16, 23.

Land Registry Act—1913 amendment of section 22 (1) of the Act—Effect of —Non-registration of conveyance—Registration of judgment—Priority —R.S.B.C. 1936, Cap. 140, Sec. 37; Cap. 91, Sec. 35.

A judgment creditor applied for confirmation of the registrar's report recommending that certain lands of the judgment debtor are liable to be sold to satisfy the judgments. The two judgments were registered on July 23rd, 1943, and March 30th, 1944, respectively. On the 19th of June, 1935, the judgment debtor had executed and delivered to Minto Trading and Development Company, Limited, a duly-attested deed conveying the lands in question to that company, but the deed was never registered. The Minto company, relying on the judgment in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 and other cases along the same line contended the principle therein decided was that an execution creditor can only sell the property of the debtor subject to all such charges, liens and equities as the property was subject to in the hands of this debtor. Here the lands in question were not at the date of the registration of the judgment and are not now the property of the judgment debtor. It was held that the case of *Entwisle* v. *Lenz & Leiser* is one directly applicable and binding on the Court unless there has been, since the date of that decision, a change in the statute law applicable, but in 1913 section 22 (1) of the Land Registry Act (now section 37) was amended by substituting the words "at law and in equity" for the words "in all Courts of justice." This amendment has the effect of making lands registered in the name of a judgment debtor his property both at law and in equity. The *Entwisle* v. *Lenz & Leiser* case, therefore, does not apply and no reason has been advanced for refusing the enforcement of the judgment and upholding the registrar's report.

Held, on appeal, reversing the decision of WILSON, J., that the main point in this appeal is whether the amendment in 1913 of section 37 of the Land Registry Act by substituting the words "at law and in equity" for the words "in all Courts of justice" substantially altered the meaning of that section as was held in the Court below. After examination of the statute and consideration of the submissions advanced, the Court is unable to conclude that the 1913 amendment read in its context did change the true meaning of the section and the appeal is allowed accordingly.

APPEAL by defendant from the decision of WILSON, J. of the 25th of October, 1944, on an application by a judgment creditor for the confirmation of the registrar's report recommending that certain lands of the judgment debtor in the Kamloops Land Registration District are liable to be sold to satisfy the judg-

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ments. The lands involved consist of two parcels—parcel A, a number of townsite lots in Minto Townsite and parcel B, a farm property in the same vicinity. The appeal is with reference to parcel A only. The judgment creditor held two judgments against the judgment debtor registered on July 23rd, 1943, and March 30th, 1944, respectively. On the 19th of June, 1935, the judgment debtor had executed and delivered to Minto Trading and Development Company, Limited, a duly-attested deed conveying parcel A to that company. This deed has not been registered nor has any application been made to register it. The Minto Trading and Development Company relied on the judgment in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 and other cases along the same line. It was admitted that *Entwisle* v. *Lenz & Leiser* was directly applicable, and binding on the Court unless there has been since the date of that decision a change in the statutory law applicable. That case was decided entirely on equitable principles. On the date of that judgment section 22 of the Land Registry Act provided as follows:

> 22. (1.) Every certificate of indefeasible title issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence in all Courts of justice that the person therein named is seised of an estate in fee-simple in the hereditaments therein described. . . .

In 1913 section 22 of the Land Registry Act was amended as follows:

> 22. (1.) Every certificate of indefeasible title issued under this Act shall, so long as same remains in force and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in such certificate is seised of an estate in fee-simple in the land therein described. . . .

By the amendment the words "at law and in equity" are substituted for the words "in all Courts of justice." It was held that in the *Entwisle* v. *Lenz & Leiser* case, which is on all fours with the present one, that the judgment could not be enforced against lands registered in the name of the judgment debtor because, in equity, the lands were the property of a third person. But the amendment of 1913 referred to has the effect of making lands registered in the name of the judgment debtor his property both at law and in equity. Owing to the said amendment the case of *Entwisle* v. *Lenz & Leiser* does not apply and the registrar's report was confirmed.

The appeal was argued at Vancouver on the 16th of March, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Bull, K.C., for appellant: This appeal has reference to section 37 of the Land Registry Act and as to the effect of the amendment of section 22 (1) of the Act in 1913. It is a case of a registered judgment and a prior unregistered conveyance, and the submission is that the amendment did not change the true meaning of the section and the case of *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 should be followed: see also *Salomon* v. *Salomon & Co. Salomon & Co.* v. *Salomon*, [1897] A.C. 22; *Associated Growers of B.C.* v. *Edmunds* (1926), 36 B.C. 413. There is no question of fraud or bad faith: see *National Provincial Bank of England* v. *Charnley* (1923), 93 L.J.K.B. 241, at p. 257; *Gregg* v. *Palmer* (1932), 45 B.C. 267; *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334.

Thomas E. Wilson, for respondent: The case turns on the effect of the amendment in 1913 of section 22 of the Land Registry Act. The submission is that the words "at law or in equity" covered the whole field. The *Entwisle* case would have been decided differently if it had been heard after the amendment: *Howard* v. *Miller*, [1915] A.C. 318, at p. 326; *In re Monolithic Building Co.* (1915), 84 L.J. Ch. 441. The company has not any real equity: see *Boulter-Waugh & Co., Ltd.* v. *Union Bank of Canada*, [1919] 1 W.W.R. 1046, at p. 1047; *Union Bank of Canada* v. *Turner*, [1922] 3 W.W.R. 1138, at p. 1142.

Cur. adv. vult.

On the 23rd of March, 1945, the judgment of the Court was delivered by

O'HALLORAN, J.A.: The main point in this appeal is whether the amendment in 1913 (by Cap. 36, Sec. 8) of section 37 of the Land Registry Act, R.S.B.C. 1936, Cap. 140 (then section 22) by substituting the words "at law and in equity" for the words "in all Courts of justice," substantially altered the meaning of that section as was held in the Court below. After examination of the statute and consideration of the submissions advanced by counsel, we are unable to conclude that the 1913

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amendment read in its context did change the true meaning of the section, and the appeal is allowed accordingly.

Appeal allowed.

Solicitor for appellant: *Alfred Bull.*
Solicitor for respondent: *Thomas E. Wilson.*

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PETKOVICH v. POTKONJAK.

Default judgment—Application to set aside—County Courts Act, R.S.B.C. 1936, Cap. 58, Sec. 84—Application dismissed—Appeal—Unsworn affidavit used on application—Application to use new affidavit granted—Delay not a bar in circumstances.

On appeal from an order dismissing an application under section 84 of the County Courts Act to set aside a default judgment of April 24th, 1931, it appeared that since the order appealed from was made, a supposed affidavit by the plaintiff had merely been signed by him and through oversight had not been sworn or filed although both parties believed that it had been. An affidavit exactly the same as the one referred to was sworn and is now filed and the plaintiff moved for leave to admit it by way of further evidence. The defendant in his affidavit admitted service of the summons in the action and set out that at the time two garnishee summonses had been issued and that after discussion with the plaintiff in which the defendant denied owing the amount claimed, the plaintiff agreed that the amounts garnisheed would be all that he would demand of the defendant and no further steps would be taken and thereupon the defendant abandoned his claims against the garnishees and did not know until January, 1945, that the plaintiff had signed judgment. The plaintiff denied these allegations. The application was dismissed in view of the length of time since the judgment.

Held, on appeal, that the supposed affidavit was used in good faith, accepted by the Court and the defendant and acted upon and the new affidavit should be admitted in evidence.

Held, further, reversing the decision of BOYD, Co. J., that in respect to delay, the time to be considered began from the date when the defendant first became aware of the judgment. There had been no delay warranting the refusal of the application. The appeal is allowed, the default judgment is set aside and the defendant is allowed in to defend.

APPEAL by defendant from the order of BOYD, Co. J. of the 26th of April, 1945, dismissing the defendant's application

under section 84 of the County Courts Act to set aside a default judgment obtained by the plaintiff against the defendant for $725.75. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Victoria on the 16th of October, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Fleishman, for appellant.

G. F. McMaster, for respondent, moved to introduce fresh evidence through a slip. An affidavit was used in the Court below that through oversight had not been sworn or filed although both sides believed it had been. The fresh evidence is an affidavit duly executed and precisely the same as the affidavit referred to: see rule 5 of the Court of Appeal Rules and rule 315; *Wallace* v. *Grand Trunk R.W. Co.* (1921), 49 O.L.R. 117; *Dumoulin* v. *Burfoot* (1893), 22 S.C.R. 120.

O'HALLORAN, J.A.: Judgment reserved as to allowing fresh evidence.

Fleishman, on the merits: The summons and garnishees were served on the defendant in April, 1931. The defendant's affidavit shows the claim was for $709 and the two garnishees were for $387. The defendant claims he only owed the plaintiff about $385. After service the defendant saw the plaintiff and after discussion the plaintiff agreed that the two garnishees would be all that he would require from the defendant and no further action would be taken. The defendant then abandoned his claim against the garnishees. On April 24th, 1931, the plaintiff obtained judgment by default for the full sum claimed and the defendant knew nothing of this until January, 1945. The plaintiff denies there was any such arrangement between him and the defendant, but he took no action under his judgment for 14 years. Under section 84 of the County Courts Act the defendant must show he acted reasonably in not filing a dispute note. We have been guilty of no laches: see *Challoner* v. *George* (1923), 24 O.W.N. 25; *Jackson* v. *Murray et al.* (1913), 5 W.W.R. 904; *Schmitt* v. *Schmitt et al.* [1919] 2 W.W.R. 642; *Cannan* v. *Reynolds* (1855), 5 El. & Bl. 301.

McMaster: Julgment was obtained and there was no obliga-

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tion to serve the defendant: see Order XII., r. 1 of the County Court Rules and see *Morrison* v. *Rees* (1850), 1 Pr. 25, at p. 27; *Imperial Life Assurance Co. of Canada* v. *Best* (1908), 7 W.L.R. 446; *Banks* v. *Sopko,* [1940] 1 D.L.R. 409.

Fleishman, replied.

Cur. adv. vult.

18th October, 1945.

Per curiam (ROBERTSON, J.A.): This is an appeal from an order of BOYD, Co. J. dismissing the defendant's application under section 84 of the County Courts Act to set aside the default judgment for $723.75 and costs in this action, dated 24th April, 1931. Section 84 reads as follows:

> 84. Where the defendant fails or neglects to file a dispute note the Judge may, upon an affidavit disclosing a defence upon the merits and satisfactorily explaining such failure or neglect, set aside the judgment and let in the defendant to defend, upon such terms as he thinks just.

The order sets out, as part of the material used on the application, "the affidavit of the said parties filed herein." It appears, however, since the judgment, that what purported to be an affidavit by the plaintiff had merely been signed by him, and, through an oversight, had not been sworn or filed, although both parties believed it had been. An affidavit exactly the same as the one above referred to, was sworn on the 21st of September, 1945, and has now been filed, and the plaintiff moves for leave to admit this affidavit by way of further evidence.

In our opinion our well-known rule as to the admissibility of further evidence—see *Marino* v. *Sproat* (1902), 9 B.C. 335—does not apply, under the peculiar circumstances of this case. Here the supposed affidavit was used in good faith by the plaintiff and was accepted by the Court and the defendant as being what it appeared to be, and was acted upon. For these reasons we think the affidavit should be admitted.

The defendant in his affidavit admitted service of the summons and set out that, at that time, two garnishee summonses had been issued, one for $267 and the other for $120, and that

> when the summons was served upon me including the garnishees, I went to the plaintiff herein and told him that under no circumstances did I owe him that much money, and that at most I owed him about $385 and not more. After some discussion, the plaintiff agreed with me that the gar-

nishees would be all that the plaintiff would demand from me, and that no further steps would be taken

and that "as a result of the same," he, the defendant, abandoned his claims against the garnishees and that he knew nothing more about the matter and did not know the plaintiff had signed judgment against him until January, 1945.

The plaintiff in his affidavit denied what was alleged by the defendant, and in particular that he ever agreed with the defendant

that any garnishees whatsoever would be the full amount of my claim against the said defendant.

He denied the defendant's allegations that he had abandoned his claims against the garnishees and that the defendant's indebtedness to him was not more than $385 and that it has been agreed "that this would take care of the indebtedness in full."

The learned judge in dismissing the application did so "in view of the length of time" since the judgment. With respect, we think the judge proceeded upon a wrong principle. In our opinion length of time under the circumstances in this case, commenced from the time when the defendant first became aware of the judgment. Mere delay, which is not unreasonable under all the circumstances, is not, by itself, a reason for refusing relief and in this case in our opinion there has been no delay to warrant refusal of the application.

Then the position is that this Court must consider the matter on its merits. There has been no cross-examination on the affidavits, so that they contain the only evidence. Therefore this Court is in as good a position to decide the matter as the Court below.

It was submitted that as nothing had been paid by the garnishees, even on the defendant's own statement there had been no accord and satisfaction, and therefore the judgment should not be set aside. This overlooks three things. The first is that the defendant denied that he owed the amount, $735, for which judgment has been obtained; and said he only owed about $385. Next, it may be argued that the abandonment alone, of his claim against the garnishees, and altogether apart from the question of actual performance, may be a good satisfaction, and, discharge the cause of action if it clearly appears that the parties

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so intended. *Morris* v. *Baron and Company,* [1918] A.C. 1; and finally, that if the arrangement which the defendant suggests was made, and the plaintiff did not recover anything against the garnishees because of his laches in not proceeding against them, the defendant might have a good equitable claim to be relieved from so much of the judgment at least as would have been satisfied if the plaintiff had been diligent and forced the garnishees to pay what it is alleged they owed. Of course, we express no opinion as to these submissions. All these matters are things to be decided at the trial.

We would therefore allow the appeal, set aside the judgment, and let the defendant in to defend; all this to be subject to terms to be spoken to at the opening day of the November sittings. See *MacGill* v. *Duplisea* (1913), 18 B.C. 600.

Appeal allowed.

Solicitor for appellant: *A. H. Fleishman.*
Solicitors for respondent: *Crux, McMaster & Sturdy.*

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Oct. 9, 10; *Nov.* 27.

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 Shingle Bay Packing Company Limited, E. A. Towns Limited (old company) and S. C. Ruck, E. A. Towns Limited (old company) agreed to advance Shingle such sums of money as required to meet the cost of operation of its plant up to $10,000 in any one year, and Ruck, being owner of the plant used by Shingle and held under a lease from Ruck, agreed to secure said advances by executing a chattel mortgage on said plant in favour of E. A. Towns Limited (old company) in which Shingle 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 E. A. Towns (new company and plaintiff) E. A. Towns (new company) assumed the obligations of the old company under the agreement of

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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, and by reason of this a further chattel mortgage was made on December 31st, 1941, between Ruck as grantor and E. A. Towns Limited (plaintiff) as grantee with Shingle as third party joining in the covenant for payment, it being in the same terms as in the first chattel mortgage and reading 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 December 21st, 1942. During his lifetime he was managing director of Shingle and was actively engaged in carrying on its business and dealt directly with E. A. Towns Limited. He was succeeded in the management of Shingle by one of his executors G. S. T. Ruck. Towns Co. Limited continued after the death of Ruck to make advances to Shingle pursuant to the contract until July 1st, 1943. It is alleged that on July 1st, 1943, the indebtedness to the plaintiff was $9,109.43. It was held on the trial that the inclusion of the words "and each of them" in the covenant makes it a joint and several covenant and the plaintiff recovered judgment.

Held, on appeal, affirming the decision of COADY, J., that the language of the covenant as above set out must be read as creating a joint and several obligation. Here there are words of severalty.

As to whether the *status* of Ruck was that of a surety for Shingle or was that of principal debtor, nowhere in the several agreements or chattel mortgages is any reference to "guarantee" or "surety." By section 7 of the agreement of January, 1939, the covenant there provides for a chattel mortgage "to secure the sum" not to secure payment by Shingle of the sum. The obligation thereby assumed by Ruck must be taken to be the obligation of principal debtor and not that of a surety. Assuming Ruck's liability to be that of surety and not primary debtor, this defence cannot prevail as Ruck not only had full knowledge of and consented to direct sales by Shingle to Towns Limited which constituted a deviation from the contract, but he actively participated in the making of these contracts.

APPEAL by defendants from the decision of COADY, J. of the 13th of April, 1945 (reported, 61 B.C. 414), in an action against the executors of the estate of Sydney Charles Ruck, deceased, to recover the sum of $9,105.43 owing by Shingle Bay Packing Company Limited to the plaintiff and guaranteed by S. C. Ruck, deceased. In January, 1939, Shingle carried on the business of producing fish oil and meal from fish waste on Pender Island, B.C. The principal shareholder was Sydney Charles Ruck. The plant operated by Shingle was owned by

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Ruck and until his death he was in charge of operations. On January 29th, 1939, an agreement was entered into between Shingle, E. A. Towns Limited (old company) and Ruck whereby Towns Limited agreed to finance the operations of Shingle by advancing money without interest up to a maximum of $10,000 and in exchange Towns Limited was appointed sole agent for the sale of the production of Shingle at a commission specified in the agreement. By deed of January 30th, 1939, Ruck mortgaged the plant in favour of Towns Limited to secure $1,500 already advanced and any further advances made. Shingle was a party to the mortgage which contained a covenant by Shingle and Ruck and each of them for repayment of the money. The respondent company was incorporated in December, 1939, under the name of E. A. Towns (1940) Limited and with the consent of all parties in the agreement of December 30th, 1939, took the place of E. A. Towns Limited which went into liquidation and later E. A. Towns (1940) Limited changed its name to E. A. Towns Limited. By agreement betweeen the parties on December 31st, 1941, the duration of the agreement of January 28th, 1939, was extended from January 1st, 1942, to July 1st, 1943. This alteration required a corresponding change in the security so on December 31st, 1941, Ruck executed a fresh mortgage in favour of respondent, Shingle being a party. The deed secured repayment of $8,694.89 then due and any further advances. It contained the following covenant:

> 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.

On this covenant the action was brought. Ruck died on the 21st of December, 1942, and the defendant George S. T. Ruck continued to manage the business which was carried on in the same way. On the 30th of June, 1943, when the agreement of January 28th, 1939, expired the amount owing was $9,109.43. The same business relationship continued, but the indebtedness increased and the plant closed down in the Spring of 1944, the total liability then being $14,400.72. A receiving order was made in bankruptcy against Shingle on January 15th, 1945.

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The appeal was argued at Victoria on the 9th and 10th of October, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Whittaker, K.C., for appellants: The covenant for payment upon which the action was brought is a joint covenant not joint and several and S. C. Ruck, having died, his estate is discharged from liability: see Halsbury's Laws of England, 2nd Ed., Vol. 14, p. 410, par. 771. It will be noted that the covenant is not "that they, Shingle and Ruck, and each of them" will pay, but "that they Shingle and Ruck, or one of them" will pay. It will be seen from the authorities that the words "they or one of them" import a joint covenant. If the parties intended the liability to be joint and several it would have been very easy to use apt and usual language: see authorities found in three articles by Mr. W. F. O'Connor in 3 Can. Bar. Rev. pp. 243, 289 and 383; see also *White* v. *Tyndall* (1888), 13 App. Cas. 263; *Robinson* v. *Walker* (1703), 7 Mod. 153; *May* v. *Woodward* (1677), Free. K.B. 248; *Copland* v. *Laporte* (1835), 3 A. & E. 517; *Levy* v. *Sale and another* (1877), 37 L.T. 709; *Wilmer* v. *Currey* (1848), 2 De G. & Sm. 347. The circumstances as appear from the documents clearly indicate that it was not the intention to bind Ruck's estate. The chattel mortgage of 1939 contains the usual blanket clause binding the heirs, but the chattel mortgage in substitution in 1941 omits the blanket clause at the end of the document. Ruck had no interest in the money advanced: see *Other* v. *Iveson* (1855), 3 Drew. 177. The consequences of a several liability would be such that it is inconceivable that the parties should have intended it. If it should be held that the covenant is not clearly joint, then at the very least there is ambiguity and the documents and surrounding circumstances negative an intention to create a several liability. Ruck was a surety for advances made by respondent and his estate is discharged from liability. That he was a surety appears from the documents. It makes no difference that the surety contracts as a principal: see Halsbury's Laws of England, 2nd Ed., Vol. 16, p. 87, par. 90; *Wythes* v. *Labouchere* (1859), 5 Jur. (N.S.) 499; *The Mutual Loan Fund Association* v. *Sudlow* (1858), 5 C.B. (N.S.) 449; *Pooley* v. *Harradine* (1857), 7 El. & Bl. 431. As to the defences arising out of Ruck's relationship as a surety

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(a) there was a material variation by the respondent of the terms of the contract between Shingle and respondent. The respondent bought and resold Shingle's products as principal instead of selling such products on Shingle's behalf as agent. Respondent admits he acted as principal and not agent, but the agreement was purely an agency one. This discharges Ruck from liability: see Halsbury's Laws of England, 2nd Ed., Vol. 16, p. 135, par. 161. The *onus* is on the respondent to show that Ruck consented to the variation: see *Provincial Bank of Ireland* v. *Fisher,* [1919] 2 I.R. 249; *General Steam Navigation Co.* v. *Rolt* (1859), 6 C.B. (N.S.) 550. Even if the surety has knowledge of the variation, the creditor must show the surety consented: see *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755; *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495, at pp. 505 and 507; *Polak* v. *Everett* (1876), 1 Q.B.D. 669, at pp. 673 and 675. Very slight variation entitles surety to relief: see *Smith* v. *Wood,* [1929] 1 Ch. 14, at pp. 25-6; *Blest* v. *Brown* (1862), 4 De G. F. & J. 367, at pp. 375-6; *Rees* v. *Berrington* (1795), 2 Ves. 540, at p. 542; (b) respondent having made advances beyond what it was obligated to make and having neglected to apply the security in satisfaction of the guaranteed debt failed in his duty to the appellants: see *In re Darwen and Pearce* (1926), 95 L.J. Ch. 487; *Canadian Bank of Commerce* v. *Swanson and McMillan,* [1923] 3 D.L.R. 188; *Wulff* v. *Jay* (1872), L.R. 7 Q.B. 756; *General Steam Navigation Co.* v. *Rolt* (1859), 6 C.B. (N.S.) 550; *Pearl* v. *Deacon* (1857), 1 De G. & J. 461; *Mayhew* v. *Crickett and Others* (1818), 2 Swanst. 185; (c) the documents and evidence show that Ruck was only to be called upon to pay if Shingle delivered insufficient product to satisfy the guaranteed debt and respondent was bound to apply all moneys paid in first on the guaranteed debt. If the credit items were applied first to the guaranteed debt, it would have been paid many times over: see *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139; *Browning* v. *Baldwin* (1879), 40 L.T. 248, at p. 249.

Symes, for respondent: It is difficult to conceive words which express more clearly the two separate joint and several promises "and Shingle and Ruck do and each of them both," etc.: see

1 Sm. L.C., 13th Ed., 456; *May* v. *Woodward* (1677), Free. K.B. 248; 89 E.R. 177 and 178; Halsbury's Laws of England, 2nd Ed., Vol. 7, pp. 74-5 and Vol. 10, pp. 315-6; Jenk's Digest of Civil Law, 2nd Ed., Vol. 2, pp. 153-4. Ruck had consented and acquiesced in the way the business was carried on and with such knowledge had executed the second mortgage. Ruck himself signed the various contracts of sale. The relationship of Ruck to the respondent was that of principal debtor. The contention that Ruck was only a surety is "mutually antagonistic" to a contention that the liability of Shingle and Ruck was joint. As to the sales of Shingle's products being applied in payment of advances to Shingle, the answer is that there was never anything to apply. It was obliged to pay Shingle for the goods before they were received because Shingle required the money to keep in operation. During 1943 and 1944 the respondent paid to Shingle over $65,350 for goods of a value of $56,017. George Ruck's letters show the state of the company's affairs in 1943-4.

Whittaker, replied.

Cur. adv. vult.

27th November, 1945.

Per curiam (BIRD, J.A.): This appeal is taken from the judgment of COADY, J., whereby the executors of the estate of the late Sidney Charles Ruck were found liable to pay to Towns Limited the sum of $9,109.43, under a covenant of Ruck, deceased, in an indenture of chattel mortgage dated December 31st, 1941. The liability so found is the balance of moneys advanced by Towns Limited to Shingle Bay Packing Company Limited (hereafter, for brevity, referred to as "Shingle"), pursuant to the terms of several agreements made between those companies in the period between January, 1939, and June, 1943, to each of which agreements Ruck deceased was a party.

The appellants found this appeal upon four main grounds, namely:

1. The covenant in the deed dated December 31st, 1941, is a joint obligation; being so, the estate of the deceased Ruck is under no primary liability. 2. Alternatively, if the covenant is not clearly a joint obligation, then there is ambiguity, and consequently the covenant must be construed according to the

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interests of the parties; and surrounding circumstances may be looked at to determine the intention of the parties. 3. The obligation of Ruck, deceased, was that of a surety and the executors may advance equitable grounds which could have been raised by the deceased. 4. Towns Limited, having notice of his death, failed in its duty to protect the surety by crediting the proceeds of sale of the products of Shingle received subsequent to Ruck's death, to the reduction of the liability existing at his death, and thereafter made further advances by way of loan to Shingle and charged the same to the loan account.

During the period of operation under the several agreements previously referred to, and until his death in December, 1942, Ruck was the owner of the plant and equipment of Shingle, then held under lease by that company. He was also the owner of substantially the largest shareholding in that company.

The general purpose of the several agreements mentioned was to provide for the sale through the agency of Towns Limited of the products of Shingle, and for the financing of the operations of the latter company by advances within certain defined limits, which Towns Limited agreed to make by way of loan from time to time as required by Shingle.

Security for the advances so made by way of loan was thereby agreed to be, and under the terms of the indenture of chattel mortgage dated December 31st, 1941, was, furnished by Ruck. That indenture contained the following covenant:

> And Shingle and Ruck do and each of them doth hereby covenant promise and agree to and with the grantee [Towns, Limited] 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:

the proviso being

> if Ruck or Shingle do and shall well and truly pay . . . unto the grantee the full sum of $8,694.89 and such further sums as may be advanced by the grantee to Shingle under the terms of the said agreement . . .

I find myself so fully in accord with the views expressed by the learned trial judge upon the effect of that covenant that there is little reason to comment upon the interpretation to be placed upon the language of the covenant. Suffice it to say that upon the application of the rule of construction discussed in *White* v.

Tyndall (1888), 13 App. Cas. 263 by Lord Halsbury, L.C. at p. 269, *viz.*:

> . . . With respect to the form he says: "No particular words are necessary to constitute a covenant of either kind" (that is to say either joint or several). "If two covenant generally for themselves, without any words of severance, or that they or one of them shall do such a thing, a joint charge is created; which shows the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts."

the language of the covenant, in my opinion, must be read as creating a joint and several obligation. Here there are words of severalty. The language used, in my opinion, imports the addition of the words in brackets following, *i.e.*,

> Here Shingle and Ruck [jointly] do and each of them [severally] doth hereby covenant . . . that they Shingle and Ruck [jointly] or one of them [severally] will pay.

So read, as I think it must have been intended to be read, there is no ambiguity.

Then as to the question whether the *status* of Ruck was that of surety for Shingle or was that of principal debtor: It is to be observed that nowhere in the several agreements or indentures of chattel mortgage is there to be found any reference to "guarantee" or "surety." The agreement of January, 1939, paragraph 7, reads in part as follows:

> . . . the party of the third part, [*i.e.*, Ruck, deceased] being the owner of the plant now used and occupied by the producer [*i.e.*, Shingle] . . . agrees . . . to execute a chattel mortgage of the said plant to the agent [*i.e.*, Towns Limited] to secure the said sum of $1,500.00 and the further advances . . . .

The covenant there provides for a chattel mortgage "to secure the sum," not to secure payment by Shingle of the sum. Then again, the covenant here under review, as has been said, is a joint and several covenant by Shingle and Ruck to pay. The obligation thereby assumed by Ruck, in my opinion, must be taken to be the obligation of principal debtor and not that of a surety.

Moreover, there is nothing in those documents or in the testimony below to suggest that Towns Limited knew Ruck's position in the transaction to be, or to have become, that of surety, or that they accepted him in that capacity.

If one is to acquire the rights of a surety as against the creditor, one must show that he was only a surety, known to be so to the

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creditor and accepted as such by the creditor. *Strong* v. *Foster* (1856), 25 L.J.C.P. 106.

But even assuming that the *status* of Ruck was that of surety for Shingle to the knowledge of Towns Limited and accepted by them as such, then, notwithstanding that there was a material variation in the contract, I do not think that effect can be given to the third ground of appeal, for the reasons given by the learned trial judge, with which I concur.

There remains the fourth ground of appeal, which also appears to have been taken below and discussed in some detail by the learned trial judge in his reasons for judgment. I agree that, to quote the words of the learned trial judge,

> assuming Ruck's liability to be that of surety and not primary debtor, this defence [and ground of appeal] [cannot prevail] under the particular circumstances here;

and for the further reason that, as found by the learned trial judge, Ruck, deceased not only had full knowledge of and consented to direct sales by Shingle to Towns Limited, which constituted deviation from the contract, but as appears from the execution by him for Shingle of sales contracts (Exhibits 18, 19, 20) he actively participated in the making of those contracts.

The learned trial judge, as I think, with deference, rightly found that Towns Limited 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. For the reasons given by him, I think that the plaintiff was not only justified, but was under obligation to do so up to that date. That obligation, in my opinion, required Towns Limited to continue to finance Shingle within the terms of the agreement.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors for appellants: *Whittaker & McIllree.*
Solicitor for respondent: *A. H. Douglas.*

CAVE AND SAUNDERS v. DAY *ET AL.*

S. C.
1945
Sept. 25;
Oct. 24.

Will—Interpretation—Payment of succession duties to be made out of "capital"—Specific bequests included—Costs.

The will herein directed the executors to pay all probate and succession duties "out of the capital of my estate." The will contained a number of specific and pecuniary legacies, a devise of some real estate and a devise and bequest of the residue to the wife of the testator.

Held, that the beneficiaries of specific bequests mentioned are not entitled to receive their shares of the estate of the deceased free from probate and succession duties. The word "capital" is used in contradistinction to income, not residue.

An affidavit of one of the executors, who was also a legatee and drew the will stated that deceased informed him that "it was his wish that all specific bequests to be contained in said will were to be free from probate and succession duties and with that intent the deponent was instructed to insert the clause in the will."

Held, that the affidavit was inadmissible.

All parties were, under the circumstances, given their costs out of the residue, the executors on a solicitor and client basis.

ORIGINATING summons for the construction of the will of John Edward Day, deceased. The facts are set out in the reasons for judgment. Heard by MACFARLANE, J. at Victoria on the 25th of September, 1945.

Child, for executors.
Alexander Maclean, for Amelia E. Day.
Manzer, for other defendants.

Cur. adv. vult.

24th October, 1945.

MACFARLANE, J.: Originating summons for the construction of the will of John Edward Day, particularly with reference to clause 2 of the will reading as follows:

I direct my executors hereinafter named to pay all my just debts and funeral and testamentary expenses and probate and succession duties out of the capital of my estate as soon as conveniently may be after my decease.

The will contains a number of specific and pecuniary legacies, a devise of some real estate and a devise and bequest of the residue to the defendant Amelia Eliza Day, the wife of the testator.

The question is whether the defendant Ivan Stanley Day and the other beneficiaries under the will taking like interests are

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Macfarlane, J.

entitled to receive their shares of the estate of the said deceased free from probate and succession duties by reason of the direction in clause 2 which I have recited.

In effect I am asked by counsel for these beneficiaries to construe the word capital as meaning residue, or to hold that a direction to the executors to pay duties out of the capital of the estate is an additional gift of the probate and succession duties.

There are in this Court two previous decisions of Mr. Justice ROBERTSON—*In re Blowey Estate* (1935), 50 B.C. 222 and *In re Estate of Katherine Dixon, Deceased* (1935), *ib.* 285, in which the learned judge held that

> when the testator provided that the probate and succession duties should be paid by his executor, he was only directing what it would be his duty to do.

In the first of these cases there was a trust for conversion and the direction was to pay

> "out of the moneys produced by such . . . conversion and out of . . . ready money."

In the second of these cases the direction was to pay

> "from and out of my estate."

In these cases ROBERTSON, J. followed the decision of Warrington, L.J. in *In re Kennedy*, [1917] 1 Ch. 9. The only difference between those cases and this is that the direction here is to pay out of the capital while there is a gift of the residue to the widow. The residue refers, in my opinion, to what remains after the specific and pecuniary legacies are satisfied.

In this case I was asked to consider the affidavit of one of the executors who is also a legatee and who drew the will that the deceased informed him that

> it was his wish that all specific bequests to be contained in said will were to be free from probate and succession duties, and with that intent

he was instructed to insert the clause which I have quoted in the will; this clause being taken from a former will drawn by a solicitor. A similar request was made in *In re Estate of Katherine Dixon, Deceased, supra,* and was denied on the ground that the evidence did not fall within the "equivocation rule." I refer to the authority there cited. I think the word "capital" has a definite meaning and though in this will its use adds nothing to the content of the whole expression, I do not see that the word is either ambiguous or obscure. It cannot be questioned that

the intention of the testator governs, but it is, apart from ambiguity or obscurity, the intention of the testator as expressed by the words of the will that governs.

My attention is directed to *Re Reading,* [1940] 1 D.L.R. 387, a judgment of Kelly, J., in Ontario. That case deals with a direction to the executors to pay duty falling to be paid in respect of gifts made in the lifetime of the testator, the subjects of which did not at any time vest in the executors. The application of the reasoning of Street, J. to succession duties, to which the learned judge makes reference, is consistent with the decisions in the two cases I have referred to in our own Courts.

I am also referred to *In re Johnston Estate,* [1941] 2 W.W.R. 94. There a trust fund was created and there was a direction to pay out of the trust fund debts, etc., succession duties and pecuniary legacies and a gift of the residue which is construed there as meaning what remained after paying the items specifically mentioned, including succession duties. I note the distinction made with reference to the cases I have referred to in this Court and while that distinction may not be sound, I do not think that decision applicable to this case. In any event I would prefer the decisions of our own Court. As to the case of *Toronto General Trust Corp.* v. *Shaw,* [1942] 1 D.L.R. 802, from what I have said as to *Re Reading, supra,* I do not think that case is of assistance. It may be noted that in *Re Anderson, Can. Perm. Trust Co.* v. *McAdam,* [1928] 4 D.L.R. 51, to which it refers, there is a specific direction that

"all legacies and bequests . . . be paid . . . free from all succession duty."

It should be obvious that such a direction can be made if the testator by the language of his will makes such a direction and indicates a fund from which the duties may be provided. That case decides that if he does so, it is in effect a second legacy to the legatee. A mere direction, however, in a will to pay succession duties unaccompanied by an indication of the source or fund from which they are to be paid or by an indication that the gifts in the will are to be made free of such duties is not sufficient—*vide Re Patterson,* [1944] 1 D.L.R. 196.

It may be useful to point out that by section 29 of the Succes-

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Macfarlane, J.

sion Duty Act, the executor is required either to deduct from the property or collect from the beneficiary the duty payable before transfer of the property bequeathed, or devised, and by section 28 he may sell the interest of any person in property within the Province to provide for payment of the duty, and by section 29 he may be sued in his representative capacity for the duty and the judgment may be executed against the property in his possession or charge in that capacity. In practice it is the executor and not the legatee who pays the duties over to the Government and that was done in this case as is shown by Mr. Cave's affidavit. And usually the executor pays the duties out of whatever moneys he has on hand and charges it to the appropriate fund afterward. Whatever the testator may have intended, what he authorized the executors to do in this will was to make payment out of the capital of the estate in their hands, and it is to be noted that the will contains no provision that the legacies are to be paid free of succession duties or absolving the executors from the statutory duty of deducting the duties from the legacies or of collecting them from the beneficiaries. The only indication of the source or fund is to be found in the word "capital." If by "capital," the testator meant the residue unfortunately he did not say so. The word "capital" is used in contradistinction to income, not residue. The whole estate here is capital. I do not think in using that word the testator indicates anything more as to the source from which the duties are payable than he does when he directs payment out of the estate. I think, therefore, the case falls within the decisions of ROBERTSON, J. above cited. My answer to Question 1 is therefore that the beneficiaries mentioned are not entitled to receive their shares of the estate of the deceased free from probate and succession duties. Question 2 does not arise. As to costs, in view of the assessment made which I hope will be corrected, and of the doubt raised by the decisions in other Provinces, I think the costs of this summons should be treated in the same way as testamentary expenses and that all parties should have their costs out of the residue, the executors on a solicitor and client basis.

Order accordingly.

REX v. KUBE.

C. A.
1945
Dec. 10, 12.

Criminal law—Carrying dangerous weapons—"For purpose dangerous to the public peace"—Evidence insufficient to justify conviction—Conviction for offence substituted—"Possession of unregistered revolver"—Criminal Code, Secs. 115, 121A and 1016, Subsec. 2.

The accused and one Ramsay were charged with having in their possession a certain offensive weapon, to wit, a revolver for a purpose dangerous to the public peace. Police officers on routine investigation met the two men in the hallway of an hotel. Each carried a valise. Kube was asked by one of the officers whether "he had anything in the suit-case he should not have—no guns or anything like that." He replied "No." The officer then searched the suit-case and when doing so he said "You still insist there are no guns there?" He replied "Yes, there is a gun there, you have it in your hand." The gun was unloaded but there was also a paper bag containing 41 rounds of ammunition in the suit-case. Both suit-cases belonged to Kube. Kube then explained to the officers that one Irvine had loaned him the revolver and that he was taking it to Woodfibre, where he was employed, for shooting in the bush. Irvine testified that he knew Kube and had shown him the revolver which belonged to his father, but he had not loaned it to Kube. Two war savings certificates in the name of Frederick Morrison were found in a leather jacket in one of the suit-cases. No evidence was called by the defence. Kube was found guilty and sentenced to 5 years' imprisonment.

Held, on appeal, reversing the decision of police magistrate Wood, that in the circumstances here, although highly suspicious and perhaps point to the commission of some offence, possession for a purpose dangerous to the public peace is not to be inferred therefrom and the conviction cannot be sustained, but since the magistrate upon the evidence could have found accused guilty of another offence, namely, under Code section 121A (it was clearly established that the accused had in his possession an unregistered revolver) Code section 1016, subsection 2 should be invoked and a conviction substituted for the offence prescribed by section 121A. The maximum penalty is imposed under that section.

APPEAL by accused from his conviction by police magistrate Wood at Vancouver on a charge of having in his possession an offensive weapon, to wit, a revolver for a purpose dangerous to the public peace under section 115 of the Criminal Code. The facts are sufficiently set out in the reasons for judgment.

The appeal was argued at Vancouver on the 10th of December, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

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Murdock, for appellant: The charge is under section 115 of the Criminal Code. He was sentenced to five years' imprisonment. There was no evidence to show that Kube had the revolver "for a purpose dangerous to the public peace." The revolver was unloaded, but 41 shells were found in a suit-case other than the one in which the revolver was found. Both suit-cases belonged to Kube. He said he borrowed the revolver for shooting up country where he worked. He is 19 years old: see *Rex* v. *Cavasin* (1944), 82 Can. C.C. 171.

J. H. MacLeod, for the Crown, referred to *Rex* v. *Smith* (1926), 37 B.C. 248, at p. 250; *Rex* v. *Ellis* (1943), 59 B.C. 393; *Rex* v. *Berdino* (1924), 34 B.C. 142.

Murdock, replied.

Cur. adv. vult.

12th December, 1945.

Per curiam (BIRD, J.A.): Kube, a young man of about 19 years of age, was convicted upon an indictment preferred against him and another youth, one, Ramsay, for having

in their possession a certain offensive weapon, to wit, a revolver, for a purpose dangerous to the public peace.

Ramsay was acquitted by the magistrate, Crown counsel having conceded that no case had been made out against him.

The charge is laid under scetion 115 of the Criminal Code, which reads:

Everyone is guilty of an indictable offence and liable to five years' imprisonment who has in his custody or possession, or carries any offensive weapon for any purpose dangerous to the public peace.

The evidence adduced by the Crown shows that about 4 p.m. on October 19th, 1945, officers of the police morality detail, then apparently engaged on a routine investigation of certain hotel premises on Powell Street, Vancouver, B.C., encountered Kube and Ramsay in the hallway of the hotel. The accused men had recently vacated their room and were about to leave the premises. Each carried a suit-case.

Kube was then asked by one of the officers whether "he had anything in the suit-case he should not have—no guns, or anything like that." He said "No." Then when the officer proceeded to search the contents of the suit-case carried by him, Kuke replied in response to a further question, as follows:

You still insist there are no guns here? Yes, there is a gun there. You have it in your hand.

The suit-case carried by Kube was found to contain in addition to a large quantity of wearing apparel and articles of a personal nature, an unloaded "New Ely Colt Revolver .455 calibre," wrapped in a shirt; also a paper bag containing 41 rounds of ammunition for that revolver.

Kube then explained to the police officers that one, Irvine, had lent him the revolver which he was going to take with him to Woodfibre "to have some fun with it shooting in the bush." He said he was then returning to his place of employment at Woodfibre, B.C. Testimony was adduced at the trial showing that the revolver had been removed in circumstances not satisfactorily explained, from the custody of the owner, one, Irvine, in whose home the weapon had been shown to Kube on October 13th, 1945, by the owner's son, who was a schoolboy friend of Kube. It appeared from evidence of the police officers that when Kube subsequently learned that the younger Irvine repudiated his statement made to them that Irvine had lent the revolver to him, Kube then said to the police officers that he had borrowed the weapon from a boy named Fraser. It further appeared that certain of the clothing in the suit-cases, both of which were claimed by Kube, was found to be wet. It was shown that it had been raining on the preceding night, although there was no rain on October 19th, the date of the accused's arrest. There was found in the lining of a leather jacket, being part of the clothing in one of the suit-cases, two war savings certificates in the name of Frederick Morrison. These certificates were put in as exhibits at the trial, but no further evidence was adduced in regard to them.

No evidence was called by the defence. The learned magistrate, after consideration of the decision of the Court of Appeal of Ontario in *Rex* v. *Camarati* (1927), 33 O.W.N. 152, found the accused guilty, and imposed the maximum sentence of five years' imprisonment fixed by section 115 of the Criminal Code.

The sole question raised upon this appeal from conviction was as to the sufficiency of the evidence to support the conviction that Kube had the revolver for a purpose dangerous to the public peace.

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Some light upon the degree of proof required to constitute the offence defined by section 115 ("purpose dangerous to the public peace") may be obtained from an examination of other sections of the Criminal Code relevant to the possession of offensive weapons.

Equally serious offences to that under section 115 are defined under section 118. Under subsection (*a*) of that section it is an offence to have upon one's person, without a permit, elsewhere than in his own dwelling place, etc., a revolver or other firearm, whether loaded or unloaded; and under subsection (*d*) of that section it is likewise an offence to have in any vehicle without a permit, whether on one's person or elsewhere, a revolver or other firearm, whether loaded or unloaded. It is likewise an offence under section 121A, but of a less serious nature, to have in one's possession anywhere an unregistered revolver. In this connection it is significant that in the immediately preceding section, *i.e.*, section 114, which relates to the possession of explosives, the possession is described as one which may "give rise to a reasonable suspicion" that the possession is not for a lawful object.

Examination of these sections of the Criminal Code I think makes it apparent that the mere keeping in possession, without more, of an unloaded revolver cannot be said to constitute possession "for any purpose dangerous to the public peace." The concluding phrase of section 115 is not to be interpreted as meaning "for any purpose suspected to be dangerous to the public peace."

Here, apart from the evidence of mere possession by Kube of an unloaded revolver in a suit-case, there is:

1. Evidence of possession in the suit-case of ammunition for that revolver. 2. Contradictory testimony by the accused as to the fact of there being a gun in the suit-case as well as to the manner in which Kube acquired possession of it. 3. Evidence of possession in the suit-case of wet clothing. 4. Evidence of accused's possession of two war savings certificates in a name other than his own.

That evidence cannot be taken as direct proof that Kube's possession of the revolver was for a purpose dangerous to the

public peace. No more, in my opinion, is it evidence from which, upon the proper application of the principle laid down by Alderson, B. in *Hodge's Case* (1838), 2 Lewin, C.C. 227, "an inference may be drawn that such was the purpose of Kube's possession of the revolver."

No such circumstances are found here as were held sufficient to support an inference of possession for a dangerous purpose drawn in the *Camarati* case. In the latter case, as well as in *Rex* v. *Yaskowich* (1938), 70 Can. C.C. 15 and in *Rex* v. *Cavasin* (1944), 82 Can. C.C. 171 (there reported on an application for bail only) the cumulative effect of the surrounding circumstances pointed inescapably to possession for a purpose dangerous to the public peace.

Undoubtedly this evidence is such as to arouse suspicion as to the purpose for which Kube had possession of the revolver, but as was said in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152 (a civil case, but the comment I think applies with equal force to evidence led on a criminal charge), by Lord Wright at pp. 169-70.

> . . . The Court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

Kube's denial of possession of the gun and subsequent acknowledgment of it, as well as his contradictory statements relating to his acquisition of the revolver, are equally consistent with a desire to avoid discovery either of the fact that he had stolen the revolver from Irvine or the fact that he had it in his possession without a permit, contrary to section 121A. The evidence outlined under the above heads Nos. 1, 3 and 4, in my opinion falls far short of leaving as the only rational conclusion to be derived therefrom that he had the weapon for a purpose dangerous to the public peace.

It may well be that in other circumstances and considered in relation to a different background, facts such as were proved

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here may be found sufficient to establish the purpose of the accused's possession. However, in the circumstances here under review, notwithstanding that they may be highly suspicious and perhaps point to the commission of some offence, possession for a purpose dangerous to the public peace is not in my opinion to be inferred therefrom.

As has been said authoritatively on many occasions

> a man may be ever so guilty, but he must be convicted according to law:

per HUNTER, C.J.B.C., in *Rex* v. *Chow Chin* (1920), 29 B.C. 445, at p. 447.

Therefore, being of opinion as I am, that proof of this essential element of the offence under section 115 has not been established, the conviction cannot be sustained, but since the magistrate upon that evidence could have found the accused guilty of another offence, *i.e.*, under Code section 121A (it was clearly established that the accused had in his possession an unregistered revolver), I would invoke Code section 1016, subsection 2 and substitute a conviction for the offence prescribed by section 121A. I would impose the maximum penalty under that section, *viz.*, imprisonment for a period of 30 days and a fine of $50, and in default of payment of the fine before the expiry of the said term of imprisonment, to a further term of imprisonment of 30 days, both with hard labour.

Conviction quashed and conviction under section 121A substituted.

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Malicious prosecution—Want of reasonable and probable cause—Mens rea—Honest belief of prosecutor—Duty to make enquiry—Malice—Province of judge and jury.

While the plaintiff was driving his car at Duncan, B.C., the engine "stopped dead." He was advised by a garageman that the engine was "beyond repair." He then sold the car to a garageman named Grassie for $20, who said he was "going to junk it," and he let the plaintiff have the number plate. The plaintiff took the number plate to the Government office and said "I want to report this car sold as junk." He then

signed a form of relinquishment which included the words: "The undersigned hereby certifies that the motor-vehicle under Motor-vehicle Licence No....., has been . . . Damaged beyond all possibility of being repaired or used as a motor-vehicle." He then obtained a refund of $2.85 on his licence fee. A day or two after the sale Grassie put another engine in the car, made certain other repairs and sold it to one Gregson, who applied for a licence telling the clerk it was for the "old car of Mr. *Leighton's*," without telling her the engine was changed, and a licence was issued to him with the old number. The defendant Henry, a police corporal, acting under instructions from the defendant Hood, inspector of motor-vehicles, laid a charge against the plaintiff under section 62 of the Motor-vehicle Act of unlawfully making a false statement in the notice of relinquishment of the licence. The plaintiff was acquitted. The plaintiff then brought this action for malicious prosecution and on the answers to questions by the jury, the learned judge found there was lack of reasonable and probable cause and gave judgment for the plaintiff against both defendants.

Held, on appeal, reversing the decision of HARPER, J., that the question of reasonable and probable cause was, although a question of fact, one to be determined by the Court and not by the jury and unless there is no dispute about the facts (and there was an important dispute of fact in this case), the judge should have the jury answer questions upon which he could come to the conclusion as to whether there was or was not reasonable and probable cause. The learned judge did not declare his view on the question of reasonable and probable cause until after the jury's verdict had been recorded, so that the jury, not having any instructions from the learned judge upon this important point, were left to determine the case without consideration of this point except in so far as they were told that if "you find that there is an absence of reasonable and probable cause" you are allowed to infer malice. In effect this was leaving to the jury to find whether or not there was reasonable and probable cause which is not in accordance with the law. The learned judge did not tell the jury anything about the defence, namely, that they were carrying out their official duties and that it was possible for both defendants to feel quite honestly that there had been a technical breach of the Act and a prosecution was justified. Further as the jury were not instructed by the learned judge as to his opinion upon the question of reasonable and probable cause, it was not in a position to deal with the question of malice. There should be a new trial unless the Court was of opinion that there was no evidence to support the jury's finding of malice. The Court, concluding that there was no evidence to support the jury's finding of malice, the appeal was allowed and the action dismissed.

APPEAL by defendants from the decision of HARPER, J. of the 5th of December, 1944, in an action for damages for malicious prosecution. The plaintiff, who lives at Duncan, B.C., concluding his Ford motor-car was beyond repair, sold it to a

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junk dealer for $20. The motor in the car was beyond repair and the junk dealer took the motor out of another car which he had and put it in the car he bought from the plaintiff. After making certain repairs and tightening up the body of the car, he sold it to one Gregson. Gregson took the car away and registered it, a car being identified by the motor number. On selling the car to Grassie, the plaintiff took off the plates and went to the Government office, turned in the plates and reported he had sold the car as junk and signed a "notice of relinquishment of licence," which contained the words "Damaged beyond all possibility of being repaired or used as a motor-vehicle." He was then refunded $2.85, being one-half of the unexpired portion of the licence fee. The defendant Hood, an inspector of Provincial Police, is the officer in charge of the Motor Division of the police, his particular duty being administering and enforcing the provisions of the Motor-vehicle Act of British Columbia and the defendant Henry is a corporal of the Provincial Police and officer in charge of the police office at the city of Duncan. On the 31st of January, 1945, the defendant Henry, acting under the orders of his superior officer the defendant inspector Hood, preferred a charge against the plaintiff before the stipendiary magistrate at Duncan that on or about the 15th of November, 1943, at Duncan in the county of Nanaimo, he unlawfully did make a false statement in a notice of relinquishment of a licence under the Motor-vehicle Act. On being served with summons, the plaintiff appeared before the magistrate on the 9th of February, 1944, when the charge was dismissed.

The appeal was argued at Victoria on the 11th, 12th and 13th of April, 1945, before SLOAN, C.J.B.C., ROBERTSON and BIRD, JJ.A.

Cunliffe, for appellants: After signing notice of relinquishment of the auto licence the plaintiff received a refund. We say there was a false statement under section 62 of the Motor-vehicle Act. In this action judgment was given in plaintiff's favour for $549. The main ground of appeal is that there were reasonable grounds for reasonable and probable cause for prosecution. We say there was no malice: see *Renton* v. *Gallagher*

(1910), 19 Man. L.R. 478, at p. 493. The verdict was perverse. On the question of costs see *Frey* v. *Hewlett,* [1929] 3 W.W.R. 511; *Henry* v. *Columbia Securities Ltd. In re Legal Professions Act and In re Freeman & Freeman, Solicitors* (1942), 58 B.C. 193; *Cornish* v. *Boles* (1914), 31 O.L.R. 505. The principal element was whether the statement was true or false. To say that the car was junk was not a fair statement at all. A person who makes a false statement is guilty of an offence. On the doctrine of *mens rea* see Maxwell on the Interpretation of Statutes, 8th Ed., 90; *Rex* v. *Piggly Wiggly Canadian Ltd.* (1933), 60 Can. C.C. 104; *Rex* v. *McKenzie* (1921), 29 B.C. 513; *Rex* v. *McDonald* (1927), 38 B.C. 298. *Mens rea* must be proved and lack of *mens rea* is a defence. The correspondence shows clearly that Leighton was interviewed: see *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493. There should be some definite evidence of malice. The position of these defendants is such that they should have been sued separately. Hood had no authority over Henry: see *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404.

Arthur Leighton, for respondent: The car which Gregson bought from the junk dealer was not the same car at all. It was a new car reconstructed from three other cars. It had a different engine and a car is identified by the number on the engine: see *Allen* v. *Sugrue* (1828), 8 B. & C. 561, at p. 564. It was a "total loss." There was a lack of *bona fides* in the prosecution. As to whether *mens rea* applies see *Sherras* v. *De Rutzen,* [1895] 1 Q.B. 918; *The Queen* v. *Tolson* (1889), 23 Q.B.D. 168, at p. 172. On the evidence the jury could reasonably infer there was malice.

Cunliffe, replied. *Cur. adv. vult.*

25th June, 1945.

SLOAN, C.J.B.C.: From a close perusal of the evidence adduced at the trial it is abundantly clear that the appellants did not institute the proceedings in question against the respondent in a malicious spirit: that is from an indirect and improper motive and not in the furtherance of justice. The appellants and respondent undoubtedly acted in good faith throughout according to their understanding of their respective positions.

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The respondent, however, having failed in his proof of an ingredient essential to his success cannot maintain the judgment below and accordingly the appeal must be allowed.

ROBERTSON, J.A.: The respondent *Leighton* was charged under section 62 of the Motor-vehicle Act with having, on or about the 15th of November, 1943, unlawfully made a false statement in a notice of relinquishment of a licence under the Motor-vehicle Act. Section 62 of the Act, under which the charge was laid, reads as follows:

62. Every person who:—

(*a.*) Makes any false statement . . . in any notice of relinquishment of a licence under this Act; . . . shall be guilty of an offence against this Act; and shall be liable, on summary conviction, to a fine of . . .

The charge was laid by the appellant Henry, acting under the instructions of the appellant Hood. The respondent was acquitted. Then he brought this action for malicious prosecution. The action was tried by HARPER, J. and a jury. The jury answered questions as follows:

1. Did the defendant, Henry, ask the plaintiff for an explanation before laying this charge? No: 8. If he did not, should he? Yes: 8.

2. Did the defendant, Henry, on the facts you find existing here, make proper enquiry of Miss Jessie Herd of the circumstances under which the application for registration and licence signed by Gregson was filled out? No: 8. If not, should the defendant Henry have done so? Yes: 8.

3. Did the defendants act with malice as legally defined to you? Yes: 7. No: 1.

4. Regardless of your answers to the above questions, give total damages suffered by the plaintiff:

(a) For special damages—$49.90—8.

(b) For general damages $500.00—8.

The learned judge then said that he found there was lack of reasonable and proper cause and gave judgment for the respondent against both defendants, who now appeal.

The facts, shortly, are that the respondent, who lived at Duncan, B.C., owned an ancient motor-car (1928). On the 15th of November, 1943, while the respondent was driving his car at Duncan the engine "stopped dead." He was advised there by a garageman, Berry, that the engine was "beyond repair." He sold it for $20 to Grassie, a garageman, at Duncan, who said he was "going to junk it." He let the respondent have the num-

ber plate. Section 13 of the Motor-vehicle Act provides, *inter alia,* that when a registered motor-vehicle

> is burned or damaged so that it cannot be again repaired or used as a Motor-vehicle Licence No. 20-963, B.C., 1943, has been:— . . . (*c*) Dam- transmitted to the Superintendent for registration [under the Act] a notice in the prescribed form.

Subsection (2) of section 13 provides that:

> Upon the certificate of the Superintendent showing the relinquishment of the licence in respect of the motor-vehicle covered by a notice under this section,

a refund may be made to the licensee of part of the licence fee. The respondent, being minded to obtain this refund, took the number plate to the Government office and said "I want to report this car sold as junk." He then signed a printed form of "notice of relinquishment of licence," being the prescribed form, in which it was stated:

> The undersigned hereby certifies that the motor-vehicle licensed under Motor-vehicle Licence No. 20 963, B.C., 1943, has been:— . . . (*c*) Damaged beyond all possibility of being repaired or used as a motor-vehicle.

It is to be noted that this is not in the exact wording of section 13, *supra.* In due course the respondent obtained a refund of $2.85. When a car is first registered it is given a departmental master file number, which continues during its lifetime; and the car itself is identified in this file by the serial number stamped on the engine block, which in this case was C A 16533. A day or so after the sale Grassie put another Ford engine in the car and sold the car to Gregson, telling him he would have to register it. Gregson then went to the Government office for that purpose, where he saw a clerk, Miss Herd. He told her that he wanted to apply for a licence for the "old car of Mr. *Leighton's* that he had purchased." He did not mention to her the fact that the engine had been changed. She then proceeded to make out the application, copying the old number, *viz.,* C A 16533 from *Leighton's* licence, charged Gregson a fee for the new registration and gave him a licence for a car with the same serial number. The respondent knew nothing of what Gregson had done.

P. R. Brown, senior clerk in the Motor Branch, Victoria, of the Provincial Police, and directly responsible for the handling of adjustments of licences, noticed that Gregson's application to

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register was for a car with the same serial engine number as *Leighton's* car "which had been relinquished." He took the notice of relinquishment signed by the respondent, and the Gregson application, to the appellant Hood, inspector of the Motor-vehicle Branch, Provincial Police, Victoria, whereupon a letter was written to the police department at Duncan, setting out the circumstances as they appeared to the department at Victoria, and asking for an investigation and report. A report was made by Henry, who was stationed at Duncan, on the 30th of December, in which it was shown that Grassie had bought the car from the respondent for the purpose of junking it; and that Grassie had placed a new engine in the car and sold it to Gregson. Henry was asked to make a further report and on the 20th of January, 1944, he wrote that Berry had informed the respondent that the car was of no further use except for junk and that he had offered him $10 for it; that Leighton had got $20 from Grassie, who bought it for the "express purpose of junking it"; that it would appear from his investigation that there was no intent to commit an infraction of the Motor-vehicle Act on the part of the respondent, who had sold the car unquestionably for junk; and that "the facts bespeak a technical but not a moral infraction."

At an interview which Henry had with Hood on the 25th of January, 1944, when the matter was gone into, Henry said he could not see any reason why a charge should not be laid. Hood came to the same conclusion. He thought there was a *prima facie* case; that *Leighton* had obtained a refund without taking the precaution to ascertain that the motor-vehicle had been "damaged beyond all possibility of being repaired or used as a motor-vehicle"; that there was no option but to proceed; and the only thing to do was to "bring it before a magistrate." He regarded it purely as a matter of routine. While no one suggested that the respondent had been fraudulent, the department felt that his statement was false in that the motor-vehicle had not been damaged so that it could not be again repaired or used as a motor-vehicle and therefore he was not entitled to a refund.

From the evidence it appears that Henry knew the respondent "quite well, in official matters mainly—not socially." Hood

did not know *Leighton* at all. There was not any evidence of spite, or hatred or ill will between the respondent and either of the defendants, nor was there any motive suggested why they should seek in any way to injure him.

The plaintiff to succeed in a malicious prosecution action, must prove: (1) The charge and his acquittal. (2) Want of reasonable and probable cause for the prosecution. (3) That the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive and not in furtherance of justice. See Pollock on Torts, 14th Ed., 248.

Sir Richard Couch, in delivering the judgment of the Privy Council in *Bank of New South Wales* v. *Piper,* [1897] A.C. 383, said at p. 388, that it was for the judge to decide the question of reasonable and probable cause as a matter of law.

Lord Atkin, with whom all the other law-lords agreed, said in his speech in *Herniman* v. *Smith,* [1938] A.C. 305, at p. 316:

> . . . It is well settled that the question of the absence of reasonable and probable cause is for the judge. At the same time it is, I think, clear that the question is one of fact and not law.

Anyway the question is for the judge.

As pointed out by Bowen, L.J. in *Abrath* v. *North-Eastern Railway Co.* (1883), 11 Q.B.D. 440, at p. 458 (affirmed 11 App. Cas. 247) there are three modes of trial of a malicious prosecution action, as follows:

> A judge may leave the jury to find a general verdict, explaining to the jury what the disputed facts are, telling them that if they find the disputed facts in favour of one side or the other, his opinion as to reasonable and probable cause will differ accordingly, telling them what, in each alternative, his view will be, and enabling them to apply that statement with reference to the issue as to malice; that is a way in which a very simple kind of case may be adopted. But I think it necessary only to state as much as I have stated about it, to see that a very clear head and a very clear tongue will be required to conduct a complicated case to a general verdict in that way. Accordingly, judges have been in the habit of adopting a different course whenever there are circumstances of complication. A judge may accordingly do this; he may tell the jury what the issues or questions are, and at the same time inform them what will be the effect upon the verdict, which they will ultimately be asked to find, of the answers they give to the specific questions, leaving the jury both to answer the questions and then to find a verdict, after he has explained to them what result the answers to the questions will involve. That is the way in

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which Cave, J., really did try this case. There is a third way in which a judge may conduct the trial, by asking the jury specific questions, and not leaving it to them to find the verdict, but entering the judgment upon their findings himself. That is a third way, and that was not adopted in form by the learned judge, although it will be observed it differs only slightly in form from the second mode of procedure, which he, in fact, did adopt.

Cave, J., who tried the *Abrath* case, adopted the second mode of trial. In summing up to the jury he hold them that it was for the plaintiff to establish want of reasonable and probable cause and malice and then said he thought the material thing for them to examine about was whether the defendants in that case took reasonable care to inform themselves of the true facts of the case; and another point was when the defendants went before the magistrates did they honestly believe in the case which they laid before the magistrates? He then said that if they came to the conclusion that these two questions should be answered in the affirmative, then he would tell them, in point of law, that that amounted to reasonable and probable cause, in which case the defendants would succeed. But if, on the other hand, they came to a negative conclusion on either one of these points, then they would have to ask themselves the further question: Were the defendants in what they did actuated by malice, that is to say, were they actuated by some motive other than an honest desire to bring a man, whom they believed had offended against the criminal law, to justice. If they came to the conclusion that the defendants did honestly so believe they were entitled to the jury's verdict. But if they came to the conclusion that the defendants did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff was entitled to a verdict.

Where, however, the trial judge adopts the third mode of trial, as the learned judge did in the case at Bar, it seems to me that unless there is no dispute about the facts (see *Archibald* v. *McLaren* (1892), 21 S.C.R. 588, *Renton* v. *Gallagher* (1910), 14 W.L.R. 60; *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404, at p. 416, and *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155, at p. 1201), the judge should have the jury answer questions upon which he could come to the

conclusion as to whether or not there was or was not reasonable and probable cause. There was an important dispute of fact in this case.

In *Tanghe* v. *Morgan* (1905), 11 B.C. 455, HUNTER, C.J. said at p. 458:

> It is well settled that in an action for malicious prosecution the question of reasonable and probable cause is for the judge to decide, and that any material facts which enter into the determination of the question are for the jury to pass on if in dispute.

In *Scott* v. *Harris* (1918), 14 Alta. L.R. 143, the learned trial judge first submitted the evidence to the jury for the purpose of deciding the question of reasonable and probable cause; and upon their findings he held there was a want of reasonable and probable cause. He then directed them on the subject of malice.

Brown v. *Hawkes,* [1891] 2 Q.B. 718 was referred to in the *Archibald* case, *supra,* by Strong, J. at p. 593, where he quotes what Lord Esher, M.R. said, *viz.*:

> The question whether there is an absence of reasonable and probable cause is for the judge and not for the jury, and if the facts on which that depends are not in dispute there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, these facts must be left specifically to the jury, and when they have been determined in that way the judge must decide as to the absence of reasonable and probable cause.

In *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521 the headnote is:

> It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable and probable cause.

In *Cox* v. *English, Scottish and Australian Bank,* [1905] A.C. 168, Lord Davey, delivering the judgment of their Lordships of the Privy Council, said at p. 171:

> Now the proceedings at the trial in this case were not conducted with extreme strictness, because the question whether there was reasonable and probable cause was left to the jury, whereas the judge ought to have determined that for himself upon the facts found by the jury.

At p. 592 in the *Archibald* case, *supra,* Strong, J. said that he thought that the well-known case of *Lister* v. *Perryman* had settled the law to be that a question of reasonable and probable cause was, although a question of fact, one to be determined by

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the Court and not by the jury. That in such cases the respective functions of the trial judge and jury were this, that whilst the jury were to find all the facts from which the inference was to be drawn, yet that inference itself, deducible from those facts, was one to be drawn, not by the jury, but by the judge.

Duguay v. *Myles* (1913), 15 D.L.R. 388 was a decision of the New Brunswick Supreme Court, sitting *en banc*. At p. 394 Barker, C.J., who delivered the judgment of the Court, said:

> If there had been no dispute between the parties as to the facts upon which the plaintiff relied as proof of the want of reasonable and probable cause, it might have been unnecessary to submit those facts to the jury: *Archibald* v. *McLaren* [(1892)] 21 S.C.R. 588 at 592; *Brown* v. *Hawkes* [1891] 2 Q.B. 718 at p. 726.
>
> In the present case however there is a wide difference between the parties; and in that case the facts upon which the judge is to determine the question of reasonable and probable cause must be submitted to the jury.

In *Barber* v. *Simonds,* [1943] 3 D.L.R. 285, an action for malicious prosecution, the facts were that the learned trial judge did not rule upon the question of reasonable and probable cause, but reserved judgment on that question, and in the course of his charge to the jury stated to them that the question of whether there was reasonable and probable cause was for him to decide as a matter of law, and in order that he might have some assistance in that, he would put to the jury certain questions of fact, the answers to which would help him in coming to a decision on that point. Kellock, J.A., after referring to these facts at p. 289, said at p. 290:

> If the jury were bound to give effect to the finding of the learned trial judge with regard to the existence or non-existence of reasonable and probable cause on the part of the defendant, then this should have been decided before the case went to the jury.

He further said:

> In determining the question of malice the jury may, but are not bound to, imply malice from the absence of reasonable and probable cause. In that sense the jury must give effect to the judge's finding with respect to reasonable and probable cause, and it is, therefore, important, as already stated, that this finding should be made before the jury are called upon to discharge their duty.

In the case at Bar the learned judge did not declare his view on the question of reasonable and probable cause until after the jury's verdict had been recorded. So that the jury, not having any instructions from the learned judge upon this important

point, were left to determine the case without consideration of this point, except in so far as they were told that if "you find that there is an absence of reasonable and probable cause" you are allowed to infer malice. In effect, this was leaving to the jury to find whether or not there was reasonable and probable cause, which is not in accordance with the law.

Further, the learned judge charged the jury:

> On the question of malice; from the absence of reasonable and probable cause you may or may not infer malice. Malice is one of the issues in this case which you alone decide. It is not for me to say anything on the evidence.

Then he defined malice.

The learned judge did not tell the jury anything about the defence, namely, that the defendants were merely carrying out their official duties—Hood as the one charged with the administration of the Act, and Henry acting under the orders of his superior; that it was possible for both appellants to feel quite honestly that there had been a technical breach of the Act and therefore a prosecution was justified. As this was a disputed fact, he should have asked the jury a question as to whether or not the appellants honestly believed the respondent was guilty. He therefore did not have the necessary findings of fact upon which to decide the question of reasonable and probable cause. Further, as the jury were not instructed by the learned judge as to his opinion upon the question of reasonable and probable cause, it was not in a position to deal with the question of malice. For these reasons a new trial would be the proper order, were it not for the fact that in any event, in my opinion there was no evidence upon which the jury could find malice.

Even if there is a lack of reasonable and probable cause, it is still necessary for the respondent to prove malice (*Meering* v. *Graham-White Aviation Company Limited* (1919), 122 L.T. 44, at p. 55 and *Brown* v. *Hawkes*, [1891] 2 Q.B. 718).

Malice is a state of mind—*Scott* v. *Harris* (1918), 14 Alta. L.R. 143, where Harvey, C.J. said (p. 147):

> From the authorities quoted it seems perfectly clear that absence of reasonable and probable cause is some evidence from which malice may be inferred but that it is something entirely distinct and different. The latter is entirely a state of mind; the former is at least partly an extraneous condition arising by reason of the non-existence of certain facts. . . .

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The making of enquiry as the cases show is something to be considered in determining the existence of reasonable cause, but it is certainly not a state of mind, as the malice which is necessary to support an action of malicious prosecution is.

Assuming further enquiry of Miss Herd should have been made, that is only some evidence of want of reasonable and probable cause and not of malice (*per* Kay, L.J. in *Brown* v. *Hawkes*, [1891] 2 Q.B. 718, at p. 728).

Pollock, *supra*, at pp. 249-50 refers to what Lord Davey said in *Allen* v. *Flood* [1898] A.C. 1, at p. 172, as follows:

"In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle" [as liability for defamation on a privileged occasion]. "From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is liable to an action, not for the malice but for the wrong done in subjecting another to the annoyance, expense, and possible loss of reputation of a causeless prosecution.

At p. 148 of *Scott* v. *Harris, supra,* Harvey, C.J. said:

There is no doubt that if a person, honestly believing in the guilt of another and desiring only the enforcement of the law, lays a charge without making any enquiry whatever he is not liable to an action even though the result of enquiries would have shown him his mistake.

In *Herniman* v. *Smith, supra,* Lord Atkin said at p. 319:

. . . It was further said that he should have asked for a further explanation from Herniman. No doubt circumstances may exist in which it is right before charging a man with misconduct to ask him for an explanation. But certainly there can be no general rule laid down, . . . It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.

At the hearing we asked counsel for the respondent to point out to us the evidence which showed malice. Without going into detail of these, in my opinion none of the matters mentioned supported a charge of malice.

It is not necessary to decide the question as to whether or not, upon the facts proved in evidence, there was an actual breach of the Act. It is sufficient to say that it was very arguable that there was, and under these circumstances the appellants, if they acted in good faith, could not be said to have acted maliciously.

In my opinion there was no evidence to support the jury's finding of malice. I therefore think its finding perverse and the appeal should be allowed.

I cannot conclude without saying this: It appears to me clear that throughout Mr. *P. R. Leighton* acted in perfect good faith.

BIRD, J.A.: I concur substantially with the views expressed by my brother ROBERTSON, whose reasons for judgment I have been privileged to read.

I agree that there was not any evidence adduced below upon which the jury could reasonably find malice. In those circumstances the verdict of the jury cannot be sustained.

I would allow the appeal accordingly.

Appeal allowed.

Solicitor for appellants: *F. S. Cunliffe.*
Solicitor for respondent: *Arthur Leighton.*

REX v. JOHNSON AND CREANZA.

Criminal law—Plea of guilty—Duty of Court to ascertain facts—Failure of accused to understand charge—New trial refused.

A plea of guilty ought not to be accepted unless the judge or magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty to assure himself that the accused is pleading guilty to the offence with which he is charged.

From examination of the depositions considered in conjunction with sections 69 and 340, subsection 2 of the Criminal Code the Court was unable to conclude that any miscarriage of justice occurred and the appeal was dismissed.

APPEALS by accused from their conviction by HANNA, Co. J. at Cumberland on the 6th of June, 1945, on a plea of guilty to a charge of breaking and entering a store and stealing a quantity of merchandise contrary to section 460 of the Criminal Code.

The appeal was argued at Vancouver on the 22nd of June, 1945, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Hurley, for appellants.
Castillou, K.C., for the Crown.

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Per curiam (O'HALLORAN, J.A.): The appellants pleaded guilty before HANNA, Co. J. at Cumberland to a charge of breaking and entering a store at Union Bay and stealing (Code section 460) substantial quantities of cigarettes and other things to the value of $282.02. The appellant Johnson, aged 30, was sentenced to two and a half years' imprisonment while the appellant, Creanza, aged 21, whose criminal record was not as bad as Johnson's, received 18 months.

On behalf of the appellants it was submitted in this Court that they did not understand the charge to which they had pleaded guilty, and further, that if the learned county judge had given due weight to the depositions before him (Code section 827) he ought not to have accepted their plea of guilty, but ought to have directed a plea of not guilty to have been entered on their behalf. We agree that a plea of guilty ought not to be accepted unless the judge or magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to assure himself that the accused is pleading guilty to the offence with which he is charged; and *cf. Rex* v. *Theriault* in which judgment was given on 16th November, 1944 (unreported).

But we are unable to conclude that any miscarriage of justice occurred in this case when the depositions are examined and considered in conjunction with Code sections 69 and 340, subsection 2. Apparently this must have been recognized by counsel for the appellants, for a motion was made to this Court to admit on the appeal fresh evidence relating to the circumstances leading to their conviction as set forth in their joint affidavit. That motion must be rejected for reasons refusing the admission of fresh evidence on appeal recently stated in *Rex* v. *Martin* (1944), 60 B.C. 554.

The appellants also appealed against their sentence but in our opinion they have disclosed no ground for interference and *cf. Rex* v. *Zimmerman* (1925), 37 B.C. 277.

The motion to admit fresh evidence is refused and the appeals from conviction and sentence in each case are dismissed.

Appeals dismissed.

IN RE ESTATE OF MARY E. HARRISON.

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Practice—Administration Act—Passing of accounts—Order dispensing with in clear cases—Delivery and cancellation of administration bond—R.S.B.C. 1936, Cap. 5, Sec. 24.

On an application by an administrator of the estate of a deceased person to dispense with the passing of accounts and to have the administration bond delivered up to be cancelled, there was submitted in lieu of his accounts, the consents of all the persons who, according to the affidavit of the administrator, are entitled to share in the distribution of the estate. These releases approve of, consent to and accept the accounts of the administrator and consent to the passing of the same being dispensed with.

Held, that the Court should be able itself to receive and deal with the accounts, that it is the Court which has to be satisfied, notwithstanding the customary procedure before the registrar and that the Court has power to direct the manner of the giving of the notice under the Administration Act, and if the Court is prepared to relieve its officers of this responsibility in clear cases, it need not necessarily be considered as an evasion of the statutory requirement. It was ordered that the bond be delivered up.

APPLICATION by the administrator of the estate of Mary E. Harrison, deceased, to dispense with the passing of the accounts and to have the administration bond delivered up and cancelled. Heard by MACFARLANE, J. in Chambers at Victoria on the 2nd of October, 1945.

Manzer, for the application.

Cur. adv. vult.

24th October, 1945.

MACFARLANE, J.: This is an application by an administrator of the estate of the deceased in British Columbia to dispense with the passing of the accounts and to have the administration bond delivered up to be cancelled. It involves consideration of the powers of the Court in view of the provisions of section 24 of the Administration Act which reads as follows:

Where an administrator has passed his final account and has paid into Court or distributed the whole of the property of the deceased which has come into his hands, the Court may, after notice given to all the beneficiaries in such manner as the Court may approve, direct that the bond or other security furnished by the administrator be delivered up to be cancelled.

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The administrator submits in lieu of his accounts the consents of all the persons who according to the affidavit of the administrator are entitled to share in the distribution of the estate. These releases approve of, consent to and accept the accounts of the administrator and consent to the passing of the same being dispensed with. It is submitted that quite independent of section 24 of the Administration Act, there is inherent jurisdiction in the Court to order documents filed in any judicial proceeding to be delivered out of Court when their purpose has been served and all parties interested consent. It is further submitted that section 20 (2) which authorizes the Court to dispense with a bond altogether on certain conditions is not limited in its terms to dispensing with the bond when the order for administration is made but that if circumstances then do not permit the exercise of that power, and such circumstances subsequently change so that the conditions therein stated have been satisfied, the Court then has power to dispense with the bond, and *a fortiori* to deliver it up. It is submitted here that all the beneficiaries having consented, and the debts being paid, the conditions exist which enable the Court to dispense with the bond.

Dealing with these submissions in the order in which I have recited them, if this were purely a matter of procedure on which the statutes and the rules were silent, I might agree. In fact it was said by HUNTER, C.J.B.C. in *Bell* v. *Wood and Anderson* (1927), 38 B.C. 310, at p. 311, that in that case

> It was argued that because there is nothing in the rules requiring the affidavit that there is no jurisdiction to require it. That is to say, the Court is controlled by the process and has no power to control it but I apprehend that the Court has a discretion to make any order about a matter of procedure, which it considers the circumstances require, when the rules are silent on the subject and especially when it tends to prevent misuse of the process. The rules are made to promote justice and not to impede it or to render the Court powerless to prevent injustice and it would of course be impossible for any set of rules, however elaborate, to cover every conceivable case.

But in the present case there are statutory provisions, which deal with this particular matter and I do not think it is open to the Court to override them by the method suggested. I think the second submission is open to the same objection. It is said

that section 24 does not apply as its purpose is to require notice to the beneficiaries, while here the beneficiaries have consented. I will deal with that later.

I have discussed the matter, however, with my brother judges and they are of opinion that the Court has power to accept, as the registrar, in fact in many cases in some registries, does the submission of accounts, approved by all the interested beneficiaries as a passing of the final account and the receipt of the beneficiaries for their share as distribution of the property and where the beneficiaries have approved the accounts and filed releases and waived personal notice, to treat the filing of application itself as sufficient notice, as no good purpose could then be served by incurring the expense of further notice, and as the Court is given a discretion as to the manner of notice, and upon such conditions being present to order the bond to be delivered up to be cancelled. The objection to this procedure is that it appears that the Court may be attempting to give itself jurisdiction which the statute itself does not give, but on the other hand, it should be clear that the Court should be able itself to receive and deal with the accounts, that it is the Court which has to be satisfied notwithstanding the customary procedure before the registrar and that the Court has power to direct the manner of the giving of the notice and if the Court is prepared to relieve its officers of this responsibility in clear cases, it need not necessarily be considered as an evasion of the statutory requirements.

I would therefore order the bond to be delivered up.

Application granted.

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Oct. 25, 31

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND *IN RE* ESTATE OF FREDERICK SAUNDERS, DECEASED.

Testator's Family Maintenance Act—Will—Whole estate bequeathed to niece — Petition by son — Special circumstances — Petition refused — R.S.B.C. 1936, Cap. 285.

The testator died in November, 1944, at Victoria, leaving a will in which he left practically all his estate to a niece, the net value of which, after payment of certain small legacies and succession and probate duties was about $10,000. He formerly lived in Ontario where he separated from his wife in 1907. He had two sons, the applicant herein and Ralph Saunders, but Ralph disappeared and had not been heard of since 1931. The applicant is a teacher and resides in Los Angeles, California. Between 1914 and 1918 he visited his father at his home on Vancouver Island where he stayed for some weeks, but they had a disagreement and the son left. After that, with the exception of advising his father of his mother's death, he had had no communication of any kind with his father until 1939 when he went to his father's home in Vancouver, but his father refused to have anything to do with him. The niece was on intimate terms with the testator for some time prior to his death and the correspondence shows that it was his intention to give his property to the niece at his death. By arrangement between them he sold his house and went to live with his niece where he remained until his death. Upon the petition of the son to share in his father's estate under the Testator's Family Maintenance Act:—

Held, that a man having a small estate who has been separated from his son for over a quarter of a century and who in his last year found comfort and affection from his niece should not be deprived of making a will in her favour in appreciation of the services which she had rendered him. There are no special circumstances in this case which would entitle the applicant to succeed.

PETITION by a son for adequate provision from the estate of his deceased father under the provisions of the Testator's Family Maintenance Act. Heard by FARRIS, C.J.S.C. in Chambers at Vancouver on the 25th of October, 1945.

G. L. Murray, for petitioner.
Owen, K.C., for respondent.

Cur. adv. vult.

31st October, 1945.

FARRIS, C.J.S.C.: This was an application made before me by way of petition under the Testator's Family Maintenance Act, R.S.B.C. 1936, Cap. 285, by one Raymond Saunders, a son of the late Frederick Saunders who died at the city of Victoria on or about the 28th day of November, 1944, leaving a will in which he left practically the entire estate to a niece, one Nellie Barnett, the estate having a net value after taking care of certain other small legacies and the payment of the succession and probate duties, of approximately $10,000. The will of the testator who was an elderly man and who had been in poor health for some time was made on the 6th of August, 1943. The testator formerly lived in Ontario and separated from his wife about 1907. He apparently had two sons, the applicant and Ralph Saunders, to each of whom he left the sum of $10. The whereabouts of the son Ralph is unknown, and he has not been heard of, apparently, since 1931.

It would appear that some time between 1914 and 1918 the applicant visited his father, the testator, for several weeks at his father's home on Vancouver Island. They had some disagreement and the son left. He is now residing in the city of Los Angeles where he is a teacher. It does not appear that this son ever communicated with his father except some years ago when he wrote and advised the father of his mother's death, and except in 1939 when he came to Vancouver and attended at the home of his father, the father refusing to have anything to do with him, even to the extent of refusing to shake hands with him. It would also appear that the testator had a number of years ago lost what savings he had, but was given a third interest by his two sisters in the property which they owned and which was eventually sold, and the amount received by the testator from this sale, through wise investments by the testator was brought up to the amount of the estate which he left.

The testator for the last few years of his life suffered from a rheumatic condition and also had some eye trouble. It would appear, however, that up to the very time of his death his mentality was unimpaired.

The niece, Nellie Barnett, was on intimate terms with her

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uncle, the testator, and the letters which were filed as exhibits, from the testator to Mrs. Barnett, would indicate that the relationship between them was almost as that of father and daughter. This correspondence clearly shows that not only was it his intention to give his property to his niece at his death, but if she desired it she could have had a considerable portion of it during his lifetime. A considerable portion of the estate was made up of Coast Brewery stock and Canadian Breweries, and in a letter undated addressed by the testator to Mrs. Barnett and her husband he says in part:

> Well now your Coast Breweries are up to $1.65 so I thought I would let you know in case you wanted to sell. I don't recommend you to until the average is under 5% or until they are over $2.00.

As a postscript to the same letter he says:

> Tell Joe I will sign Canadian Breweries shares on October 5th/43, so if he cares to sell them when I go he can do it.

It is also evident from the correspondence and the affidavits filed that there was an understanding between the testator and Mrs. Barnett that as soon as she could get a suitable home the testator would sell the home that he was then living in, and live with the Barnetts, and as soon as such a home was obtained he did go to live with the Barnetts and remained with them until he died. Upon the Barnetts getting a suitable home, the testator immediately effected a sale of his own property on terms under an agreement for sale, which agreement for sale is part of the assets of the estate. As for this particular part of the property it might be successfully argued that the proceeds from the sale of the testator's house was the property of the Barnetts under an agreement that if the Barnetts obtained a suitable home the proceeds from the sale of the testator's home would go to the Barnetts to help finance this new home. However, I do not consider it necessary on this application to decide in respect thereto.

Upon all the facts it would seem to me that for over 20 years the testator had no communication with the applicant other than the letter from the applicant to the testator a number of years ago advising that his mother was dead.

In 1939 the applicant came to Vancouver and the father refused to be reconciled with him. It may well have been that he felt that his son who had paid him no attention for over 20

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years was only seeking this reconciliation knowing that his father was getting along in years and had a little money. In any case I cannot find on the evidence before me that the father wrongfully acted in refusing to be reconciled with the son. From the date when the son saw the testator in Vancouver until the testator's death there was no further communication between them. The applicant also contends that he was entitled to consideration because he had assumed the obligation of his father in taking care of his mother. No particulars were given as to how long he did this, or any expenditures that he made, or that any request was ever made to the father for financial assistance. It did appear, however, that for many years at least after the separation the mother was a nurse and was in active service, and apparently was quite capable of earning her own living.

It does seem to me that many counsel and applicants seem to think that the effect of the case of *Walker* v. *McDermott,* [1931] S.C.R. 94, is to allow any child, regardless of the circumstances, who has been ignored by a testator in making a will, a right to apply to have the Court vary the will and make provision for such child. As I have already pointed out in the case of *In re Testator's Family Maintenance Act and In re Estate of Isabella Caroline Dickenson, Deceased* (1944), 60 B.C. 214, that to my mind that is not the principle upon which that case was decided. I quote from that judgment in referring to the *Walker* v. *McDermott* case (p. 216):

> The learned justice, while stating there is a variety of circumstances which a just father must take into consideration in regard to his child, and in respect thereto must make proper and adequate provision for the child, nevertheless indicates that these circumstances must be special circumstances.

In my opinion it is preposterous to think that a man having a small estate such as in this case, who had been separated from his son for over a quarter of a century and who in his last year apparently only found comfort and affection from the niece, Mrs. Barnett, should not be permitted to make a will in favour of such person as a mark of his love for her and in appreciation of the services which she had rendered him. I can find no special circumstances in this case which would entitle the applicant to succeed. The application is dismissed with costs.

Application dismissed.

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BERGERON v. REILLY AND CHATHAM HOUSE PRIVATE HOSPITAL.

May 14;
Nov. 6

Negligence—Damages—Employee in hospital—Injuries sustained in fall through defective fire-escape — Acting in course of employment — Whether employer negligent—Knowledge of defect in fire-escape by employee.

The plaintiff, an employee in a private hospital, occupied a bedroom between which and a fire-escape was a passage-way. On a day off, while cleaning her room, she went out through the passage-way on to the fire-escape in order to shake out a scarf which was used on her dresser. When shaking it out she leaned against the rail of the fire-escape. The rail gave way and she fell, suffering severe injuries. In an action for damages the plaintiff admitted that she knew the day before the accident that the rail was loose, she had seen it out of place and hanging down at one end. She did not report the fact to her employers. She further said that someone had put it back in place and that it was back in place at the time of the accident. There was no evidence that the employers knew it was loose, and they gave evidence of regular inspection by the fire marshal and of repairs of this rail a few months prior to the accident.

Held, that it is necessary to show that the employers ought to have known of the defect if they had used reasonable care. The plaintiff has not succeeded in establishing that breach of duty on the part of her employers and the employers have established that they exercised reasonable care. When the plaintiff with the recent knowledge she had of the condition of this rail, went out on the landing and leaned on the rail, she cannot be absolved from negligence on her part which led directly to the accident. She is responsible for her own misfortune and the action is dismissed.

ACTION for damages by an employee in a private hospital in respect of injuries sustained by her when she fell through a defective railing in a fire-escape. The facts are set out in the reasons for judgment. Tried by MACFARLANE, J. at Vancouver on the 14th of May, 1945.

McLorg, for plaintiff.
McAlpine, K.C., for defendants.

Cur. adv. vult.

6th November, 1945.

MACFARLANE, J.: This is an action by a ward maid in a private hospital against her employers for damages, in respect

of injuries sustained by her when she fell through a defective railing on a fire-escape. The plaintiff occupied a bedroom with another girl similarly employed. Between the door of her room and the fire-escape was a passage-way. On her day off, while cleaning up her room she went out through this passage-way and on the fire-escape in order to shake out a scarf which was used on her dresser. When shaking out the scarf she leaned, she thinks, slightly against the rail of the fire-escape. The rail was loose at one end. It gave way and she fell suffering very severe injuries to her knee, which will result, according to the evidence, in permanent disability.

The first question that arises is whether in doing what she was at the time of the accident she was acting in the course of her employment. I think she was performing a duty incidental to her employment. In the course of her ordinary duties she had been instructed to go into the passage-way and rub her dusting-mop on the slats of the fire-escape. The defendants say she was warned not to go on the fire-escape to do this. I do not think that stressing the danger of going on to the fire-escape to do this is consistent with the position that the defendants otherwise take that the fire-escape was not dangerous. I am unable to draw any practical distinction between standing at the edge of the passage-way to rub her mop on the slats and standing on the fire-escape itself to do that. In view of the evidence as to the method of her instruction by having another girl show her what to do, and of the vagueness of this evidence as to her other directions, I am unable to accept the position that she was doing something she had been deliberately warned not to do.

What distinguishes this case is the fact that the plaintiff herself says that she knew the day before the accident that this rail was loose. She had in fact seen it out of place and hanging down at one end. She did not report the fact to her employers. Whether I accept or do not accept the evidence of the witness who swore that after she had gone up the fire-escape the night before something happened that caused her to think she herself had knocked the rail loose, and the discussion of it the following morning in the kitchen when she was told that she should report it; she herself says that she knew it was down the day before,

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and admits she had not reported it to her employers. There is no evidence that they knew it was loose. She says that someone had put it back in place and that it was back in place at the time of the accident. I do not think I need to go any further than to find that she knew that it had been so recently out of place, and the fact that there had been no time to have it repaired. I think she must be taken to know its condition at the time of the accident. Some argument was addressed to me on the defence of *volens*. I am unable to follow that argument. The questions I have to decide, in my opinion, are (1) whether there was negligence on the part of her employers and (2) whether she was the author of her own misfortune. With regard to the first question, I think it is well settled that the duty of employers towards an employee engaged in the course of her employment is to take reasonable care to provide safe premises upon which the employee is required to work and to use reasonable care to keep them safe. I do not think it is necessary for the employee to prove that the employer knew that the premises they had provided were or had become defective; it is however necessary to show that the employers ought to have known if they had used reasonable care. I do not think that the plaintiff here (the employee) has succeeded in establishing that breach of duty on the part of her employers, and I think that the employers have established that they exercised reasonable care. I do not think that in a case such as this where personal negligence of the employers has to be proved that the doctrine of *res ipsa loquitur* applies because the negligence is not brought home to the employers. The employers gave evidence of regular inspection by the fire marshal accompanied by one of them who looked after the premises and also of repair a few months before the accident of this particular rail. I do not see what more they could have done than they did. With reference to the second question, *i.e.*, whether she was the author of her own misfortune, I think when the plaintiff with the recent knowledge she had of the condition of this rail, went out on the landing and leaned on this rail she cannot be absolved from negligence on her part which led directly to the accident. I must I think find her

responsible for her own misfortune. While I regret the unfortunate occurrence, I think in the circumstances I must dismiss the action.

Action dismissed.

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S. C.

BERGERON v. REILLY AND CHATHAM HOUSE PRIVATE HOSPITAL

"PRINCESS NORAH" v. "CO-OPERATOR 1."

In Admiralty

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Nov. 1, 2, 10, 17

Admiralty law—Ships—Collision—Small harbour—Narrow entrance—Both vessels leaving port—Failure to keep look-out—Both vessels at fault—Proportion of liability.

Victoria inner harbour is roughly in the shape of a half-moon with diameter running north and south with the rim to the west. The diameter is about 2,000 feet long and the radius about 1,000 feet. The exit is to the west about the middle of the rim and about 400 feet in width. It is little more than a turning basin and only one vessel of any size can safely manœuvre therein at one time. At 11 p.m. on September 30th, 1944, the Canadian Pacific Railway steamer "Princess Norah" of 2,731 gross tonnage left her berth at the south end of the harbour for outer voyage and at about the same time the "Co-operator 1" a small fishing packer 97 gross tonnage, left her berth at the north end of the harbour. Both vessels first went astern and when in a position to shape up for the outer channel, stopped their engines and then went ahead, the "Princess Norah" under starboard helm and the "Co-operator 1" under port helm. While so turning and with very little headway on the "Princess Norah" and with three or four knots headway on the "Co-operator 1," the vessels collided with considerable damage to each, the port side of the "Co-operator 1" striking the starboard counter of the "Princess Norah." At the time of the collision the "Princess Norah" was heading S.S.W. and the "Co-operator 1" about S.W.x.W. There was a light south-west wind; the night was clear, cloudy and moon-lit.

Held, that if the "Princess Norah" had been seen earlier, the "Co-operator 1," being much the smaller and more easily handled vessel, as a matter of good seamanship in the circumstances, might have been expected to take the prudent course of stopping and allowing the "Princess Norah" to pass out ahead of her. The failure to keep a look-out on the part of the "Co-operator 1" being without any extenuating circumstances, must be regarded as being the primary cause of the collision and she therefore must be held in fault. The master of the "Princess Norah" should have become sooner aware of the presence of the "Co-operator 1" and that she was under way. Had he done so, he might have the sooner noticed the turning movement in which she became engaged and given her a wider berth and is therefore also at fault. The pro-

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portion of liability found was that the "Princess Norah" was one-quarter to blame and the "Co-operator 1" three-quarters to blame for the collision.

ACTION arising out of a collision between the S.S. "Princess Norah" and the S.S. "Co-operator 1" within the Victoria inner harbour at 11.08 p.m. on the night of the 30th of September, 1944. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, D.J.A. at Vancouver on the 1st, 2nd and 10th of November, 1945.

McMullen, K.C., for plaintiff.
Clyne, for defendant.

Cur. adv. vult.

17th November, 1945.

SIDNEY SMITH, D.J.A.: The inner harbour of Victoria, B.C., is roughly in the shape of a half moon, with the diameter running approximately north and south and with the rim to the westward. The diameter is approximately 2,000 feet long and therefore the radius is about 1,000 feet long. The exit from the harbour is to the west, about the middle of the rim, and is about 400 feet in width. The central part of the harbour is therefore little more than a turning basin and only one vessel of any size can safely manœuvre therein at the one time.

On the 30th of September, 1944, at 11 p.m., or very shortly thereafter, the "Princess Norah," a Canadian Pacific Railway coasting passenger steamer 262 feet in length, 48 feet beam and 2,731 tons gross tonnage, left her berth at the south end of the harbour on her usual voyage to the West Coast of Vancouver Island. About the same time the "Co-operator 1," a small fish packer, 82 feet long, 18 feet beam, 97 tons gross tonnage, with a crew of four, left another berth at the north end of the harbour, on a voyage to Vancouver, B.C. Both vessels went astern and when in a position to shape up for the outward channel, stopped their engines and then went ahead; the "Princess Norah" under starboard helm and the "Co-operator 1" under port helm. While so turning, and with very little headway on the "Princess Norah" but with some three to four knots headway on the "Co-operator 1," the two vessels collided with considerable damage

to each; the port side of the "Co-operator 1" striking the starboard counter of the "Princess Norah." At the time of the collision the "Princess Norah" was heading S.S.W. and the "Co-operator 1" about S.W.x.W. The task before the Court is to determine where the liability rests for this rather unusual and peculiar collision. Fortunately the area of controversy is very limited, and there can be little doubt as to the sequence of events.

I heard evidence from captain Robert Thomson, the master of the "Princess Norah," and also from his second and third officers and from the third engineer. They produced the deck log, the engine-room log and the engine-room bell-book of their vessel. These contained entries depicting the events that happened, made as they happened, or very shortly thereafter. It will be convenient to say here that I reject at once the suggestion that the engine-room bell-book may have been falsified; and also the suggestion, made at one time during the evidence, that the vessel may have been exhibiting a green stern-light. Captain Thomson seemed to me to be a shipmaster of experience and ability. He had been in permanent command of Canadian Pacific Railway coasting vessels for 20 years. His evidence was impressive and I accept it. He was navigating his vessel from the top bridge and therefore was in a commanding position to see the events as they occurred. I prefer his evidence to that of his officers, particularly to that of his junior officer, whose primary duty was to stand-by aft and, with the aid of a spot-light, to sight and report on logs likely to endanger the propeller. There was a light south-west wind; the night was clear, cloudy and moon-lit. There was some controversy about this last feature, but I think I can take official notice of the phase of the moon. I find it was full moon on the night after the collision.

The "Princess Norah" left her wharf at 11.02 p.m. and the following are the entries in her engine-room bell-book, *viz.*, 11.02 slow astern; 11.03 stop; 11.03½ slow astern; 11.05 half astern; 11.07 full ahead; 11.08 stop. The collision was at 11.08. The third officer said that when his vessel was proceeding astern he saw the white and red lights of a vessel; but in this I think he was mistaken. I think they were not seen till

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later, and that they were first seen by the master, and that that was just before the third officer directed his spot-light upon the vessel exhibiting them, which proved to be the "Co-operator 1." The master testified that he was proceeding with his engines at half speed astern and, having reached the proper position to turn to starboard for the outward channel, had put his engines full ahead with helm hard-a-starboard; and at that time he saw the "Co-operator 1" about four points on his port quarter, 350 to 400 feet distant, and close to and a little to the north of Enterprise Wharf. I am satisfied that at the time and place indicated by the third officer the red light of the "Co-operator 1" had not opened out and could not then be seen by those on board the "Princess Norah." Captain Thomson judged the other vessel was going at two to three knots with increasing speed. He heard her blow one short blast. Under the influence of her engines and helm the "Princess Norah" gradually lost her stern-way and her stern swung to port. The "Co-operator 1" came on with headway and with her head swinging to port. These movements resulted in the "Co-operator 1" colliding with the "Princess Norah" in the manner already mentioned, and in a position rather less than midway between Enterprise Wharf and Tuzo Rock. Both vessels then stopped their engines and in due course made their way back to dock.

The case for the "Co-operator 1" was that she sailed at approximately 11 p.m. from Spouse's fish slip at the north-east corner of the harbour, just below Johnson Street bridge, and went astern for about 500 feet parallel to, and close to, the north side of the harbour. During this movement she gave three short blasts of her whistle. She then ported her helm, went slow ahead for about two minutes, steadied on her course out of the harbour with helm amidships, and proceeded with engines at half ahead. She then saw on her port bow the stern of the "Princess Norah" bearing down upon her, under very fast sternway, at a distance which was variously estimated in the evidence as being from 30 feet to 83 feet. Collision was seen by her master to be inevitable, and in order to minimize the impact he ported his helm so as to bring about a glancing blow. He testified that had it not been for this helm action the damage

would have been much more serious. I am of opinion that the "Co-operator 1" never steadied on her course out of the harbour. I think that after she concluded her stern movement she went ahead under hard-a-port helm and that she continued so doing until the collision. I think her master was confused and shaken by the sudden appearance of the "Princess Norah." Captain Williams, then superintendent of the Canadian Pacific Railway Coast Service, found him so when he went on board later that night to survey the damage.

I formed the opinion that the master of the "Co-operator 1" did his best to assist me with his evidence. I think that in familiar ships and in familiar waters he would be a competent officer; but I think, too, that on this occasion he was neither in the one nor in the other. He holds a certificate as passenger mate, obtained in 1944. No point was raised before me as to whether this was a proper certificate for master of this vessel. He had been at sea since 1919; for all but two years of that time in the ships of the Union Steamship Company out of Vancouver, reaching the position of chief officer. He said he had had some service during the war as officer, master, and pilot with the United States Army Transport Service, but the type and the term of this were left very vague. He stated that at the date of the trial he was fairly familiar with Victoria Harbour, but that at the date of the collision he had been there only five or six times. No deck or engine-room log was produced from his vessel; and therefore he spoke, as did the other three witnesses from the ship, from memory of events long after they had taken place. I find their evidence unreliable. They had no accurate idea of the time intervals and in their evidence seem to have accepted those of the "Princess Norah." In their preliminary act they gave the time of collision at 11 p.m., a time when neither vessel had left her berth. The master said he first became aware of the "Princess Norah" when her spot-light flashed into his pilot house, and that she was then almost on top of them; and that it was only a matter of seconds before the collision. Yet in this brief period he stated that he blew a series of short blasts, put his helm hard-a-port, rang full astern on his engines and sounded three short blasts on the whistle.

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He made no mention of the one short blast heard by the witnesses from the "Princess Norah."

The reason for the failure of those on board the "Co-operator 1" to become aware of the presence of the "Princess Norah" at an earlier period was because (as they testified) she showed no lights. The argument advanced seemed to be that the grey colour of her hull merged into the dark background of the piers; or, alternatively, if she were showing lights, that her lights merged into the lights of the piers in the background. This seemed to me to be rather inconsistent but, in any event, I accept neither limb of the submission. There can be no doubt in relation to this matter that the "Princess Norah" was properly exhibiting all her regulation lights, and that in addition she was showing a series of deck lights round her stern. When it is remembered that the "Princess Norah" is a relatively large vessel and that all this happened in restricted waters, on a moon-lit night, the failure of the "Co-operator 1" to see her becomes, to me at least, quite inexplicable.

It was contended that the "Princess Norah" should have blown three blasts, as required by article 28. I cannot accept this view. For one thing, her engines were never at any material time going full speed astern; for another, she was not taking any course "authorized or required by these rules." She was pursuing her usual and proper course out of the harbour (*The Anselm,* [1907] P. 151; *The Bellanoch, ib.,* 170). Then it was argued, failing this submission, that she should have blown three blasts as a precautionary measure or warning signal, and that this was a customary thing to do. However it may be in other harbours, there is no such practice in Victoria Harbour. A three-blast signal might well have been misleading. Moreover, no one in the "Princess Norah" could have been expected to realize in the circumstances that the "Co-operator 1" could possibly fail to see her, or could possibly fail to appreciate the manœuvre she was carrying out. (Compare *The Lady Belle* (1933), 49 T.L.R. 595.)

If the "Princess Norah" had been seen earlier, the "Co-operator 1," being much the smaller and more easily handled vessel, as a matter of good seamanship in the circumstances,

might have been expected to take the prudent course of stopping and allowing the "Princess Norah" to pass out ahead of her (*cf. Owners of the "Cameronia" v. Owners of the S.S. "Hauk,"* [1927] S.C. 518). Indeed her master expressly stated that this is what he would have done. I therefore regard the failure to keep a look-out on the part of the "Co-operator 1" as being without any extenuating circumstance, and as being the primary cause of the collision. She must therefore he held in fault.

There remains to consider whether there was also fault on the part of the "Princess Norah." I think there was. It seems to me that her master should have become sooner aware of the presence of the "Co-operator 1" and that she was under way. Had he done so he might have the sooner noticed the turning movement in which she became engaged, and given her a wider berth. But this fault falls far short of that of the "Co-operator 1." Giving the best attention I can to the proportion of liability in the light of all the circumstances, I find that the "Princess Norah" was one-quarter to blame and the "Co-operator 1" three-quarters to blame for this collision.

Mention should perhaps be made of two witnesses who gave evidence on behalf of the "Co-operator 1." The first was captain Cecil Claxton, superintendent of pilots at Vancouver, B.C. From captain Claxton's testimony it is evident that, apart from some experience in command of mine-sweeping vessels in the Mediterranean in the first Great War, he spent his sea career as an officer in ocean-going liners; that he has had no experience in vessels like the "Princess Norah"; that he has never been in command (except as aforesaid), and that he has never navigated any type of vessel in Victoria Harbour. In these circumstances I was unable to derive much guidance from his evidence. The other witness was the skipper of a fishing-vessel in a nearby berth to the "Co-operator 1." His evidence was not particularly helpful to me; and neither side seemed to regard it as being of much weight. That is also my view.

For these reasons judgment will go as indicated, with costs in the like proportions. There will be a reference to the registrar to assess the damages of each vessel.

Judgment accordingly.

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Nov. 9, 12, 13, 14, 15, 16. 1946 Jan. 15.

PROTOPAPPAS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED *ET AL.*

Negligence—Intersection—Pedestrian-way—Pedestrian crossing in front of close approaching street-car—Struck by motor-truck beyond street-car—Motion for non-suit—Adjourned to end of hearing—Cross-examination of co-defendant's witness—Effect of—Damages—Verdict—Appeal.

On the 15th of August, 1945, at about 8 p.m. when the weather was fine and the pavements dry, a street-car of the defendant company proceeded west on Hastings Street in Vancouver from Victoria Drive towards Salsbury Drive on a down grade at from 20 to 25 miles an hour. When still some distance from Salsbury Drive one Stewart, the motorman saw the plaintiff stepping off the kerb at the south-east corner of the intersection and walk to the south track evidently intending to catch his car. Stewart's vision was then obscured by an east-bound street-car passing him. He then slowed down and sounded his gong and when about 15 feet from the intersection, he again saw the plaintiff suddenly emerge from behind the east-bound street-car. He then applied his brakes and sounded his gong. The plaintiff proceeded at a run across the front of his car, clearing it by about five feet. When clear of the north track the plaintiff was confronted by the defendant Knap's motor-truck travelling westerly about 10 feet back of the front of the street-car and from two to three and a half feet north of the street-car travelling at about 25 miles an hour. When the plaintiff saw the Knap truck he ran in a north-westerly direction, Knap swerving his truck to the right endeavouring to avoid him, but he struck the plaintiff who was severely injured. Knap's evidence was in conflict with that of Stewart and one Turner (a passenger on the street-car) in swearing that the street-car did not slow up but continued at 25 miles an hour up to the pedestrian-way and there was no sounding of the gong. A city by-law limited the speed of a street-car to 18 miles an hour. The jury found all the parties guilty of negligence and apportioned the fault: the plaintiff 10 per cent. and Knap and B.C. Electric Ry. Co. 45 per cent. each.

Held, on appeal, affirming the decision of WILSON, J. (BIRD, J.A. dissenting in part and would allow the appeal of the B.C. Electric Ry. Co.), that the jury were entitled to accept or reject any part of the evidence of any witness, and they may have accepted Knap's evidence as to the speed of the street-car in preference to that of Stewart and Turner and upon these facts the jury were justified in finding that it was the negligent actions of Stewart which forced the plaintiff to jump from in front of the west-bound car into the path of the motor-truck. As to Knap the jury found his negligence to be "travelling too fast towards an intersection." They had Knap's evidence that he was going "not more than 30 miles an hour." It was no excuse that he followed the street-car thinking he would be safe in doing so. The jury found the plaintiff

was guilty of contributory negligence in that he misjudged the speed of the street-car. There is no reason to disturb the finding of the jury. At the conclusion of the plaintiff's case counsel for the B.C. Electric Ry. Co. applied to have the case taken from the jury. After argument, the learned judge asked counsel if he would under the circumstances have any objection to his reserving his motion, putting the case to the jury and considering the motion after the jury's verdict. He suggested it would save a lot of trouble and said "I will consider your motion on the evidence I have heard up to this time." After the jury had answered questions, the learned judge heard argument and dismissed the motion.

Held, on appeal, that where counsel for the defendant desires to make a submission of "no case," he must elect to call no evidence, otherwise the trial judge will refuse to rule. Counsel for the B.C. Electric Ry. Co. did not call any witnesses, but upon the defendant Knap calling Stewart (the motorman) said counsel cross-examined him at length bringing out evidence favourable to his client. This put him in the same position as if he had led evidence. Having cross-examined Stewart, the B.C. Electric Ry. Co. lost the right to pursue its motion for a non-suit.

APPEAL by defendants from the decision of WILSON, J. of the 17th of July, 1945, on the findings of a jury in an action for damages for personal injuries brought against the B.C. Electric Railway Company and George Knap and Burrard Industries Limited, the owner of the motor-car. The accident took place on the north-east corner of the intersection of Hastings Street and Salsbury Drive. The street-car in question was proceeding west on Hastings Street and approaching the intersection of Salsbury Drive. The Knap motor-car was proceeding west parallel with the street-car on the north side of Hastings Street. The plaintiff was standing on the south-east corner of the intersection intending to cross Hastings Street to where he would take the west-bound street-car which he saw approaching a block away. He stepped off the kerb towards the south track when he saw a car approaching from the west coming into the intersection. He waited until this car passed, then ran behind this car in front of the west-bound car across the northern tracks. The motorman on the west-bound car saw him suddenly emerge from behind the east-bound car headed for the front of his car and he immediately slowed down to let him pass in front. When the plaintiff was past the street-car he found himself suddenly confronted by the Knap motor-car which was running

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alongside of the street-car in the same direction. The presence of the motor-car was unknown up to this time either by the pedestrian or the motorman. When the plaintiff saw the motor-car he started to run in a north-westerly direction towards the north kerb and Knap swerved his car in the same direction. He struck the plaintiff who was severely injured. On the trial the jury found that both defendants were guilty of negligence and that the plaintiff was guilty of negligence, and assessed the portion of the damages of the two defendants at 45 per cent. each and the plaintiff at 10 per cent.

The appeal was argued at Vancouver on the 9th and the 12th to the 16th of November, 1945, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Farris, K.C., and *Riddell,* for appellant B.C. Electric Ry. Co.: The learned judge should have allowed the motion of the railway company to dismiss the action against that company at the close of the plaintiff's case in view of his expressed opinion that there was no evidence against the said company to go to the jury. He followed *Hummerstone* v. *Leary and Foster* (1920), 90 L.J.K.B. 1148. That case is distinguishable, first because in that case there was evidence to go to the jury against one defendant, whereas in this case there was no evidence to go to the jury as against either defendant. Secondly, in the *Hummerstone* case County Court Order XIII., r. 5 applied. This rule is the same as Supreme Court Order XVI., r. 7. The plaintiff's pleadings here do not come under this rule, but under Order XVI., r. 4, and judgment should have been given for the railway company under Order XXXVI., r. 39. The negligence of the railway company was not the proximate cause of the injury. The jury found "excessive speed, realization of danger to the pedestrian." From the evidence it is apparent that the street-car did not hit the plaintiff, that he voluntarily ran in front of the street-car. That the street-car was sufficiently under control and that the speed of the car had no relation whatever to the plaintiff's accident. That the street-car was going at from 18 to 25 miles per hour was an immaterial circumstance. What happened to the plaintiff after clearing the north tracks was entirely the

result of his own actions: see *Goodwin* v. *Goodwin and The Canadian Pacific Railway,* [1933] O.R. 225; *Gauley* v. *Canadian Pacific Railway Co.* (1930), 65 O.L.R. 477; *Stewart* v. *Smith,* [1936] 3 W.W.R. 1; *Maitland* v. *Mackenzie* (1913), 28 O.L.R. 506; *Winnipeg Electric Rway. Co.* v. *Canadian Northern Rway. Co.* (1919), 59 S.C.R. 352, at p. 367. The harm must be the immediate consequence of the negligent act: see *Toronto Railway* v. *King* (1908), 77 L.J.P.C. 77, at p. 80. There was no act of the motorman which caused the injury. The plaintiff was guilty of ultimate negligence: see *Long* v. *Toronto Rway. Co.* (1914), 50 S.C.R. 224, at pp. 247-8; *Brenner* v. *Toronto Ry. Co.* (1908), 40 S.C.R. 540, at pp. 555-6; *Herron* v. *Toronto R. W. Co.* (1913), 28 O.L.R. 59, at p. 90; *Swadling* v. *Cooper,* [1931] A.C. 1. The finding itself indicates a negligent act on the part of the plaintiff: see *Parsons* v. *B.C. Electric Ry. Co. Ltd.,* [1940] 3 W.W.R. 612; *Jacobson* v. *V.V. & E.R. & N. Co.* (1941), 56 B.C. 207; *Towne* v. *British Columbia Electric Ry. Co. Ltd.* (1943), 59 B.C. 61; *McLaughlin* v. *Long,* [1927] S.C.R. 303; *Canadian Pacific Railway* v. *Frechette* (1915), 84 L.J.P.C. 161. The apportionment of damages is unreasonable and perverse, especially in finding the plaintiff only 10 per cent. responsible: see *Jung Hon Mann* v. *Northwestern Messenger & Transfer Ltd. and Jones* (1940), 55 B.C. 404.

MacInnes, K.C., for appellants Knap and Burrard Industries Limited: The sole and only cause of the accident was the reckless and heedless conduct of the plaintiff in rushing across the front of the west-bound street-car. He cleared the street-car but put himself in such a position that the accident which did happen was inevitable. No skill or care by the truck driver could have prevented it. Upon the evidence and findings the judgment should have been entered for the defendants: see *The Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Swartz* v. *Wills,* [1935] S.C.R. 628, at p. 634. The sole ground upon which these defendants were charged with negligence consisted of "travelling into the intersection without taking care that he could see to the left." Any view to the left

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was blocked by the two street-cars going in opposite directions and this eliminated any reasonable expectancy of any pedestrian coming from his left: see *Groves* v. *Wimborne (Lord),* [1898] 2 Q.B. 402; *Carnat* v. *Matthews,* [1921] 2 W.W.R. 218. The degree or standard of care which the law requires is that which is reasonable in all circumstances: see *Ford* v. *The London and South Western Railway Company* (1862), 2 F. & F. 730; *Blyth* v. *The Birmingham Waterworks Company* (1856), 25 L.J. Ex. 212; Pollock on Torts, 12th Ed., 444; Salmond on Torts, 7th Ed., 30. No default alleged against Knap was an effective cause of the accident: see *McLaughlin* v. *Long,* [1927] S.C.R. 303; *Canadian Pacific Railway* v. *Frechette,* [1915] A.C. 871, at p. 879. The finding of 10 per cent. blame on the part of the plaintiff is unwarranted and perverse.

Guild, and *Yule,* for respondent: The respondent relies on the verdict of the jury. It is submitted there was no contributory negligence on the part of the respondent: see *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217; *McLaughlin* v. *Long,* [1927] S.C.R. 303, at pp. 309 and 319. There was evidence to go to the jury upon which the jury could reasonably hold that the plaintiff was injured as a result of the combined negligence or the individual acts of negligence of both defendants. Both defendants exceeded the speed limit and it was for the jury to say whether any relationship existed between the speed and the injuries suffered by the plaintiff. The finding of fault and of liability made by the jury against the defendants and the apportionment of fault ought not to be disturbed: see *McCannell* v. *McLean,* [1937] S.C.R. 341, at p. 343; *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Toronto Transportation Commission* v. *Whittleton,* [1939] 3 D.L.R. 721; *Danley* v. *Canadian Pacific Ry. Co.,* [1940] S.C.R. 290, at pp. 296-7; *Day* v. *Toronto Transportation Commission, ib.* 433; *Nixon* v. *Ottawa Electric Ry. Co.,* [1933] S.C.R. 154, at p. 160; *The Otranto* (1930), 100 L.J. P. 11, at p. 15; *S.S. Benmaple* v. *Ship Lafayette. Maple Leaf Milling Co. Ltd.* v. *Ship Lafayette,* [1941] S.C.R. 66, at pp. 74-5; *The Luso* (1934), 49 Lloyd, L.R. 163. It is not open to the learned trial judge at any stage of the trial to grant a non-suit on motion of the B.C. Electric Ry. Co.

or withdraw the case from the jury in so far as that defendant is concerned: see *Hummerstone* v. *Leary and Foster* (1920), 90 L.J.K.B. 1148. The withdrawal of the case could only be justified if there was no evidence at all against the company: see *Peart* v. *The Grand Trunk Railway Company* (1886), 10 O.L.R. 753; *Canadian Pacific Ry. Co.* v. *Kizlyk,* [1944] S.C.R. 98; *Storry* v. *Canadian National Ry. Co.,* [1940] S.C.R. 491.

Farris, in reply, referred to *S.S. Singleton Abbey* v. *S.S. Paludina,* [1927] A.C. 16, at p. 26; *Admiralty Commissioners* v. *S.S. Volute,* [1922] 1 A.C. 129, at pp. 136-7.

Cur. adv. vult.

15th January, 1946.

ROBERTSON, J.A.: This is an appeal from the judgment of WILSON, J., following the trial with a jury of a claim for damages for injuries sustained by the plaintiff on the 13th of August, 1944, alleged by him to have been caused by the negligence of the defendants. The accident occurred on the north-east corner of Hastings Street (which runs east and west) and Salsbury Drive (which runs north and south) about 8 p.m. in broad daylight. The weather was fine and the pavements dry. There was a double line of street rails on Hastings Street. Near the north-east corner of this intersection is a post on which appear the words "car stop," indicating a west-bound street-car would stop there to take on passengers. The plaintiff's evidence was that he came to the south-east corner of Hastings Street and Salsbury Drive. He wished to go to the city, that is west. He saw the stop sign and a west-bound street-car (later referred to as the west car) "away up the hill" at Victoria Drive, which is up-grade for 500 feet east of Salsbury Drive. He walked in the pedestrian way towards the south rails, intending to catch this car. Then he saw an east-bound street-car (hereafter called the east car) and he stopped before he came close to the south rails to permit this car to pass in front of him. Then having looked to the right and seeing the west car "at a distance," "coming down the hill" and having formed the opinion that this car was so far away that there was no danger to him in passing in front of it, he continued on his way north, walking fast, still on the

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pedestrian way. He managed to pass in front of the west car, and then was confronted with Knap's motor-car almost upon him. As Knap was travelling alongside the west car the plaintiff had not been able to see his motor-car before. He endeavoured to avoid it, but was struck and suffered serious damage.

The plaintiff put in as against the B.C. Electric Railway the discovery evidence of Stewart the driver of the west car. Stewart said that he first observed the plaintiff when he was standing just off the kerb at the south-east corner of Hastings and Salsbury, and then formed the impression that he wanted to catch the west car. Later he observed the plaintiff "pretty well in front of him" between the kerb and the most southerly rail, at which time the east car "was a good half way across Salsbury Drive," but the front end had not yet passed the plaintiff. The west car was then "quite a way past the corner," of Victoria Drive and Hastings Street. He said he had in mind that the plaintiff was going to come behind the east car to catch the west car; and he did not change this opinion until after the plaintiff had crossed in front of the west car, as will be later related, and was on the right side of the west car. He was unable to estimate the speed of his car at the time, or how far he was from the east side of Salsbury Drive when the front end of his car started to pass the front end of the east car, because he was "worrying more about this gentleman in front of me." He rang his gong before he passed the front of the east car—"when I first saw danger quite a piece from the corner" and because he thought the plaintiff might pass his car. He continued to ring the gong. In addition to this, he said he slowed down his speed and "he was going dead slow when passing the east car" and "slow enough that I would not hit him"; that just after the nose of the west car was parallel with the hind end of the east car the plaintiff "started running in front of me"; that the west car had been going down the hill from Victoria Drive at a constant speed, the brakes being partly on, until he "got pretty well to the corner," that is of Salsbury and Hastings; that when he "saw danger a few feet from the corner close to the pedestrian lane" he put his brakes on full; that he would have hit the plaintiff if he had been going very fast; that he was dead slow when he passed the other car; that

the plaintiff gave no signal that he wished to take the car or looked at him at all.

The plaintiff also called Turner, a passenger in the west car, who was sitting in the front seat, on the right-hand side, the door in front of him leading into the vestibule being open. He said the west car was coming down the hill at about 20 to 25 miles per hour; that he saw the plaintiff start to cross the street when Stewart sounded his gong quite a way back from the corner of Salsbury and Hastings, but the plaintiff never looked up but still kept going straight ahead; that Stewart slowed up the car and barely missed hitting the plaintiff. He saw the plaintiff crossing the rails in front of the west car. He first saw the plaintiff when he was 200 feet away and "he was hurrying across," that when he got to the north side of the rails he "kind of looked up and looked towards the east" and then started to run in a north-westerly direction and then Knap's car hit him. Turner said that the speed of the west car got down to "about maybe five or six miles per hour" when it was practically in line with Salsbury Drive; and that it missed the plaintiff by about five feet. Under the regulations made under the authority of the Railway Act the west car was limited to a speed of 18 miles per hour. Up to this point I have been referring only to the evidence in the plaintiff's case against the B.C. Electric, as I wish now to deal with an application made by its counsel at the conclusion of the plaintiff's case, that the case be taken from the jury.

Where counsel for the defendant desires to make a submission of "no case" he must elect to call no evidence, otherwise the trial judge will refuse to rule. See *Laurie* v. *Raglan Building Co.*, [1942] 1 K.B. 152 and *Yuill* v. *Yuill*, [1945] 1 All E.R. 183. Having elected he is, of course, bound. *Yuill* v. *Yuill, supra,* at p. 185. After some considerable argument the learned judge asked Mr. *Farris,* counsel for the B.C. Electric, if he would under the circumstances have any objection to his reserving his motion, putting the case to the jury and considering the motion after the jury's verdict. He suggested it would save a lot of trouble; and said "I will consider your motion on the evidence I have heard up to this time."

After the jury had answered questions the learned judge heard

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argument and dismissed the B.C. Electric motion for non-suit, applying *Hummerstone* v. *Leary and Foster* (1920), 90 L.J.K.B. 1148.

Ordinarily, where a motion for non-suit is reserved for consideration until the end of the trial the situation is as laid down in *Canadian Breweries Transport Ltd.* v. *Toronto Transportation Commission,* [1944] S.C.R. 240, at pp. 251-2, where Kerwin, J., delivering the judgment of the Court, said:

> . . . This refers to the fact that at the close of the plaintiff's case a motion for non-suit was made by counsel for the Commission, consideration of which was adjourned until the end of the trial. Evidence was thereafter led on behalf of the Commission. Undoubtedly all of the judges that took part in the hearing of the appeal from Barlow, J. were aware of the well-settled rule that in such circumstances the plaintiff is entitled to rely upon any evidence adduced on behalf of the defendant.

But Mr. *Farris* says he should not be prejudiced because he consented to the suggestion made by the learned trial judge. I should have a great deal of sympathy with this position except for the fact that this arrangement of the learned trial judge was made upon the basis that Mr. *Farris* did not call any evidence. He did not call any witnesses but when Stewart was put in the box by Knap, one of the defendants, Mr. *Farris* cross-examined him at length and brought out a great deal of evidence favourable to his client. The result was that the case went to the jury as against the B.C. Electric, not only on the evidence adduced by the plaintiff in his case, but also on the evidence brought out by Mr. *Farris* in his cross-examination of Stewart. In my opinion, then, this puts him in the same position as if he had led evidence. It is true Mr. *Farris* said he was proceeding to cross-examine "without prejudice to the position I have taken." But if I am right that cross-examination of Stewart was tantamount to calling evidence then this position was not open to Mr. *Farris* because he could not maintain his application for non-suit and at the same time call evidence.

By analogy I think the principle laid down in civil and criminal cases with reference to the right to reply is in point here. I refer first to Phipson on Evidence, 8th Ed., 42, where it is said

> the prosecution may also have the right of reply where the accused has cross-examined witnesses, *e.g.*, of a co-accused, so as to make their evidence part of his case.

Hobbs v. *Tinling,* [1929] 2 K.B. 1 was an action for libel. From the judgment I gather the fact to be that in the course of the cross-examination certain documents were put in by counsel for the defence (p. 22). At p. 27 Scrutton, L.J. said that when Mr. Birkett told the Lord Chief Justice

> he reserved the right to address the jury last

he

> must have forgotten that he had put in evidence, which, of course, deprived him of the right to speak last.

In my view, having cross-examined Stewart, the B.C. Electric lost its right to pursue its motion for a non-suit. In this view it is not necessary for me to consider the interesting questions raised by the decision of *Hummerstone* v. *Leary and Foster, supra.*

Before considering the question raised upon the main appeal it is necessary to set out the remainder of the evidence. As against Knap the plaintiff put in his discovery in which he said he was driving his truck at the time of the accident alongside the west car; he first saw the plaintiff when the plaintiff was about two feet north of the northerly street-car rail. His truck was between two and three and one-half feet to the north of the west car; that his speed was no more than 30 miles an hour at the time; and that it might have been even less than 25 miles an hour. That he "knew for a fact" that it was not more than 30 miles per hour. As soon as he saw the plaintiff he put on his emergency brakes and swerved right over to the north-east corner; that when he struck the plaintiff he was going round the corner; and that when he first saw the plaintiff "he was hesitating," having looked in Knap's direction and then "started up and ran" because "he was bewildered." He further said that the west car had overtaken him about a block or so away, at which time he was going 25 miles per hour; that he came down the grade alongside the west car about 10 feet from its front end; that he maintained that position down the hill right to Salsbury Drive; that he did not notice any change in speed of the west car as it approached Salsbury Drive; that he did not slacken his speed as he approached Salsbury Drive; that his speed when he was 20 feet from the cross walk at Salsbury Drive was the same as when he was 120 feet east of Salsbury Drive and the west car

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was travelling as fast, if not a little faster, then he was; that the west car did not slow down at all as it approached Salsbury Drive, and that the west car and his motor-car were travelling into the intersection of Hastings and Salsbury at the same speed they had been travelling for a block away.

Knap was called for the defence. His evidence was much the same as the discovery. He maintained he was going at all times about the same speed as the west car; and when they got to a short distance of the intersection of Salsbury Drive and Hastings Street he was travelling at the same speed as the street car; and had been in the same position with relation to the street car for over a block; that he was in the middle of the road between the west car and the north of Hastings Street. That he saw the east car when he was about a block away from Salsbury Drive but that as he got towards Salsbury Drive he could not see the east car. He said he first saw the plaintiff when he jumped out in front of the west car, almost touching the street-car; that he seemed to "like jump out in front" of the west car; and that he was a couple of inches from the west car when it cleared him; that he just skimmed around in front of the west car; that if the plaintiff had not moved "awfully fast" in front of the street-car he would have got under the wheels; and that the plaintiff was either jumping or running when he emerged from the front of the street-car. That if the plaintiff had stood still where he was when he first saw him he would not have hit him. That he heard the west car gong "just as soon as the plaintiff jumped in front of it." That he was positive there was no gong previous to that. That when he first saw the plaintiff the street-car was approximately at the cross walk and at that time the street-car was travelling at 25 miles an hour; and that it had not slowed down at that time. He was positive as to this. He said that as he had heard the east car passing at the intersection he thought there would be no one on the intersection. He then said that he was going the same speed as the street-car, which might be from 20 to 25 miles an hour. That he had checked it when he was coming down the hill. He admitted that he had told constable Sheppard that he was travelling between 25 and 30 miles an hour, but that in fact he was only travelling at 25 miles an hour and that he made

a mistake when he told Sheppard what his speed was, as he was excited. He admitted having made these answers in discovery as to speed to which I have referred. He also admitted that on discovery he had said that at the time he looked at the dashboard the speed of his car was 25 miles per hour. He admitted that he was travelling into the intersection at the same speed he had been travelling over a block away, and that the west car was doing the same thing; that as the street car maintained a constant speed and was going through the intersection, he maintained a like speed and intended to go through the intersection.

The jury were entitled to accept or reject any part of the evidence of any witness. First, then, as to the B.C. Electric, the jury found its motorman Stewart was negligent, such negligence "consisting of excess speed, realization of danger to the pedestrian." The jury may have accepted Knap's evidence as to the speed of the street-car and as to whether it slowed up in preference to that of Stewart and Turner; and that of Knap in preference to that of Stewart as to how far in front of the street-car the plaintiff crossed; also Knap's evidence as to when the gong was first rung. If this is so, then the evidence before the jury as against the B.C. Electric would appear to be this: Stewart saw the plaintiff at the south-east intersection of Salsbury and Hastings and thought and continued to think that he intended to take the street-car. He saw him come out to the south rail, wait until the east car passed, and yet he maintained a speed of at least 25 miles per hour down the grade and never at any time prior to the accident, changed his speed, although "he saw the danger quite a piece from the corner." The plaintiff, when the east car had passed, looked to the right, saw the west car so far away that he thought there was no danger in continuing to cross in front of it and, accordingly, proceeded on his way and then found the west car which the jury found was going at an excessive speed immediately upon him, and had to jump to avoid being run down by it; and just missed or skimmed it by two inches; and then found himself ten feet in front of the motor-car, which was running parallel with the west car about two and one-half feet north of it. If he had stood there the motor-car might have missed him. He hesitated momentarily and then tried to

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start to run north-westerly. He had no time to think, as it was a case of "agony of collision." It seems to me that upon these facts the jury were justified in finding that it was the negligent actions of Stewart which forced the plaintiff to jump from in front of the west car into the path of the motor-car. Then as to Knap, the jury found his negligence to be "travelling too fast towards an intersection for use of a pedestrian without a proper view to the left." The jury had before them Knap's own statement as to his speed; they might have accepted his statement that he was going not more than 30 miles an hour. They knew he had no proper view to the left and did not look. Under the by-law he was bound to give the right of way to the plaintiff who was crossing. It was no excuse that Knap followed the street-car, thinking that he was safe in doing so as the street-car would not cross unless the way was clear.

In *Gray Coach Lines* v. *Payne,* [1945] 4 D.L.R. 145, at pp. 147-8, Kerwin, J., delivering the judgment of the Court, said:

> In a case tried by a jury the question whether there is any evidence on any particular issue is distinct from that whether the jury's verdict may stand as being one which reasonable men might have come to. *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.,* [1935] A.C. 346. The principles which must be followed in the latter inquiry are set forth in *McCannell* v. *McLean,* [1937] S.C.R. 341, where Chief Justice Sir Lyman P. Duff states, at 649 D.L.R., p. 343 S.C.R.: "The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it." As was there pointed out, the same rule had been set forth in numerous cases in this Court, the then most recent one being *C.N.R.* v. *Muller,* [1934] 1 D.L.R. 768, 41 C.R.C. 329, and was the same guide by which the Judges in England had governed themselves as exemplified in the judgment of Lord Wright, delivered in the *Mechanical* case, which judgment was adopted by Lord Atkin and Lord Macmillan. The same rule has been consistently followed ever since.
>
> If, however, there is no evidence, then a Court of Appeal has the right and the duty to set aside a verdict.

Whether or not the jury have performed their duty is to be tested by the reasonableness of their judgment upon the facts as found by them, not upon the facts as they appear to any other tribunal. See *C.N.R.* v. *Muller, supra,* at p. 773.

I am unable to say that the verdict was so plainly unreasonable and unjust that no jury reviewing the evidence as a whole and acting judicially could have reached it.

The jury found the plaintiff was guilty of contributory negligence in that he misjudged the speed of the street-car. They apportioned the fault amongst the three parties as follows: Plaintiff 10 per cent.; Knap and B.C. Electric each 45 per cent. The appellants submit that if the verdict stands, this proportion is unreasonable as the plaintiff by proceeding as he did was as much to blame as they. Section 6 of the Contributory Negligence Act declares that the fault (if any) and degrees of fault shall be questions of fact. It is not possible to say upon what facts the jury proceeded in apportioning the fault.

I see no reason to disturb the findings of the jury as to fact. In *British Fame* v. *Macgregor,* [1943] 1 All E.R. 33, the learned trial judge had apportioned the blame for reasons which he mentioned. The Court of Appeal altered the apportionment. The House of Lords restored the trial judge's judgment. Viscount Simon, L.C. said at p. 34:

> . . . It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge.

Lord Atkin and Lord Thankerton agreed with him. Lord Wright said at p. 35:

> . . . ; but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts.

Lord Porter agreed with Viscount Simon and Lord Wright. In that case, of course, the House of Lords was dealing with an apportionment made by a judge. The matter is much more difficult when the apportionment is made by a jury, and, with great respect, I agree, if I may say so, that the Court of Appeal when accepting the finding of facts of a jury as to fixing of the blame, should not, except in exceptional cases, alter the allocation made by the jury, although as Viscount Simon says "I do not, of course, say there may not be such cases."

One other submission by counsel for the B.C. Electric was that its negligence, if any, was not the proximate cause, or did not contribute to the accident. If the jury did, as I think they must have, accepted the view that the action of the B.C. Electric's motorman caused the plaintiff to jump to escape being run down

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by the west car, then I think its negligence was a proximate cause contributing to the accident.

For these reasons I think the appeal should be dismissed.

SIDNEY SMITH, J.A.: I concur with the views expressed by my brother ROBERTSON, and would dismiss the appeals herein.

BIRD, J.A.: This appeal is taken by both appellants (defendants) from the judgment of WILSON, J., founded on the verdict of a jury in a running-down case. Each of the parties was thereby found at fault under the provisions of the Contributory Negligence Act—the respondent (plaintiff) to the extent of 10 per cent. and each of the defendants to the extent of 45 per cent.

It is I think unnecessary for me to discuss in any detail the evidence adduced below, since my brother ROBERTSON in his reasons, which I have had the privilege of reading, has examined most carefully and completely the relevant testimony of all the witnesses who gave evidence relative to the circumstances which led up to the happening of the unfortunate accident in which the plaintiff sustained serious injuries.

The accident occurred on the north roadway of Hastings Street, at the intersection of Salsbury Drive. Hastings Street at this point is 60 feet wide from kerb to kerb. A double line of street-car tracks occupies the middle portion of the street, flanked on each side by 20-foot roadways.

It appears from the evidence of numerous witnesses that in the early evening of August 13th, 1944, the respondent proceeded in broad daylight to cross Hastings Street from south to north by way of the pedestrian lane. Two street cars of the appellant B.C. Electric Railway Company were within sight, one east bound, then on the west side of Salsbury Drive, the other west bound and then in the vicinity of Victoria Drive, *i.e.*, about 575 feet east of Salsbury Drive.

The respondent stopped to permit the east-bound street-car to pass; then continued at a rapid pace to cross the two lines of car tracks, and safely reached a point on the roadway north of the most northerly rail. Upon reaching that point he found himself in a position of imminent danger due to the presence of a motor-vehicle, the property of the appellant Burrard Company, driven

by the appellant Knap, then proceeding west alongside the street-car. Neither the respondent nor the appellant Knap had been able to see the other prior to the time when the respondent crossed the north rail, due to the intervening presence of the west-bound street-car. The respondent then attempted to avoid the Knap car by running in a north-westerly direction, but was struck by it, notwithstanding that Knap endeavoured to avoid a collision by applying his brakes and swerving to the right. Respondent was severely injured.

The respondent says that he saw the west-bound street-car then at Victoria Drive before he left the south kerb, and saw it again after the east-bound street-car had passed him, and when he was between the south tracks. He walked very fast when crossing the rails because he wanted to catch the street-car. He gave no signal to the motorman. The motorman had seen the respondent both before and after the east-bound street-car passed, and says he reduced his speed anticipating danger to the respondent. He was not aware of the presence of the appellant's motor-car at any time prior to the accident.

At the time when respondent crossed in front of the street-car the speed of the latter and that of the motor-car, both of which had proceeded together from Victoria Drive to the vicinity of Salsbury Drive, was variously estimated by several witnesses at from six to 30 miles per hour. The motorman as well as other witnesses said that the street-car reduced its speed to about six miles per hour shortly before it reached Salsbury Drive, but Knap swore that its speed was not reduced prior to the time when respondent emerged in front of the street-car, up till which time both street-car and motor-car had been travelling about 25 miles per hour—not more than 30 and not less than 20 miles per hour.

The jury found all parties guilty of negligence, which caused or contributed to the accident; the negligence of each consisting of the following, *viz.*:

1. The motorman in "excess speed, realization of danger to the pedestrian."

2. Knap in "travelling too fast toward an intersection for use of pedestrians without a proper look-out to the left."

3. The respondent in "misjudging the speed of the street-car."

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The jury found further that, notwithstanding the respondent's negligence, neither of the appellants could have avoided the accident by the exercise of reasonable care, and that the respondent, notwithstanding the negligence of the appellants Knap and B.C. Electric, could not have avoided the accident by the exercise of reasonable care.

Turning then to consideration of the main ground of appeal on the merits by the appellant railway, *i.e.*, that the verdict of the jury was perverse, in that this appellant is not shown to have been guilty of any negligence which was the proximate cause of respondent's injury.

The finding made against the railway company, in my opinion, must be interpreted as a finding that this appellant's negligence consisted in the operation of the street-car at an excessive speed, in view of the motorman's realization of danger to the respondent, and that such speed was a factor in creating the conditions surrounding the plaintiff, from which the accident ensued.

There was evidence upon which the jury reasonably could find that the motorman realized that there was danger to the pedestrian from the oncoming street-car if its speed was maintained. Indeed, the motorman Stewart said as much, and for that reason he says he applied the brakes and reduced the speed. But the jury were entitled to reject the evidence of Stewart as to the speed of the street-car and as to a reduction of speed to six miles per hour, as well as that to the same effect given by several other witness called by the plaintiff. Likewise they were entitled to accept the evidence of Knap, who alone of all the witnesses deposed to the effect that the speed of the street-car was 25 to 30 miles per hour, and was not reduced up to the time when the respondent crossed the north rail. There was in Knap's testimony evidence upon which the jury reasonably could find Stewart to have been negligent in operating the street-car at a speed in excess of that authorized by the city by-law, *i.e.*, 18 miles per hour.

However, the street-car did not strike the respondent, and in my opinion it does not necessarily follow that the respondent's actions were in any respect influenced or affected by the maintenance of a speed of 25 to 30 miles per hour by the street-car.

In the absence of evidence upon which the jury reasonably could find that the respondent's action (in proceeding in front of the street-car to that point north of the north rail which now appears to have been a point of imminent danger) was compelled or induced by the unrestrained and high speed of the street-car, I do not think that the finding against the railway company of negligence causing or contributing to respondent's injury can be supported. Without such evidence there is nothing to show that such excessive speed caused or contributed to the accident, that is to say, to show that the speed of the street-car was a proximate cause of the accident. Liability does not arise from mere negligence, but only from negligence causing damage. *S.S. Singleton Abbey* v. *S.S. Paludina,* [1927] A.C. 16, at p. 26. As was said by Lord Atkinson in *Canadian Pacific Railway* v. *Frechette,* [1915] A.C. 871, at p. 879:

> . . . If the negligence of either party falls short of this [*i.e.*, negligence so connected with the injuries as to be a cause materially contributing to it] it is an irrelevant matter, an *incuria,* no doubt, but to use Lord Cairns' words, not an *incuria dans locum injuriæ.*

See Lord Bowen's judgment in *Thompson* v. *Quartermaine* (1887), 18 Q.B.D. 685, and Lord Chancellor Cairns' judgment in *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193; and *cf. Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155, *per* Lord Cairns at p. 1166; and *The Grand Trunk Railway Co.* v. *Labreche* (1922), 64 S.C.R. 15, *per* Anglin, J. at p. 22; *Gauley* v. *Canadian Pacific Railway Co.* (1930), 65 O.L.R. 477.

In order to reach a conclusion as to whether there was evidence to support this finding it is necessary to examine in some detail the evidence of Knap as well as that of the respondent. I do not find in the evidence of any other witness anything which can be said to touch upon the reason for the respondent's crossing the track in the manner he did.

Knap's evidence on this subject was as follows:

In direct examination:

When did you first see the plaintiff? He just jumped out in front of the moving street-car when I first seen him.

How far was he from the front of the street-car when you saw him? He was almost touching the street-car.

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Was he running or walking? He seemed to like jump out in front of the street-car.

How far was he from the north side of the street-car when the street-car cleared him? A couple of inches.

Just a couple of inches. In other words, the street-car just—he just skinned round the front of the street-car? Yes.

And again:

Where was the street-car in relation to the cross-walk when you first saw the plaintiff? Approximately at the cross-walk. I am not sure though.

It was approximately at the cross-walk? Yes.

What speed was it travelling at that time? The street-car?

Yes. Twenty-five miles an hour, the same speed as I was, you see.

Had it slowed down at that time? No.

And in cross-examination by counsel for the respondent:

Where did you get this idea about the plaintiff jumping out into the street—to the right of the street-car rails? Well, if he had not moved awfully fast in front of that street-car he would have got underneath the wheels.

The jury no doubt were entitled to accept that evidence as proof that the respondent completed the crossing of the tracks with but a narrow margin of safety ahead of the oncoming street car, but I seriously doubt that the evidence justifies the jury in drawing the inference that respondent's actions were induced or influenced by the speed of the street-car.

No more do I think that the jury reasonably could find in it any factual basis to support the inference that the speed of the street-car created the predicament in which respondent found himself after safely completing the crossing of the tracks.

The evidence, in my opinion, leaves it open to conjecture as to what was the cause of the respondent's predicament.

In *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, Lord Wright said of the distinction between inference and conjecture or speculation (pp. 169-70):

. . . if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

Consequently I think that Knap's evidence is not sufficient to support the finding of negligence against the appellant railway company, and since, apart from his evidence, there was not any testimony which showed that the speed of the street-car in any way influenced respondent's actions, I take it to be not only the right but the duty of this Court to set aside the verdict. See

Gray Coach Lines Ltd. v. *Payne,* [1945] S.C.R. 614, *per* Kerwin, J. at p. 618.

But assuming that I am wrong in the conclusion that this inference was not open to the jury upon Knap's evidence, then it becomes necessary to consider the respondent's evidence on the same subject in the light of the inference which the jury must have drawn from Knap's testimony.

The respondent's evidence on the same subject is, I think, the best evidence from which to determine what factors moved him to cross the track in the manner he did. After having said that the street-car was "a distance to the east" when he crossed the north rails, he answered questions on direct examination as follows:

How were you proceeding across those rails? Were you walking or running or what were you doing? I was walking very fast, fast as I can.

And why did you walk fast across the north side rails? Because I want to get ready to catch him street-car.

And in cross-examination:

And then you could see the west-bound car coming, the one you wanted to catch? I see, yes.

Did you not think it was dangerous to go in front of that car? It was far away from me.

Is it not a dangerous thing to do, to go in front of the car? No, no danger, too far.

If, upon consideration of Knap's evidence, along with the respondent's explanation of his crossing the tracks in the manner described the jury chose to draw the inference that respondent's predicament was induced or caused by the speed of the street-car, then, in my opinion the verdict is so unjust and unreasonable that it cannot be supported upon consideration of the whole of the evidence.

In those circumstances I think this Court should apply the principle laid down by Chief Justice Sir Lyman Duff in *McCannell* v. *McLean,* [1937] S.C.R. 341, when he said at p. 343:

The principle has been laid down . . . , that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

In view of the evidence before recited, I think that the facts here adduced bring this case within the language used by Lord Cairns in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery, supra,* at p. 1166, when he said:

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> . . . If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the company which caused his death. . . . The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, to his own destruction.

I would say with Taschereau, J. in *George Matthews Company* v. *Bouchard* (1898), 28 S.C.R. 580, at p. 584:

> . . . There is no evidence whatever that the negligence of the company, assuming negligence to be proved, caused the accident in question, and an affirmance of the condemnation against it would unquestionably be at variance with our own jurisprudence.

and *cf. Canadian Pacific Railway* v. *Frechette, supra.*

In these circumstances I think that the finding of the jury of negligence by the appellant railway company is not such as a jury on the evidence reasonably could have made.

It follows from the opinion before expressed that I would also allow the appeal of the appellant railway company on the further ground taken before this Court that the plaintiff's case should have been dismissed at the conclusion of the defence of the defendant Knap upon the renewal of the motion made by counsel for the railway company.

In view of the conclusion which I have reached on the merits, it is unnecessary to consider the questions raised on the first motion made on behalf of the railway company.

Turning then to a consideration of the appeal of the appellants Knap and Burrard Industries Limited (hereafter referred to as the "other appellants") the jury have found that the appellant Knap was negligent "in travelling too fast toward an intersection for use of pedestrians without a proper look-out to the left."

Upon consideration of the evidence of Knap as well as that of the respondent, it is clear that at the moment when the respondent reached the north roadway at the point on the pedestrian lane north of the north rail, Knap's car occupied a position on that roadway "about the middle of the street-car." The evidence is by no means clear as to the distance then intervening between Knap's car and the respondent. The respondent was unable to give any estimate thereof. On discovery Knap described the

interval as about ten feet and on the trial fixed the position of his car at a point midway up the street-car. The only evidence upon the overall length of the street-car is that given by Stewart who made an estimate of about 30 feet, but he was not sure. The jury may have reached the conclusion based on such evidence as was led on the subject and their knowledge of the length of street-cars which normally operate on Vancouver streets, that there was a sufficient interval between Knap's car and the respondent to have permitted Knap to avoid the impact if he had been driving at a reasonable speed upon approaching the Salsbury Drive intersection.

In any event the jury have found Knap to have been negligent in driving too fast in the circumstances and that such negligence contributed to the accident. I am unable to say upon the evidence that the finding is unreasonable.

The jury has found, though for reasons that I find difficult to understand, that the respondent was guilty of negligence contributing to the accident. Negligence on his part is, I think, abundantly proved. Although respondent says that he was not in danger from the oncoming street-car and in effect that there was ample time for him safely to cross in front of it, yet it appears from my examination of his evidence that he crossed without regard to traffic that reasonably might have been expected on the north roadway. The negligence of the respondent contributed, in my opinion, in much greater degree to the subsequent accident than that of the appellant Knap, but since the jury have found Knap at fault to the extent of 45 per cent., I am not disposed to substitute my own choice or discretion for theirs and to change that part of the apportionment made by the jury. In *British Fame* v. *Macgregor,* [1943] 1 All E.R. 33, Viscount Simon, L.C., at p. 34 said:

> . . . , that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge. I do not, of course, say that there may not be such cases.

And *cf. Nixon* v. *Ottawa Electric Ry. Co.,* [1933] S.C.R. 154; *The Luso* (1934), 49 Lloyd, L.R. 163 (referred to in [1941]

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S.C.R. at p. 75), wherein Scrutton, L.J. in the Court of Appeal said:

> " . . . before the Court of Appeal ought to interfere with that finding they must be able to put their finger on something and say that the learned Judge has been wrong on some particular point and that that particular point is so substantial that if he had taken what we say is the right view of it he must have altered the proportion of damage.

There arise here, in my opinion, circumstances of such exceptional nature as to justify a change in the apportionment of blame made by the jury. Indeed, since, in my opinion, the jury was wrong in attributing any fault to the appellant railway company it becomes necessary to alter the jury's apportionment of fault on the part of the respondent. I would therefore vary the apportionment made in respect of respondent's negligence, and fix the fault of the respondent as contributing to the extent of 55 per cent.

I would allow the appeal of the appellant railway company, and dismiss the action as against that appellant. The appellant railway company to recover against the respondent its costs both here and below.

I would dismiss the appeal of the appellants Knap and Burrard Industries. Costs here and below as between the respondent and the other appellants to be spoken to.

Appeal dismissed, Bird, J.A. dissenting in part.

Solicitor for appellant British Columbia Electric Railway Company, Limited: *V. Laursen.*

Solicitor for appellants Knap and Burrard Industries Limited: *C. S. Arnold.*

Solicitors for respondent: *Locke, Lane, Guild & Sheppard.*

REX v. SHERMAN.

C. A.
1945
Dec. 3, 12

Criminal law—Drugs—Morphine—Joint possession—"Knowledge and consent"—Can. Stats. 1929, Cap. 49, Sec. 4 (d)—Criminal Code, Sec. 5, Subsec. 2.

Accused and two others were arrested in a room one of which W. was the occupant and in which two eye-droppers containing traces of morphine and a hypodermic needle were found. As the officer entered the room he thought he saw accused throw something toward the window which he believed caused the window curtain to wave, the window itself being closed. The officer found a paper package containing the above articles under a book on the window-seat beneath the window. The occupant W. testified the contents of the package belonged to him and none of the others knew of it. On being charged jointly with possession of morphine, the occupant of the room and accused were convicted.

Held, on appeal, reversing the decision of SARGENT, Co. J. (SIDNEY SMITH, J.A. dissenting), that the officer admitted in evidence that he did not see what was thrown by accused and it would be almost impossible for the accused to have thrown the paper package in such a way that it could get under the book where it was found. While the testimony brings Sherman under strong suspicion, yet it does not go as far as it must under the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227, at p. 228, to exclude any reasonable hypothesis of his innocence, and the appeal is allowed.

APPEAL by accused from his conviction by SARGENT, Co. J. on the 10th of May, 1945, on a charge of unlawfully having in his possession a drug, to wit, morphine, contrary to The Opium and Narcotic Drug Act, 1929, and amendments thereto. The facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 3rd of December, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Crux, for appellant: Policemen entered a room in the East Hotel in Vancouver in which were four persons, including the accused. Under a book near the window they found two eye-droppers with traces of narcotic drugs on them and a hypodermic needle. The accused knew nothing of these articles being there and there is no evidence whatever implicating him. There was evidence that the occupant of the room only knew of the instruments being there. Section 5, subsection 2 of the Criminal

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Code does not apply, as there must be "knowledge and consent" by the accused: see *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204.

Wismer, K.C., for the Crown: As to the word "consent" in section 5, subsection 2 of the Code see *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204, at p. 211.

Crux, replied.

Cur. adv. vult.

12th December, 1945.

O'HALLORAN, J.A.: The appellant and two other persons (one of whom was the occupant of the room in which the narcotic drug was found) were charged jointly with possession of a drug contrary to section 4 (1) (*d*) of The Opium and Narcotic Drug Act, 1929. The occupant pleaded guilty and his common-law wife was acquitted. Another person in the room at the time was not charged. The appellant pleaded not guilty, but was not represented by counsel and did not testify in his own defence. He was found guilty.

The evidence against him was entirely circumstantial. A police officer entering the room in which were the four people, "thought" Sherman threw "something" (or that Sherman was "making a motion as if throwing something"), toward a window which he believed caused the window curtain to wave, the window itself being closed. The officer found a paper package under a book on the window-seat beneath the window. It contained two eye-droppers (with traces of narcotic drugs) and a hypodermic needle. The occupant of the room testified the contents of the package belonged to him and that none of the others knew of it. In his cross-examination it came out that he had heard that Sherman was a user of drugs.

While the foregoing testimony brings Sherman under strong suspicion, yet it does not go as far as it must under the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136 to exclude any reasonable hypothesis of his innocence. Counsel for the appellant asks us to infer, and in my judgment it is a compellable inference, that it is most improbable that Sherman could have thrown the paper package in front of the eyes of the police officer without the officer seeing the package, or hearing

the rustle of its impact when it hit the curtain or dropped to the window-seat.

The police officer admitted in evidence that he did not see what was thrown and agreed that it would be "almost impossible" for Sherman to have thrown the paper package in such a way that it could get under the book where it was found. The occupant of the room testified he had put the package there just before the police came in, after he had first tried unsuccessfully to open the window in order to throw the package out. The waving of the curtain could have been caused by his efforts to open the window.

I must conclude in the recited circumstances that the evidence against Sherman lacks that certainty and precision essential to establish his guilt. In whichever way the objective facts may be assembled, they do not exclude a rational hypothesis of his innocence. At their strongest those facts are no more than consistent with Sherman's guilt, but that is not enough where the evidence is purely circumstantial, for they are not inconsistent with his innocence.

Counsel for the appellant also relied upon Code section 5, subsection 2 as applied in *Rex* v. *Parker* (1941), 57 B.C. 117 and in *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204 to mean that joint possession must extend beyond quiescent knowledge and disclose some measure of control over the subject-matter. As the application of the *Hodge's* principle to the evidence examined, denies possession in Sherman in that sense, and as there is no statutory *onus* upon him (such as there was upon the occupant of the room), in my opinion, the only conclusion open to this Court upon the evidence before it is that the conviction cannot be sustained.

The conviction is set aside and the appeal allowed accordingly.

SIDNEY SMITH, J.A.: I see no reason for disturbing the finding of the learned trial judge and would dismiss the appeal.

BIRD, J.A.: I would allow the appeal and set aside the conviction for the reasons given by my brother O'HALLORAN, in which I concur.

Appeal allowed, Sidney Smith, J.A., dissenting.

S. C.
1945
Oct. 26;
Dec. 20.

REX v. ORMONDE.

Criminal law—Charge of stealing—Conviction—Certiorari—Admission of affidavit evidence to show lack of jurisdiction—Conviction quashed.

The applicant was convicted on a charge of stealing a typewriter by the police magistrate in and for the municipality of Delta. On an application for a writ of *certiorari* to quash the conviction, an affidavit of the accused was submitted in which it was alleged that no evidence was given disclosing that the offence charged was committed in the municipality of Delta.

Held, that the affidavit be accepted and as the Crown has not sought to impugn in any way the statement contained in the affidavit and there was no evidence given at the hearing that the offence was committed within the municipality of Delta, the conviction must be set aside.

MOTION for a writ of *certiorari* to quash a conviction made on the 6th of July, 1945, by Smith Wright, Esquire, police magistrate in and for the municipality of Delta. Heard by HARPER, J. at Vancouver on the 26th of October, 1945.

Caple, for the motion.
Selkirk, for the Crown.

Cur. adv. vult.

20th December, 1945.

HARPER, J.: This is a motion for a writ of *certiorari* to quash a conviction made on the 6th day of July, 1945, by magistrate Smith Wright, a police magistrate in and for the municipality of Delta, of one Hugh Fraser Ormonde, whereby the said Ormonde was convicted of

for that he during the month of January, 1945, in the municipality of Delta unlawfully did steal one certain L. C. Smith Typewriter the property of Royal Canadian Air Force, Boundary Bay Station, and of the value of over $25.

From the reading of the conviction it appears that Ormonde consented to summary trial before the said magistrate. Both the information and the conviction set forth a charge within the territorial jurisdiction of the convicting magistrate.

The neat point in this motion is whether on this application for a writ of *certiorari* there can be read the affidavit of the said

Hugh Fraser Ormonde sworn on the 26th of September, 1945, and filed, in which it is alleged that no evidence was given disclosing that the offence charged was committed in the municipality of Delta.

Counsel for the accused relies on several judgments of FISHER, J., namely, *Rex* v. *Gustafson* (1929), 42 B.C. 58 and *Rex* v. *Colpe* (1937), 52 B.C. 280. *Rex* v. *Gustafson* was an application for a writ of *habeas corpus* with *certiorari* in aid, whilst *Rex* v. *Colpe* was for a writ of *certiorari* only. In *Rex* v. *Colpe*, FISHER, J. refers to several previous decisions—*Rex* v. *Montemurro*, [1924] 2 W.W.R. 250 and *Rex* v. *Hardy* (1932), 46 B.C. 152. Whilst on page 283 of the *Colpe* case the learned judge states that he agrees with the submission that want of jurisdiction territorially or otherwise may be shewn by affidavit evidence, yet on pages 284 and 285 it is clear from the following excerpt that he had no doubt that he had not jurisdiction to enter on a consideration of the evidence before the magistrate:

> In my view none of these statements, even if true, raises a matter which may be regarded as affecting jurisdiction. The information as above set out was sworn before and the summary trial was proceeded with by the said magistrate who, in my opinion, had jurisdiction territorially and otherwise to try a case of the kind described in the information and conviction. I have carefully considered the wording of section 7, subsections (1), (2) and (3) and section 38, rr. (80) and (81), of the Metalliferous Mines Regulation Act as it stood at the time the conviction was made and the cases above mentioned relied upon by counsel for the applicant. I think, however, that these cases are distinguishable from the present one and that if, apart from the provisions of said section 101 of the Summary Convictions Act, I were to enter upon a consideration of whether the applicant is right in any or all of the statements aforesaid I would be considering whether there was sufficient or proper evidence upon which the magistrate might convict the accused. Following the views expressed in *Rex* v. *Nat Bell Liquors Ld.*, [1922] 2 A.C. 128; 2 W.W.R. 30; 91 L.J.P.C. 146, commonly known as the *Nat Bell* case, and especially in certain portions of such judgment, more particularly set out by MACDONALD, J. in *Rex* v. *Chin Yow Hing*, 41 B.C. 214 at 215-16; 51 Can. C.C. 407; [1929] 2 W.W.R. 73, I hold that, apart from said section 101, I have no right to consider whether there was sufficient or proper evidence upon which the magistrate might convict the accused. As was said in the *Nat Bell* judgment above ([1922] 2 A.C. at 141) so I would say here that:
>
> "The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so . . . No conditions precedent to the exercise of his jurisdiction were unfulfilled."

The Court here was one of limited territorial jurisdiction.

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Paley on Summary Convictions, 9th Ed., at p. 790, says:

> The rule now appears to be the same as that which is applied to proceedings by *certiorari*, where want or excess of jurisdiction may be shown by affidavit as ground for quashing a conviction or order.

Counsel for the Crown in his written submission frankly concedes that it is the duty of the Crown to prove jurisdiction —no doubt on the ground that nothing is to be inferred to give an inferior Court jurisdiction. He says:

> I must confess, your Lordship, that in my humble opinion, notwithstanding the last two authorities submitted in respect of the consent situation, the Crown should prove jurisdiction, but if the Crown fails to prove jurisdiction, an accused cannot refer to the depositions themselves, *a fortiori* then would he be prevented from doing so by the indirect method of using an affidavit purporting to discuss or refer to the depositions.

In this case the affidavit is submitted, not to discuss or refer to the depositions, but to contradict the record.

In *Rex* v. *Crooks* (1911), 17 W.L.R. 560, at p. 563, Brown, J. says:

> . . . Affidavits are sometimes admitted on the part of an accused in order to shew want of jurisdiction, even to the extent of contravening the record—*In re Sproule* [(1886)], 12 S.C.R. 157; Paley, p. 469—but not for the purpose of supplementing the record itself to shew that the magistrate had jurisdiction.

In *Rex* v. *Wandsworth JJ.*, [1942] 1 All E.R. 56, a decision of Viscount Caldecote, L.C.J., and Humphreys and Wrottesley, JJ., in which the Court held there had been a denial of natural justice in not giving the accused his right to be heard in answer to the charge made against him, in proceedings taken by *certiorari*, affidavit evidence was received to prove there had been a denial of justice and the conviction was accordingly quashed.

The Crown here has not sought to impugn in any way the statement contained in the affidavit of the accused that there was no evidence given at the hearing that the offence was committed within the municipality of Delta. Accepting then the affidavit of the accused as true, this conviction must be set aside, but it will also be a term of the order that no action or prosecution shall be commenced against the magistrate in respect of this conviction or any matters pertaining thereto.

Conviction set aside.

THE LAW SOCIETY OF BRITISH COLUMBIA v. GALLAGHER.

C. A.
1945
Dec. 3.
1946
Jan. 8.

Notaries — Application for order for enrolment — Need of notary public within applicant's district—Order granted—Appeal—R.S.B.C. 1936, Cap. 205, Sec. 5.

The respondent obtained an order directing his enrolment as a notary public with authority to practise within the city of Vancouver. His place of business is in the 400 block on West Pender Street in Vancouver.

Held, on appeal, reversing the order of HARPER, J., that an essential condition precedent to the enrolment of a notary public under section 5 of the Notaries Act is that the Court shall be satisfied "that there is need of a notary public in the place where the applicant desires to practise." Perusal of the record convinces the Court that the statute has not been complied with in this respect. The Court is of opinion that the "need" to which section 5 refers is a public need in the nature of a public necessity as distinguished from an individual need occasioned by the personal or commercial considerations of the applicant. The evidence discloses there are more than one hundred notaries public in the neighbourhood of where the applicant desires to practise. The order appealed from must be set aside.

APPEAL by The Law Society of British Columbia from the order of HARPER, J. of the 12th of May, 1945, ordering the examination of Robert F. Gallagher and his enrolment as a notary public if found qualified on such examination.

The appeal was argued at Vancouver on the 3rd of December, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

McPhillips, for appellant: The learned judge has proceeded on a wrong principle. Section 5 of the Notaries Act sets out the necessary condition under which an applicant can be appointed. There must be a need of a notary public in the place where the applicant desires to practise. In the block in Vancouver where his office is situate there are 103 notaries now: see *In re Notaries Act and J. A. Stewart* (1929), 41 B.C. 467, at p. 468. The case of *In re Notaries Act and Worsoe* (1939), 53 B.C. 376 was decided on the particular facts of that case. The case of *Re Hamilton*, [1937] 1 D.L.R. 807 has been criticized. There is no "need" for a notary in that area.

Caple, for respondent: We say the judgment is not condi-

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1945

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tional. As to section 5 of the Act, the question of "need" has been established for the benefit of the public. The case of *In re Notaries Act and J. A. Stewart* (1929), 41 B.C. 467 is in our favour: see also *Re Hamilton*, [1937] 1 D.L.R. 807, at p. 809.

McPhillips, replied.

Cur. adv. vult.

8th January, 1946.

Per curiam (O'HALLORAN, J.A.): This is an appeal by The Law Society of British Columbia from an order directing the enrolment of the respondent as a notary public (subject to his qualification on examination) with authority to practise within the city of Vancouver.

One of the essential conditions precedent to the enrolment of a notary public under section 5 of the Notaries Act, Cap. 205, R.S.B.C. 1936, is that the Court shall be satisfied

> . . . that there is need of a Notary Public in the place where the applicant desires to practise, . . .

The learned judge's reasons for judgment are silent upon this important statutory requirement. Perusal of the record convinces this Court that the statute has not been complied with in this vital respect. The Court is of opinion that the "need" to which section 5 refers, is a public need in the nature of a public necessity as distinguished from an individual need occasioned by the personal or commercial considerations of an applicant.

It is observed the evidence discloses there are now more than 100 notaries public in the neighbourhood of 448 West Pender Street where the respondent desires to practise as a notary public in conjunction with his real estate financial and insurance business.

The order appealed from must be set aside and the appeal allowed accordingly.

Appeal allowed.

Solicitor for appellant: *A. DeB. McPhillips.*
Solicitor for respondent: *M. G. Caple.*

PUNTER v. PUNTER.

C. A.
1945
Nov. 7, 8, 9.
1946
Jan. 8.

Husband and wife—Suit for nullity of marriage—Malformation—Defence of approbation, insincerity, delay—Appeal.

The parties were married April 23rd, 1937, the petitioner being 31 years old and the wife 32. The petitioner studied for the ministry and was ordained in the United Church of Canada the month following his marriage. His first church was at Fort Fraser and from there he moved to Vanderhoof in 1938 where he remained until called up for army service in 1939 as chaplain. He went overseas and his wife remained with her parents, took a job and had his assigned army pay. After the marriage they went to Bellingham where there was no intercourse because of the wife's disability. The husband's attempts caused pain and manifestations of distaste on her part and subsequent attempts were with the same result. After some persuasion in June, 1939, she consulted a doctor who operated. The operation would have made physical improvement if the wife had followed up the treatment prescribed by inserting instruments, but she refused to carry out instructions and stated to her husband she would do nothing more about it. She claimed that notwithstanding this he decided that they should continue to live together as man and wife. When he left Canada petitioner was indebted in a considerable sum and he arranged with his wife for payment of the debts from the monthly remittances. She paid the debts which amounted to slightly more than the remittances he had sent her. In March, 1943, he consulted Major Edmundson, Judge of the Advocate-General's Branch in England, and was advised that he was entitled to an annulment of the marriage. On March 26th, 1943, he wrote his wife informing her of his intention to bring action. The petition was filed in June, 1944. The wife filed an answer denying incapacity and pleading insincerity and delay. On the trial in March, 1945, the action was dismissed on the ground that there had been approbation and lack of sincerity on the part of the petitioner.

Held, on appeal, reversing the decision of COADY, J., that upon the application of the principles which are embraced in "the doctrine of sincerity" to the facts and circumstances here under review, the husband has not in true legal effect recognized the validity of the marriage, but if by action or conduct he may be said to appear to have done so he has not acted so inequitably or in manner contrary to public policy, that he may now be deprived of the right to challenge the validity of the marriage. He is entitled to the relief prayed.

APPEAL from the decision of COADY, J. of the 25th of June, 1945, dismissing an action brought by the husband for annulment of marriage. The action was brought for annulment on the ground of physical disability on the part of the wife. There was no

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vaginal opening and the marriage was never consummated. The parties were married at Vancouver April 23rd, 1937, the husband being thirty-one years old and the wife thirty-two. The petitioner studied for the ministry and was ordained in the United Church of Canada the month following his marriage. After the marriage they went to Bellingham, but there was no consummation owing to the wife's disability. In June, 1939, the wife went to Vancouver to consult a doctor. There was an operation but the wife refused to follow instructions after the operation. It was a failure and she told her husband she would do nothing further about it. After he was ordained the petitioner had a church at Fort Fraser and in 1938 he moved to Vanderhoof where he remained until called up for army service in 1939 as chaplain and shortly after went overseas. The wife then took a job and also had his assigned army pay. He remained overseas doing nothing until 1943 when he was advised by a senior officer that he was entitled to an annulment of the marriage. On March 26th, 1943, he wrote his wife advising her that he would bring action for the annulment of the marriage. The petition was filed in June, 1944. The wife filed an answer denying incapacity and later amended to plead insincerity and delay. It was held on the trial that the evidence showed the petitioner approbated the marriage after he became aware that the operation was not successful, when he agreed that they should go on living together as man and wife and that her condition, which prevented consummation, should not interfere with their marriage. The marriage therefore was approbated not only by this understanding but was indicated by the acts and conduct of the petitioner subsequent to that date. This approbation precludes the petitioner from now impeaching the validity of the marriage. On the evidence there is a lack of sincerity on the part of the petitioner as that term is defined and explained in the cases and the petition was dismissed.

The appeal was argued at Vancouver on the 7th, 8th and 9th of November, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Farris, K.C., for appellant: The learned judge found approbation and then based "lack of sincerity" on it. There is error

in this as they are distinct: see *B——n* v. *B——n* (1854), 1 Spinks 248; 164 E.R. 144; *Anonymous* (1857), Dea. & Sw. 295; 164 E.R. 581, at p. 583. Lapse of time or delay in bringing action for annulment is not *per se* a ground for dismissing a petition, but is an important ingredient to consider with other circumstances. The capacity of sexual intercourse is an important essential of marriage for a number of reasons, firstly, the procreation of children: see *E——* v. *T——* (1863), 3 Sw. & Tr. 312; 164 E.R. 1295; *S.* v. *B., falsely called S.* (1905), 21 T.L.R. 219; *G.* v. *M.* (1885), 10 App. Cas. 171; *D——e* v. *A——g* (1845), 1 Rob. Eccl. 279; *B.* v. *B.*, [1935] S.C.R. 231; *Clarke (otherwise Talbott)* v. *Clarke* (1942), 112 L.J.P. 41, at p. 46. The conduct of the respondent was unreasonable when she refused to obey instructions after the operation. Her physical condition and her nervous and mental reactions made the prospect of intercourse hopeless. There was error in the learned judge's belief in the wife's evidence in preference to that of the husband. The wife's evidence as to approbation was in fact contradicted by the husband.

MacInnes, K.C., for respondent: The finding of lack of sincerity by petitioner is a finding of fact and the evidence of the petitioner alone is sufficient grounds for the conclusion arrived at. The reasons are: (1) Upon the apparent failure of the surgical operation in June, 1939, he did not attempt further intercourse with respondent; (2) the determination of the petitioner at this time fully maintained right down to the present moment to get free of the marriage; (3) deliberate concealment from the respondent of his intention until March 26th, 1943; (4) course adopted misleading the respondent by his words, conduct and the full tenor of his correspondence into the belief that he was prepared to accept the then situation; (5) desire to maintain respondent's confidence until he could have full benefit of her assistance financially; (6) his resolve not to give any inkling of his intentions until he could have received all the benefit possible from maintenance of marriage *status*. He referred to *G.* v. *M.* (1885), 10 App. Cas. 171; *B.* v. *B.*, [1935] S.C.R. 231, at p. 237; *Nash otherwise Lister* v. *Nash*, [1940] P. 60.

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Farris, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 398, pars. 448 and 452; Bullen & Leake's Precedents of Pleadings, 8th Ed., 663; *Westen* v. *Fairbridge,* [1923] 1 K.B. 667, at p. 669; *In re Lewis. Lewis* v. *Lewis,* [1904] 2 Ch. 656.

Cur. adv. vult.

8th January, 1946.

O'HALLORAN, J.A.: Study of the testimony in this painful case convinces me, with respect, that the appellant husband's petition for annulment of marriage ought not to have been refused. In the view I take, that conclusion follows inevitably from the analyses contained in the judgment of my brother BIRD which I have been privileged to read.

Much of the argument in this Court centred upon whether the husband's otherwise good grounds for annulment of the marriage were defeated by what was described as "the doctrine of insincerity." But there appears to be a noticeable lack of certainty regarding that "doctrine" in the decisions to which we were referred.

If it is intended to mean that the appellant husband must show that throughout the marriage he maintained a real sense of his grievance unmixed with any subsidiary motive, but coupled with reasonable promptitude in seeking legal redress when he became aware of his legal rights, then it would seem to be extraneous to the decision of this appeal. For *G.* v. *M.* (1885), 10 App. Cas. 171, which I think is the leading decision, held that subsidiary motive is not an element to be taken into judicial consideration in a matter of this kind, and on the question of reasonable promptitude the learned judge has held, and I think correctly, that the delay which occurred was reasonably explained

In my judgment our decision depends upon the application of a common-law principle of general application as related to a case of this kind by Lord Watson in *G.* v. *M., supra.* That principle, related to a case of this kind, is that the complainant ought not to be prevented from challenging the validity of the marriage unless there are facts and circumstances proven which so plainly imply the complainant's recognition of the validity of the marriage that it would be "most inequitable and contrary to public

policy" that the challenge should be permitted. The Earl of Selborne, L.C. at p. 186 gave several illustrations of conditions which might come within what Lord Watson characterized as "most inequitable and contrary to public policy." Examples of the range of the general principle may be found in other branches of the law.

I take Lord Watson's statement to reflect the *ratio decidendi* of at least the majority of the House of Lords in *G.* v. *M., supra.* The editor of the Law Reports incorporated it as such in the head-note to the case—see *G.* v. *M.* (1885), 10 App. Cas. 171 and see also The English and Empire Digest, Vol. 27, p. 351, No. 3339. If that is the applicable principle, as I think it is, then it remains to apply it to a correct appraisal of the facts in the particular case.

I see nothing in this case, with respect, to justify a conclusion that it would be "most inequitable and contrary to public policy" to permit the appellant husband to be granted the judicial relief appropriate to the facts admittedly proven in evidence, *viz.,* (a) that the wife's malformation was such that not even limited sexual intercourse could take place as it did for example in *B——n.* v. *B——n* (1854), 1 Spinks 248; 164 E.R. 144 and again in *B.* v. *B.,* [1935] S.C.R. 231, and (b) that such malformation was curable, but the wife, after a curative operation, had refused to complete the medical treatment which was expected to make possible the proper consummation of the marriage.

I would declare the marriage annulled, and allow the appeal accordingly.

SIDNEY SMITH, J.A.: In the suit from which this appeal is brought the petitioning husband sought a declaration that his marriage with the respondent was null and void upon the ground that it had never been consummated, due to malformation and consequent lack of physical capacity on the part of his wife. The learned judge, and this Court upon review, were alike spared the difficult and delicate task of deciding whether the allegation of non-consummation had been established, for the admissions made at the trial by the respondent put this beyond doubt. But

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it may not be without significance to note that by her formal answer to the petition the respondent denied her incapacity, and that it was not until the opening day of the trial that this answer was amended to include the plea that the petitioner was "guilty of insincerity and of unwarranted delay" in presenting the petition. This was the sole issue contested at the trial and later debated before this Court.

The learned judge found that the petitioner was disqualified from obtaining a decree on account of his approbation and want of sincerity. The plea of approbation was not pleaded, but I think the judge was of opinion that approbation is but one of the aspects of the plea of want of sincerity, and in this I respectfully agree with him. It is difficult to define with precision what exactly is covered by this plea of want of sincerity. In *Anonymous* (1857), Dea. & Sw. 295, at p. 300; 164 E.R. 581, at p. 583 we have the high authority of Dr. Lushington that

> . . . Insincerity . . . must be a combination of circumstances which show that the alleged grievance was not the motive which led to the commencement of the suit, but what would constitute such a case cannot be defined beforehand.

The leading case on the subject seems to be *G.* v. *M.* (1885), 10 App. Cas. 171. There the Earl of Selborne, L.C. deals with the matter thus (p. 186):

> . . . , that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages or derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.

In the same case Lord Watson says as follows (pp. 197-8):

> . . . I think that when those cases are dissected they do shew the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

And Lord Bramwell adds this (p. 202):

> . . . . What the complainant does in a suit of this sort is to come to the appropriate Court for a declaration of the truth: "I say that this man is impotent and was so at the time of the marriage, and I ask you to

declare that fact." The very words of the summons are, "Declare the truth, that this man was impotent when he married me." The Court says, "No we will not," or the argument is that the Court ought to say, "No we will not—we know that it is true, but we will not say so"—why? In my opinion a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining, when she comes forward with her complaint of this wrong that he has done her, unless in some way or another he can shew that he sustains some injury from the double matter of her not having complained earlier, and of her complaining now.

The plea seems to have been most recently considered by Langton, J. in *Nash otherwise Lister* v. *Nash,* [1940] P. 60. His conclusion is expressed in this language (pp. 69-70):

> Returning now to a consideration of the legal aspect of the plea of "insincerity," it will be remembered that in nearly every case where this plea has been judicially considered, delay in putting it forward has been the basis upon which its sincerity has been attacked. The limitations upon the ordinary meaning of the word "sincerity," to which I have alluded above, seems, therefore, to be fairly clearly defined. The petitioner must be sincere in the sense of not having wavered in her view as to the action she will take to assert her rights after she attained full knowledge of the facts and the law concerning those rights. The Court will not allow a petitioner, after attaining such knowledge to approbate the contract of marriage and obtain rights and benefits thereunder for a term of years, and then subsequently reprobate the contract and claim that it is void upon the strength of those very rights which she has long elected to ignore.
>
> Upon this view of the law the Scottish case of *M.L.* v. *E.L.,* [1931] S.C. 477 appears to fall in direct line with the earlier decision of the House of Lords of *G.* v. *M.* [(1885)], 10 App. Cas. 171, and the only reason why the antecedent period, of which the Lord Selborne speaks, was in that case antedated to include a period before the marriage, was [that there was there present] the unusual feature of the petitioner's knowledge of incapacity before the celebration of the marriage. Applying the law, therefore, as I understand it, to this case, the point of time at and from which the petitioner's "sincerity" is to be judged, is such point of time as she obtained knowledge of her husband's incapacity, and a corresponding knowledge of the right in law which that incapacity allowed her to exercise.

I think, with respect, that this correctly expresses the law in England today as laid down in *G.* v. *M., supra,* and the intervening authorities; and that such is also the law in Canada (*B.* v. *B.,* [1935] S.C.R. 231).

In order to see whether the actions of the petitioner were such as to fall within the ambit of these principles and thus deny him the relief prayed for, it is necessary to examine the facts upon which the plea rests. The petitioner and respondent were married at Vancouver on the 23rd of April, 1937, being then aged

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31 and 32 years respectively. At that time the petitioner was studying for the Ministry and the following month he was ordained at Victoria, B.C., as a clergyman of the United Church of Canada. His first incumbency was at Fort Fraser, B.C.; his second at Vanderhoof, B.C., where he officiated from July, 1938, to July, 1940; going thence to Wells, B.C., where he remained until he was called up for the army in November, 1941, having volunteered his services upon the outbreak of war in September, 1939. Upon his summons to serve in the army Mrs. Punter came to Vancouver to reside with her parents for the duration of the war, and subsequently took up a position of employment.

In June, 1938, the respondent, by mutual arrangement, came to Vancouver, and was operated on by a lady doctor, who expressed the opinion that the difficulty preventing intercourse had been thereby overcome. Unhappily this did not prove to be the case, for subsequent attempts made to consummate the marriage were as unavailing as the former ones. The evidence of the respondent as to what took place when it was apparent that the operation was not a success is this—she says she told the petitioner that if he wanted a separation, that then was the time. He replied in the negative, telling her that she could put that out of her head immediately; that she would never come to anything of that sort; that he loved her too much.

The petitioner entered the army as a chaplain and was stationed at various points in British Columbia until he went overseas in July, 1942. He subsequently went to the front, was wounded and eventually returned to Canada in May, 1945. When he left Canada he arranged with his wife that she should pay off certain indebtedness that he had incurred and for that purpose assigned a monthly remittance out of his pay. These debts amounted to approximately $1,500 and were all paid before the commencement of these proceedings. On 26th March, 1943, the petitioner wrote to the respondent, outlining some matters concerned with their past life and speaking of his bitter disappointment that she had never been a wife to him. He said that now that they were separated and she was working, he felt that it would be for the best to bring their married life to an end, and that he had therefore completed arrangements asking for

the annulment of their marriage on the ground that it was so in name only. The suit came on for hearing at Vancouver in the months of March and June, 1945, before Mr. Justice COADY, who dismissed the petition.

On these facts I do not think there has been undue delay. I am fortified in that view by the remarks of Lord Birkenhead, L.C. while sitting in the Divorce Division as a judge of first instance, in the case of *C. (otherwise H.)* v. *C.*, [1921] P. 399, at p. 402. The passage is as follows:

> There has, in the present case, been sufficient cohabitation to enable the petitioner, if believed, to maintain a charge against her husband of incompetence *quoad hanc*. And in order to dispose at once of the question of delay, I record my opinion that, having regard to the intervention of the war, no inference of want of sincerity on the petitioner's part can be drawn from the fact that nearly ten years have elapsed since her marriage on August 2, 1911, and seven years since the accusation of incapacity was first made and denied. Delay may prove want of sincerity: see *G.* v. *M.* [(1885)], 10 App. Cas. 171, 196, and the comments upon that decision in *L. (otherwise B.)* v. *B.*, [(1895)] P. 274; it may also be used by a jury or judge sitting without a jury, as a touchstone for testing the truth of the witnesses. In neither respect can the delay that has occurred be so used in this case.

The learned trial judge appears to have been of the same opinion herein because he found that

> delay is pleaded as a defence, but I think under all the circumstances that is explained more or less reasonably.

If, then, want of sincerity cannot be sustained on the ground of delay, upon what other ground is it open? The learned judge found approbation, both express and implied; but I think, with great respect, that he was under a misapprehension in this regard. As to express approbation he referred to the respondent's evidence of the conversation with her husband after the fruitless operation, and expressed the view that this evidence had not been contradicted. This would seem to have been an oversight on the part of the learned judge, for the petitioner specifically denied having ever told his wife that he would be satisfied with his married life without sexual intercourse. Had this denial not been overlooked, I think that the finding on express approbation would have been different.

But I do not gather that the learned judge rested his judgment on credibility. It is not a case of the stories of the two principal

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actors being fundamentally inconsistent upon those matters as to which they and they alone can have actual knowledge. Here, except as to the incident already mentioned, there is no substantial inconsistency in their testimony. It is primarily a matter of determining what was in the "mind and heart" of the petitioner, and for that purpose we must consider the evidence as a whole, particularly his letters. I think therefore that inferences from the proven facts may be drawn by the Court of Appeal as effectively as by the learned trial judge. This view was expressed by the Supreme Court in the case of *B.* v. *B.*, *supra*, at p. 237 in this way:

> The relevant facts of this case, in so far as they concern the relations and conduct of the parties, are not in any manner disputed. The crucial question concerns the belief and motive of the petitioner's mind and heart, as to which his own statement, with whatever apparent sincerity it may be made, ought not for that reason alone to be deemed to be conclusive. Its real truth can only be satisfactorily tested by a judge or jury by a careful consideration of its consistency or inconsistency with the undisputed or established facts. As to this, where the relevant facts are all admitted or undisputed, a judge sitting on appeal, with the whole record before him, is quite as competent to make a finding as the trial tribunal, and if the admitted or proved facts are such as to force upon one's mind a firm conviction that they do not accord with the declared attitude of the party concerned, one should not hesitate to say so.

With these principles in mind I have felt at liberty to come to a conclusion different from that of the trial judge on both express and implied approbation. As to the implication from the circumstances, I think that when one remembers that the petitioner was a clergyman and that he was solicitous of his position in the church and in the community; when one remembers too that at first he was hopeful that some remedy could be found; that thereafter came the war for which he volunteered at once, followed by his going overseas; that he left behind him debts which weighed upon his mind; taking all these facts into consideration I think that he acted in the matter with no lack of sincerity, as that expression is defined by the authorities. It seems to me clear that the petitioner only became aware of his legal rights early in 1945 when he took legal advice in England; although until then he no doubt had the layman's vague opinion that the law must surely hold some remedy for such a hopeless marriage as was theirs.

Upon the argument before us much was made of the letters written by him to his wife while in England. I have felt it my duty to read with close attention all of the 26 letters included in the appeal book. Apart from the opening and the ending (which the petitioner testified were in words such as he used to all his relations) they are not couched in terms of affection; nor do they discuss any anticipated future happiness together. They simply contain an account of his daily doings and a running commentary on the doings of mutual friends at home. I am quite unable to believe that he had made up his mind as to the annulment of his marriage before he left British Columbia and that all these letters were simply a blind for his own purposes and to conceal his real intentions. His wife said that he was a considerate and thoughtful husband. I think that that is true and that he acted throughout this unhappy affair with honesty and integrity.

Before concluding this judgment I should like to record that he too spoke highly of his wife. She was a good wife, he said, and a good wife for a minister. It was manifest that nothing kept them apart but the total lack of the one essential element in normal married life. But as to that the law would seem to be clear, and this appeal must therefore be allowed.

BIRD, J.A.: The evidence in this cause discloses a most unhappy matrimonial situation, arising out of the marriage of a young clergyman, then 31 years of age, to a lady of about the same age, then said to have been incapable of consummation of the marriage.

Seven years after solemnization of the marriage the husband petitioned the Supreme Court of British Columbia for a declaration of nullity by reason of the wife's impotence.

It appears that the parties lived together continuously from the date of the marriage in April, 1937, until November, 1941. During that period of four years he was the incumbent successively of several small rural parishes. The husband then entered the Canadian Army as a chaplain and during the succeeding eight months of his service in British Columbia the wife visited him on at least one occasion at an army camp in Nanaimo, to which specific reference is made later.

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He proceeded overseas in July, 1942; was engaged on active service in England and in France throughout the succeeding three years; was wounded on active service and returned to British Columbia for discharge from the army in the Spring of 1945. These proceedings were instituted in June, 1944, following the husband's consultation with and upon the advice of officers of the Judge Advocate General's Branch of the Canadian Army.

The existence of a malformation of the wife's genital organs became known to the husband soon after marriage. The evidence does not disclose that the wife had prior knowledge of this condition, though the nature of the condition described in evidence and the fact that she was a mature woman, 32 years of age when married, makes it difficult to avoid the inference that she assumed the privilege and responsibility of holy matrimony with knowledge of her incapacity to consummate the marriage and without disclosure thereof to her intended husband.

The Consistory Courts considered the taking of marriage vows in these circumstances "such a wrongful act that they have condemned the party in costs": *Anonymous* (1857), Dea. & Sw. 295; 164 E.R. 581, *per* Dr. Lushington at p. 582.

Two years later the wife for the first time consulted a physician. The husband refers to this action as being taken "after a great deal of persuasion." She says that she did so "at the suggestion of her husband." A simple surgical operation was then performed which, in the opinion of the attending surgeon, Dr. Isabel Day, was "quite successful" and effectively remedied the malformation, as appears from the surgeon's letters to the husband. Exhibits 39 and 40.

However, it is abundantly clear even from her own testimony that the wife deliberately neglected to carry out certain *post* operational treatment directed by the surgeon, with the result that the benefit of the surgical treatment was wholly lost.

The principal grounds of defence taken at the trial on behalf of the wife were those of "insincerity" and delay in the institution of the proceedings on the part of the husband. The husband's allegation of the wife's impotence was not seriously contested, though denied in the respondent's pleadings.

Upon the trial respondent again refused to consult her physician or to submit to further surgical treatment, though she says she would have done so had not the husband undertaken nullity proceedings in the manner he did. The learned trial judge finds her attitude "not unreasonable in the circumstances."

Upon the several issues raised the learned trial judge has found: (1) That the marriage was never consummated "due to the physical incapacity of the wife existing at the time of the marriage and still existing." (2) That under all the circumstances the petitioner's delay in instituting these proceedings "is more or less reasonably explained." (3) That there was lack of sincerity on the part of the petitioner in that, having knowledge of his wife's condition and of his legal remedy arising therefrom, he had approbated the marriage prior to the commencement of these proceedings.

I take it that the effect of the finding made under head 1 above is that the wife's condition was proved to be incurable, for such proof is an essential to granting the relief sought. *A.* v. *B.* (1868), L.R. 1 P. & D. 559; *T.* v. *M., falsely called T.* (1865), *ib.* 31. In my opinion the existence of an incurable condition arising from repugnance or nervous reaction to the sexual act as well as from malformation was conclusively proven though it is not shown that the malformation could not have been remedied by further surgical treatment. But if further proof be required of an incurable incapacity to consummate the marriage, the wife's refusal beforementioned provides confirmation of a condition from which the Court reasonably may infer an incurable incapacity. Compare *S.* v. *B., falsely called S.* (1905), 21 T.L.R. 219; *L.* v. *W. (otherwise L.)* (1882), 51 L.J.P. 23.

Neither the wife's statement by way of justification of her refusal, nor the trial judge's qualified acceptance of it are decisive of the decision under review. Therefore, suffice it to say of her refusal to accept further surgical treatment that her attitude expressed at the trial is entirely consistent with that adopted by her from the inception of the marriage.

No objection was taken before us to the finding made under head 2 on the issue of delay. Indeed I think none was open in view of the husband's situation as a clergyman in small rural

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parishes during the early years of the marriage (*cf. S.* v. *B., falsely called S., supra*) lack of knowledge of the incurability of the wife's condition, and of his rights arising therefrom as well as his subsequent employment on active service, down to the date of the filing of the petition.

Consequently the judgment below rests upon the doctrine which is referred to in the cases later discussed as the doctrine of "sincerity," since the learned trial judge dismissed the petition upon the application of that principle, having found that the husband had approbated the marriage.

Examination of the cases cited by counsel as well as other decisions in which the "doctrine of sincerity" is discussed, leaves one in some doubt as to what are the principles upon which the doctrine so described is founded, as well as the extent of its application.

The doctrine appears to have had its origin in the canon law. It is said to have been recognized by the Ecclesiastical Courts and to a degree in the Courts of common law. Authoritative judicial decisions, both prior and subsequent to the enactment of the Matrimonial Causes Act in 1857 not only indicate the absence of a clear definition by the Ecclesiastical Courts of the principles on which the doctrine is founded, but from my reading of the cases the Courts of final resort in England at least since 1857 and particularly in more modern times, have shown some reluctance to apply the doctrine except with qualifications and within somewhat narrow limits.

Shortly before the passing of the Matrimonial Causes Act, 1857, *B——n* v. *B——n* (1854), 1 Spinks 248, a nullity suit which had been instituted in the Consistory Courts, was heard on appeal by the Judicial Committee of the Privy Council. In that case Dr. Lushington, speaking for their Lordships of the Judicial Committee, refers to the doctrine in these terms (p. 259):

> This doctrine is familiar both to the Civil and Canon Law, more especially to the latter, in matrimonial causes, it being a received maxim in such causes, that the party seeking relief, however well founded his ground of complaint may be against his consort, must show that, by his own conduct, by his own sense of injury, and his own vigilance, he is justly entitled to relief from the Court.

He then proceeds to discuss the institution of marriage in terms which I venture to say are as apt today as in 1854. He says:

> Without entering into any minute discussion as to all the purposes for which marriage was intended, it is obvious that the capacity for sexual intercourse is, in all cases, save when age may seem to preclude it, to be deemed a most important essential; essential, because the procreation of children is one of the chief objects of marriage; essential, because the lawful indulgence of the passions is the best protection against illicit intercourse; . . .
>
> When, therefore, a party is really aggrieved on account of those consequences, the law affords a remedy; a remedy according to the circumstances of the case.

And again at p. 260 reference is made to the effect of delay in commencement of such a suit, in these words:

> In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus.*

There the Judicial Committee refused to apply the doctrine, having found the husband not entitled to a decree "on the whole circumstances of the case." There was evidence of limited sexual intercourse, though the wife was found physically incapable of conception. Delay of 17 years in the institution of the proceedings was found not satisfactorily explained, and it further appeared that the separation between the parties took place for reasons other than the "corporeal defect" of the wife.

In *Anonymous* (1857), Dea. & Sw. 295; 164 E.R. 581 Dr. Lushington referred to and explained the decision of the Privy Council in *B——n* v. *B——n, supra,* at pp. 582-3, in these terms:

> . . . , I have great difficulty in saying what would constitute insincerity and what sincerity. . . . Suppose a man anxious to marry another woman, I could not hold that to be insincerity. Suppose a man to indulge in illicit connections, could that be proof that he was insensible to the incapacity of his wife for conjugal intercourse? I do not think that proposition maintainable; it might rather bear the other way . . . Insincerity is therefore something different. I cannot attempt to define it; it must be a combination of circumstances which show that the alleged grievance was not the motive which led to the commencement of the suit; but what would constitute such a case cannot be defined beforehand.

Then in 1885 in *G.* v. *M.,* 10 App. Cas. 171 the House of Lords found no insincerity in a wife's prayer for a decree of nullity for impotence, although she had failed to seek a remedy

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arising from her husband's impotence until the expiration of more than five years of married life without consummation, and then only when she had given birth to an illegitimate child and had been charged with adultery by him. The parties had separated after two years of cohabitation.

In that case the Lord Chancellor, the Earl of Selborne, appears to rest the doctrine of "sincerity" on principles of equitable and general jurisprudence, which from the following extract from his judgment might be described as a form of estoppel. He says at p. 186:

> . . . I think I can perceive that the real basis of reasoning which underlies that phraseology [that particular phrase "sincerity"] is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the *status* and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine . . . , there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred. Further than that I do not think it necessary for the purpose of this case to go. Of course, when facts are in dispute, motive may be all important.

Lord Watson, at pp. 197-8, says of "the rule as to sincerity" that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

As recently as 1943 in *Clarke (otherwise Talbott)* v. *Clarke*, [1943] 2 All E.R. 540, Pilcher, J., a judge of the Probate and Divorce Division in England, said of the doctrine (p. 545):

> The so-called doctrine of "approbation" was fully dealt with, explained, and to some extent exploded, by Lord Selborne in *G.* v. *M.* [*supra*].

The doctrine was considered in the Supreme Court of Canada in *B.* v. *B.*, [1935] S.C.R. 231, where Crocket, J., speaking for the Court, and with reference to part of Lord Chancellor Selborne's *dictum* quoted above, says at p. 233:

> There is no doubt that it must now be taken as authoritatively settled that a marriage solemnized between two persons, one of whom is incapable of properly consummating it, may, nevertheless, be so approbated by the acts and conduct of the other as to preclude the latter from impeaching its validity.

There the doctrine was invoked to confirm the judgment of the Court of Appeal reversing a decree of nullity of a marriage between two young people granted on the husband's petition by the trial judge. The parties had lived together continuously for eight years. The Court there found that imperfect acts of intercourse took place more or less regularly, though there had not been normal coition due to the wife's incapacity and held that the husband should have known years before that the wife's condition could not be rectified by surgical skill and since he was a practising barrister, that he must be held to have knowledge of his legal rights arising from her incapacity. The decision is apparently founded not only upon approbation by acts and conduct subsequent to acquiring full knowledge of the condition and of his rights arising therefrom, but also upon the long delay which ensued after such approbation and before commencement of the nullity proceedings. It was shown that there was a delay of some years during which the parties lived together continuously and apparently congenially.

Although the limits of the application of the principles discussed in these decisions are not there clearly defined and no doubt it is neither practical nor desirable to attempt to fix rigidly the circumstances which will justify the application of the doctrine, I think this much at least may be taken as established on the authority of the cases cited: In a proceeding wherein it is alleged that the purposes of marriage as defined by Dr. Lushington in *B——n* v. *B——n, supra*, have been defeated; that the jurisdiction of the Courts extends to the grant of a decree of nullity in favour of the complaining spouse upon proof of a valid ceremony of marriage and the fact that the marriage has not been consummated due to the incapacity of his or her consort existing

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at the date of the ceremony, and which condition is continuing at the commencement of the proceedings without any reasonable prospect that the condition can be remedied.

But if, on the evidence adduced, there appear facts and circumstances which so plainly establish or imply that the complaining spouse either by word, act or conduct has recognized the existence and validity of the marriage in such circumstances as to render it inequitable or contrary to public policy that he should be granted relief, then the Court on the application of the principles discussed will refuse to exercise the jurisdiction in his favour.

Consequently the Court will refuse to grant such relief where it is found that, with knowledge of such incapacity and of the legal rights and remedies arising therefrom, the complaining spouse has so recognized or acknowledged the validity of the marriage. Moreover, the Court will more readily infer approbation, if, having such knowledge or the means of procuring it, he is shown to have been guilty of undue delay not satisfactorily explained.

If these be the principles embraced in the "doctrine of sincerity" it remains then to test the application of these principles to the findings made by the learned trial judge, based upon the facts and circumstances disclosed upon the evidence adduced below.

Here, in view of the findings made by the learned trial judge, as noted above, no question arises either in regard to the incurable nature of the wife's incapacity or as to undue delay on the part of the husband in the commencement of the nullity proceedings; nor is there any suggestion that the motive for the suit is other than the alleged grievance. We are concerned only with the findings relating to the husband's acknowledgment or recognition of the marriage, which the learned trial judge has found amounted to approbation by "agreement" as well as by acts and conduct, that is to say, approbation of the marriage with a knowledge of the facts and of the law.

Turning then to consideration of the reasons relative to approbation by "agreement" wherein, as appears from the following extract taken from the reasons for judgment, the learned trial

judge has found that the husband approbated the marriage. The reasons read:

> The evidence shows that he approbated the marriage after he became aware that the operation to which I have referred was not successful, when it was agreed that they should go on living together as man and wife, and that her condition which prevented consummation should not interfere with their marriage. That is quite clear, it seems to me, from the evidence of the respondent which is not contradicted.

The evidence there referred to I take to be that which is quoted later in the reasons, namely:

> Was there, Mrs. Punter, any discussion between you and your husband at any time with regard to an annulment or separation or divorce or anything of that sort? Yes. After the operation in June, 1939, I went back, and things weren't any better, and I said to my husband that if he wanted a separation now was the time.
>
> What was his answer? He said "no," that I could put that immediately out of my head, that we could never come to anything of that sort, that he loved me too much.

Counsel for the husband attacks the finding that this evidence is uncontradicted and submits that the learned judge has overlooked or misapprehended evidence which is contradictory. He submits therefore that this Court is free to reach its own conclusions on the question of approbation by agreement.

On an appeal from findings of fact made by a judge without a jury it is clearly the duty of an appellate Court to review the evidence, having due regard to all the factors disclosed on the record. If convinced that the findings of fact are wrong, the Court has not only the right but the duty to make a finding in accordance with the evidence. *McCann* v. *Behnke,* [1940] 4 D.L.R. 272; *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 463.

If it appear from that review of the evidence that the trial judge, in making any finding of fact, has overlooked or misunderstood evidence or otherwise has acted under some misapprehension, then it is the duty of the appellate tribunal to review the findings in the light of the whole evidence. *Borrowman* v. *The Permutit Company,* [1925] S.C.R. 685; *Vancouver Milling Co.* v. *Farrell* (1922), 67 D.L.R. 237, at p. 240. It is necessary then to examine all of the evidence on that issue in the light of the finding of approbation by express agreement. The evidence of the wife hereinbefore set out to which the learned

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trial judge refers in his reasons quoted above, was adduced on direct examination on the opening of the trial on March 14th, 1945. The first question there quoted was prefaced by counsel's reference to part of the husband's examination on commission in England, the complete text of the examination being as follows, *viz.*:

Now, on page 7, the second question from the bottom, your husband was asked this question: "Did you or did you not have any discussion of any kind with your wife concerning the possibility of annulment of your marriage?" and his answer was "No, I did not."

The testimony continued with the extract quoted in the reasons for judgment and concluded with the following:

When I refer to discussion, I mean of any discussion that may have taken place between the time of your marriage and the time of your going overseas. No I am referring to that time.

Did you or your wife never discuss what the future held for you as a married couple? No.

Then upon the adjourned hearing of the trial on June 8th, 1945, the husband having returned to British Columbia in the interval after the first hearing, testified as follows, upon cross-examination, *viz.*:

And you had never discussed with your wife what the future would be, what the future of the two of you would be from the day she arrived back in Vanderhoof and you found the situation was not to your liking? She closed it with her attitude; she said she would never do it again.

You never discussed it again with her? No.

Nor did you ever discuss your future and her future? What was the purpose; it had been discussed previously.

I am only asking you. No. I didn't.

And again on cross-examination at the trial:

Did she not suggest to you at Vanderhoof after she returned, that she might adopt a child or children? I do not think she suggested in Vanderhoof; it was suggested by her, I think it was far earlier in our marriage than that.

But it was after you found out the situation? Yes.

Before she came to Vanderhoof? Yes, she did suggest adopting a child and I told her quite explicitly; and I told her the idea of adopting a child without any physical union was quite impossible.

You would not stand for it? No.

Did she suggest at that time that it might be well if you felt that way, to separate? No, we never mentioned separation.

She says you did. That I did?

Yes, that the two of you discussed the matter and she asked you or suggested to you that there be a separation. We didn't ever discuss separation.

There was no discussion as far as you know? No.

It is possible that the reference to absence of contradiction in the reasons for judgment relates to the lack of a categorical contradiction by petitioner of the wife's statement there quoted. If so, it is undoubtedly true that no such contradiction was made since the husband was not confronted at any time with that statement. However, with the greatest respect, I think it is hardly open to question upon consideration of the petitioner's evidence, both on commission and on the trial, not only that he did not hold or express the views attributed to him in the wife's statement at any time subsequent to June, 1939, but that he did emphatically contradict the gravamen of that statement.

I think the trial of this cause was unsatisfactory and must have been particularly so from the point of view of the learned trial judge in that it was broken by an interval of several months, and that the evidence was in part oral and in part on commission —a transcript of the latter only being available to him. Upon consideration of all the testimony which this Court now has before it, I am compelled to the conclusion that the learned trial judge has overlooked evidence of the husband which in my opinion discloses a direct contradiction of the wife's testimony which the learned judge held to be uncontradicted. In these circumstances I take it to be the duty of this Court to review the finding of approbation by agreement "in the light of the whole of the evidence."

Assuming that the wife's testimony relative to her conversation with the husband in June, 1939, must be interpreted as approbation by the husband of the existing situation, of which I entertain some doubt, I find it difficult to reconcile that assumption with her story of incidents which she says occurred soon after at Wells, B.C., and again in January, 1942, at Nanaimo, B.C., shortly before the husband's departure overseas.

She refers to his expessions of dissatisfaction with the nature of their relationship, in these words:

> Did he ever make any statements to you with regard to his married life with you before he left for overseas other than that you have told us in 1939? Well, we had a disagreement once up at Wells, and he said I was just his housekeeper and that I hadn't been a wife to him; and he said in the hotel over on the Island when he invited me over for a weekend . . .
>
> What time was this? January 18th, 1942.

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Just before he went overseas? Yes—that he hadn't gone to a prostitute. Those were his words to you? Yes.

Had there at that particular time and on that occasion been an attempt by him at intercourse with you? Yes.

I think you have answered that, but would you tell the Court again whether his expressions to you were always ones of dissatisfaction? No.

What kind of life did you generally lead, that is, were you more or less happy, or were you continuously at outs one with the other? We were very happy on the whole, yes.

Though the wife speaks of the relationship between them as being "very happy on the whole," such caustic comment on their association as she attributes to him in this testimony, particularly when made at a time and in circumstances requiring contemplation of his early departure upon active service, is not in my opinion the comment of a man who has accepted such a situation. Rather does it suggest to my mind the despair of a man who had continued to hope and believe that his wife would within some reasonable time recognize and endeavour to fulfil her duty as a wife instead of persisting in the maintenance of a mockery of marriage. On the other hand, the husband describes the relationship between them subsequent to the wife's return, following the surgical operation in June, 1939, as a situation involving a growing dislike on his part, but in which every effort was made to keep up appearances in the community; the dislike arising from the absence of any normal sexual relationship. He speaks of his wife as

a good housekeeper, a good companion, good as a minister's wife . . . but I do suggest that because of lack of unity in married life along sexual lines there was a fraying of nerves and difficult situation because of that.

He had referred earlier to his dissatisfaction and disappointment arising from the impossibility of procreation of children.

Upon consideration solely of the wife's evidence on this issue and of the probabilities in the situation disclosed, I am unable to reach the conclusion from these circumstances that the statement attributed to him by the wife is to be interpreted as an acceptance by the husband of this strained relationship between two comparatively young people, such as upon the application of the doctrine of "sincerity" must be held to deprive the husband of the relief for which he prays.

The result of a careful consideration of these factors, along with the evidence of the husband on this issue, brings me to the

conclusion that he had "put up with the wrong which had been done" him by the wife (to adopt the language of Lord Bramwell in *G.* v. *M.* at p. 203) in the belief and hope that she would ultimately recognize her duty and take the steps which had been indicated by the surgeon might result in enabling her to fulfil her obligation as a wife.

I find nothing in the evidence which satisfies me that at or subsequent to June, 1939, when the wife says that this incident occurred, the husband knew her condition was incurable. Indeed, the doctor's letter indicates that on the physical aspect at least the contrary was the case.

The acts and conduct of the husband so found to constitute approbation are not defined or otherwise described by the learned trial judge in the reasons for judgment or elsewhere. In support of that finding counsel for the respondent in his factum as well as in the argument before this Court, refers to the fact that during the husband's service overseas he had kept up a steady and frequent correspondence with his wife, the writing and tone of which, as counsel submits, was designed

> to create in her mind that she was seldom out of his thoughts, and was a deliberate concealment of his secret intention to have the marriage annulled.

Further, that by prior arrangement between them, the wife using the proceeds of his army pay assigned to her, to the extent of a total of $1,260, paid off his debts of a slightly greater total sum, all incurred prior to his enlistment, for the most part during their married life, but also including certain liabilities which antedated the marriage.

If these be the acts and conduct mentioned in the judgment, with respect, I do not find support therein for the inference presumably drawn therefrom, that the husband thereby approbated this marriage in name only.

I do not think that the husband's conduct in so arranging for payment of the debts, substantially from his pay assigned for the purpose—the small excess no doubt from her separation allowance derived from him—raises an estoppel either moral or legal.

To paraphrase the language of Lord Chancellor Selborne in *G.* v. *M.*, *supra*, at p. 188:

> . . . Can anybody say that those are motives of a fraudulent charac-

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ter, of a dishonest character, of a character from which there is some moral estoppel, unless there is a legal estoppel by some positive rule of law to prevent [him] from acting upon them, and getting the truth declared that [he] is not this [woman's husband] if in truth [he] is not?

If the husband's conduct in this regard be considered subject to criticism upon any ground, and I would hesitate to say it was, then it can only be so, in my opinion, upon the ground that he thereby took or derived benefits in consequence whereof it would be unfair and inequitable to permit him to treat the matrimonial relation as if it had never existed. This conduct, I think, falls far short of furnishing that foundation of substantial justice, sufficient to create a bar to relief, to which Lord Selborne referred.

In respect of the correspondence, the husband is charged with keeping up a pretence of continued affection for the wife and deliberate concealment of his intention to have the marriage annulled.

Having in mind the frequent protests of the husband over the unnatural condition of their marriage and particularly the incident at Nanaimo, to which I have had occasion to refer above, I find nothing in the tone of this correspondence or in the fact that the husband continued to write to his wife as he did in the period of seven months after he left Canada on active service, from which, upon the application of the principles discussed, the Court must infer approbation of the marriage by the husband. I think that the explanation for continuing the correspondence made by him at the trial carries conviction, that is to say, that he did so out of a sense of duty.

The evidence discloses that the husband's conduct toward the wife throughout was that of an exceptionally kind, considerate and thoughtful man, and the wife so describes him. This notwithstanding the grave injustice she had done him first in freely and willingly assuming the bonds of matrimony when incapable of fulfilling the main object of marriage, *i.e.*, the procreation of children, and subsequently in avoiding a possible remedy for that incapacity.

As was said by Lord FitzGerald in *G.* v. *M.*, *supra*, at p. 204:

> The procreation of children being the main object of marriage, the contract contains . . . as an essential term, the capacity for consummation.

It is conceivable, though persons of any experience of life

might think it improbable in this modern age, that a wife married at 32 years of age then may not have been aware of her incapacity; but if that be so it is clearly shown on the wife's evidence that she deliberately defeated the surgeon's apparently successful attempt to remedy the defect.

Having reached the conclusion, upon the application of the principles, which, as I understand from the cases, are embraced in the "doctrine of sincerity," to the facts and circumstances here under review, that the husband has not in true legal effect recognized the validity of the marriage, but if by act or conduct he may be said to appear to have done so, he has not acted so inequitably or in manner contrary to public policy that he may now be deprived of the right to challenge the validity of the marriage.

Upon consideration of all of the evidence adduced below, I am of opinion that the husband is entitled to the relief prayed.

Therefore, and for the reasons given, I would allow the appeal and would grant a decree of nullity of the marriage.

Appeal allowed.

Solicitors for appellant: *Cowan & Twining.*
Solicitor for respondent: *A. D. Wilson.*

MURIEL WARNER, SUING ON BEHALF OF HERSELF AND ALL OTHER CREDITORS OF THE DEFENDANT WILLIAM GRAHAM v. WILLIAM GRAHAM, RENE BEAUCHAMP AND MARIE MARTIN, WIFE OF VICTOR MARTIN.

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1945
Dec. 10, 14.

Bulk Sales Act—Sale of restaurant stock, equipment and business—Requirement of section 5 of the Act—Incomplete statement thereunder by vendor—Action to set aside sale—R.S.B.C. 1936, Cap. 29, Sec. 5.

Section 5 (1) of the Bulk Sales Act provides that it shall be the duty of each purchaser of any stock in bulk, before paying to the vendor any part of the purchase price to receive from the vendor, and it shall be the duty of the vendor of such stock to furnish to the purchaser a written statement, verified by statutory declaration of the vendor, containing

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the names and addresses of all the creditors of the vendor, together with the amount of the indebtedness or liability due to each of said creditors.

By transaction, admitted to come within the Bulk Sales Act, G. sold to B. and M. his restaurant stock, equipment and business. The purchasers obtained from the vendor a statutory declaration purporting to comply with said section reading as follows: "That there are no debts or liabilities due, owing, payable or accruing due or to become due and payable by me in connection with the restaurant business formerly operated by me at 3307 Kingsway, B.C., under the name of Felix Cafe, other than and excepting the rent of said premises at the rate of $30 per month from the 1st day of August, 1945, and the sum of $1,885 (approximately) due and owing by me to the Campbell Finance Company." The plaintiff, a *bona-fide* creditor of the vendor in the sum of $150 for a debt contracted in July, 1945, who was not mentioned in the declaration, brought this action for herself and other creditors of the vendor to set the sale aside as void under the Act.

Held, that said section 5 clearly requires a statement giving the names and addresses of all the creditors of the vendor, not just those who are creditors in connection with the business being sold. There is a clear failure to obey the requirements of the Act and the sale is declared to be fraudulent and void as against the plaintiff.

ACTION to set aside a sale of restaurant stock, equipment and business as void under the provisions of the Bulk Sales Act. The facts are set out in the reasons for judgment. Tried by WILSON, J. at Vancouver on the 10th of December, 1945.

C. R. J. Young, for plaintiff.
Isman, for defendants.

Cur. adv. vult.

14th December, 1945.

WILSON, J.: The plaintiff is, as I find, a *bona-fide* creditor of William Graham in the sum of $150 for a debt contracted in July, 1945. On August 8th, 1945, by a transaction which is admitted to come within the Bulk Sales Act, Graham sold to the defendants Beauchamp and Martin his restaurant stock, equipment and business. The plaintiff had no prior notice of this sale.

At the time of the sale the purchasers Beauchamp and Martin made every honest attempt which might be expected of them to locate and satisfy the creditors of William Graham. They also obtained from him a statutory declaration purporting to comply with the requirements of section 5 of the Bulk Sales Act.

The debt owing to the plaintiff was not paid by Graham out of the proceeds of the sale, and is still unsatisfied and she brings this action for herself and other creditors of Graham to set the sale aside as void under that Act. The action resolves itself into an argument as to whether the statutory declaration in question complies with the provisions of the Act.

The statutory declaration reads as follows:

I, William Graham, of Prince George, in the Province of British Columbia, and at present residing at the City of Vancouver in the said Province, do solemnly declare:

That there are no debts or liabilities due, owing, payable or accruing due or to become due and payable by me in connection with the restaurant business formerly operated by me at 3307 Kingsway, B.C., under the name of Felix Cafe, other than and excepting the rent of the said premises at the rate of $30 per month from the 1st day of August, 1945, and the sum of $1,885 (approximately) due and owing by me to the Campbell Finance Company.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act."

Declared before me at the City of Vancouver, in the Province of British Columbia, this 8th day of August, A.D. 1945.
W. Murray
A Notary Public in and for the Province of British Columbia.
} Wm. Graham.

Section 5 of the Act says this, in part:

5. (1.) It shall be the duty of each purchaser of any stock in bulk, before paying to the vendor any part of the purchase price (save as hereinafter provided), or giving any promissory note or notes or any security for the said purchase price or part thereof, or executing any transfer, conveyance, or encumbrance of any property, to demand of and receive from the vendor, and it shall be the duty of each vendor of such stock in bulk to furnish to the purchaser a written statement verified by the statutory declaration of the vendor or his duly authorized agent, or, if the vendor is a corporation, by the statutory declaration of its president, vice-president, secretary-treasurer, or manager, which statement shall contain the names and addresses of all the creditors of the vendor, together with the amount of the indebtedness or liability due, owing, payable, or accruing due or to become due and payable by the vendor to each of said creditors, including amounts due for taxes, which statement and declaration may be in the form set forth in Schedule A, or to the like effect.

Schedule A referred to in section 5 reads as follows:

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SCHEDULE A.

(Section 5.)

STATEMENT AND DECLARATION.

Statement showing names and addresses of all creditors of

Name of Creditor.	Post-office Address.	Nature of Indebtedness.	Amount.	When due.

I, , of , in the Province of British Columbia, do solemnly declare that the above is a true and correct statement of the names and addresses of all creditors, and shows correctly the amount of indebtedness or liability due, owing, payable, or accruing due or to become due and payable by to each of said creditors. [*If the declaration is made by an agent, add*: I am the duly authorized agent of the vendor and have a personal knowledge of the matters herein declared to.]

The question is whether the statutory declaration furnished by the creditor is a substantial compliance with the Act, that is: (1) Is it "in the form set forth in Schedule A or to the like effect," and (2) does it otherwise comply with section 5.

The plaintiff, a creditor, was not mentioned in the declaration. Some other creditors, whose claims were unsatisfied at the time of the sale, were not mentioned in the declaration. But this, as long as the form of the statement and declaration are satisfactory, will not avoid the sale. All that the purchaser is required to do is to get a declaration in proper form; he does not become the guarantor of the vendor's veracity, and a perjurous declaration will not avoid the sale if it is in proper form (see *Paddon* v. *McFarland,* [1930] 3 W.W.R. 632; *Montreal Abattoirs Limited* v. *Picotte and Lefebvre* (1917), 52 Que. S.C. 373). But, *vide* the latter case (p. 375):

> It was incumbent upon the mis-in-cause (here the purchaser) to insist on and obtain from the defendant (the vendor) an affidavit which would conform, substantially at least, to the provisions of the Statute, and consequently it is he who must bear the consequences of the irregularity of the affidavit with which he was content.

The irregularities here suggested are: 1. That the form used is not to "the like effect" with the form in Schedule A since it consists merely of a statutory declaration, and not of a statement verified by a statutory declaration. 2. That the form used does not set out the names and addresses of the creditors, and does

not substantially follow the form in Schedule A since it omits the name of the landlord, the exact amount of the debt to him, the addresses of both creditors listed, the description of the nature of the indebtedness, and a statement of when it is due. 3. That the form is defective in that it does not purport to list all the creditors of the vendor, but only says:

> There are no debts or liabilities due, owing, payable or accruing due or to become due and payable by me in connection with the restaurant business formerly operated by me at 3307 Kingsway, B.C., under the name of the Felix Cafe, . . . , other than the 2 defendants listed.

I think this latter is a fatal defect. Section 5 clearly requires a statement giving the names and addresses of all the creditors of the vendor, not just those who are creditors in connection with the business being sold. It might well be that if such a declaration had been insisted on by the purchasers the plaintiff's debt would have been listed and she would have been paid as were the other creditors listed in the declaration. I think her claim was one in connection with the business and should have been listed as such, but the vendor may not have thought so, and may for this reason, have left it out. At any rate there is a clear failure to obey the requirements of the Act. To refer again to *Montreal Abattoirs Limited* v. *Picotte and Lefebvre* (p. 375):

> The defendant was required to mention in his affidavit all his creditors generally, as prescribed by the Statute, and not only those whom he might owe in respect of the effects and merchandise which formed the subject matter of the bulk sale.

It follows that the Act was not complied with, and the sale was voidable. It has been properly attacked by a *bona-fide* creditor, and I declare it fraudulent and void as against the plaintiff. Counsel can speak to the form the order should take.

I should like to refer to one further matter. The same counsel acted for all defendants, the vendor and the two purchasers. At the opening of the trial he asked for an adjournment on the ground that the defendant Graham could not be present. Notice of trial was given October 24th, 1945. The date of trial was December 4th, 1945. No previous application had been made for an adjournment. Counsel's statement, which I accept, was to the effect that the defendant Graham was in Prince George and said he could not presently finance a trip to Vancouver.

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Counsel did not suggest to me any date on which Graham could be in Vancouver.

I refused the adjournment for these reasons: (1) The application should have been made sooner and not on the opening of the trial when plaintiff and her counsel were present and ready to proceed. (2) Admittedly the only object of Graham's evidence would be to deny his debt to the plaintiff. But admissions made by him in his examination for discovery indicated to me that such denial was not likely to be accepted. (3) If the other defendants felt that his presence was necessary for their protection, their proper course was to *subpœna* him as a witness, or to apply for an adjournment for the purpose of subpœnaing him. They did not do either of these things.

I mention these matters because I do not, as a rule, like to force on a trial in the absence of a litigant. I felt that the circumstances of this case required that I should, in justice to the plaintiff, do so.

Judgment for plaintiff.

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Dec. 4, 5, 6.
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Jan. 15.

REX v. SULLIVAN AND GODBOLT.

Criminal law—In possession of revolver and other stolen goods—Convicted on four counts—Appeal—Conviction sustained on one count—Retaining possession of revolver and blank driver's licences—Criminal Code, Secs. 115, 399, 464 (b) and 1016, Subsec. 2.

On the 19th of April, 1945, at 7.55 p.m. two police officers noticed a car at the corner of Broadway and Cambie Street in Vancouver occupied by the two accused and driven by Godbolt. The car proceeded west on Broadway and the police followed in their car. When close behind Godbolt seemed to speak to Sullivan and Sullivan turned and looked through the rear window at the police car. Sullivan then appeared to take something off a shelf behind him and as he turned, Godbolt veered the car sharply to the kerb, the right-hand door opened, something appeared to be thrown out followed by some white cards. The car continued close to the kerb with the door remaining open. When the police car came almost abreast of the other car, Sullivan seemed to be making motions with his legs as though he was trying to kick something out of the door. They signalled Godbolt to stop, but the latter increased his speed. The police then caught up and forced his car into the kerb.

One of the policemen, then looking back, saw a boy pick up something where Godbolt had first turned towards the kerb. The boy came to him and handed him a Smith-Weston revolver which he had picked up. Later the policeman found six drivers' licence forms close to where the revolver was picked up. The accused were arrested and in their car was found a set of pole-climbers, one three-pound hammer, two pieces of soap, two steel punchers, three pieces of wire, one pair of pliers and a quantity of rubber tape. On the trial the evidence disclosed that the revolver and drivers' licence forms with the articles in the car were stolen. The accused were charged and convicted jointly on four counts.

Held, on appeal, varying the convictions and sentences of LENNOX, Co. J. (SIDNEY SMITH, J.A. would dismiss the appeal) as to the first count of unlawfully retaining possession of the revolver and six blank drivers' licences knowing the same to have been stolen, that it was established that the revolver and licence forms were stolen from the Government offices in Chilliwack and they were in Godbolt's car and ejected from the car where found. There is no explanation from Godbolt for possession of the stolen articles and there is a presumption warranting his conviction. Sullivan was in joint possession of the articles and having failed to give any explanation for his joint possession he is presumed to have known they were stolen and his conviction is warranted.

On the second count of retaining possession of pole-climbers, the conviction is set aside as the evidence when read with acceptance of Godbolt's explanation of possession is too inconclusive to fix the appellants with knowledge that the articles were stolen.

On the third count of possession of the revolver for a purpose dangerous to the public peace:—

Held, that the conviction was unwarranted as there was lack of evidence of possession of the revolver "for a purpose dangerous to the public peace," but invoking Code section 1016, subsection 2 it found the appellants guilty of an offence under Code section 121A and substituted a conviction under that section.

On the fourth count of "unlawful possession by day of safebreaking instruments with intent to commit an indictable offence":—

Held, that all these articles could be used for legitimate purposes and it lay on the prosecution to prove that they were not in the appellants' possession for an innocent purpose. The evidence fails to go that far and the convictions on this count were set aside.

On the question of sentence:—

Held, that the sentence of seven years by the Court below be reduced to six years on the first count and on the substituted conviction under Code section 121A for the third count be thirty days' imprisonment with a fine of $50 and in default of payment a further thirty days' imprisonment. These sentences to run consecutively to the previous sentences of six years.

APPEAL by accused from their convictions and sentences by LENNOX, Co. J. on the 21st of September, 1945. They were

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charged jointly on four counts: (1) Unlawfully retaining possession of the revolver and six blank drivers' licence forms, all under the value of $25, knowing the same to have been stolen; (2) unlawfully retaining possession of one set of linesmen's pole-climbers under the value of $25, knowing the same to have been stolen; (3) unlawful possession of the revolver for a purpose dangerous to the public peace; (4) unlawful possession by day of safebreaking instruments, *viz.*, one set of pole-climbers; one three-pound hammer; two pieces of soap; two steel punches; three pieces of wire; one pair of pliers and a quantity of rubber tape, with intent to commit an indictable offence. The facts are sufficiently set out in reasons for judgment.

The appeal was argued at Vancouver on the 4th, 5th and 6th of December, 1945, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

McAlpine, K.C., for appellant Sullivan: The first count is under section 399 of the Code, being in possession of a revolver and six drivers' licences knowing they were stolen. On the 19th of April, 1945, in the afternoon when in Godbolt's car they were followed by a police car. All the articles in the car were legitimate tools. There was no evidence that Sullivan knew the goods were stolen. What was found is based entirely on suspicion. They were Godbolt's property and Sullivan was a passenger. The fact of kicking the revolver out of the car is no indication of control of the car. He was not in possession of the goods: see *Rex* v. *Lester* (1938), 27 Cr. App. R. 8, at p. 11; *Rex* v. *Parker* (1941), 57 B.C. 117. The learned judge did not properly direct himself: see *Rex* v. *Colvin and Gladue* (1942), 58 B.C. 204, at p. 209; *Rex* v. *Watson* (1943), 79 Can. C.C. 77; *Rex* v. *McKinnon* (1941), 56 B.C. 186; *Rex* v. *Pawlett* (1923), 40 Can. C.C. 312, at p. 323; *Rex* v. *McClellan* (1943), 59 B.C. 401; *The Queen* v. *Wiley* (1850), 20 L.J.M.C. 4. The circumstances are as consistent with innocence as with guilt. As to the fourth count under section 464 of the Code, possession must be actual physical possession: see *Rex* v. *Harris* (1924), 94 L.J.K.B. 164, at p. 165; *Rex* v. *Mitchell and McLean*, [1932] 1 W.W.R. 657. He must be found abroad with the housebreaking instruments: see *Rex* v. *Ellis* (1943), 59 B.C. 393; *Rex* v. *Smart* (1945), 61

B.C. 321. There is nothing to show Sullivan had the articles with intent to commit an indictable offence: *Rex* v. *Ward alias Seckree* (1915), 11 Cr. App. R. 245. On "possession," this gun was not loaded and not an offensive weapon. The learned judge found joint everything and grouped the two together: see *Rex* v. *Camarati and Lacovoli* (1927), 33 O.W.N. 152; *Rex* v. *Yaskowich et al.* (1938), 70 Can. C.C. 15.

Hodgson, for defendant Godbolt: As to counts one and three, there was not that measure of control that brings him within the sections of the Code. He did not know the goods were stolen. Under section 464 (*d*) they were not in his possession with intent to commit an indictable offence. At no time did he have the unloaded revolver in his possession: see *Rex* v. *Davis,* [1941] 1 D.L.R. 557, at p. 559.

Remnant, for the Crown: On the cumulative effect of the evidence and question of reasonable doubt, the trial judge will not be interfered with unless palpably wrong: see *Rex* v. *Edwards* (1945), 83 Can. C.C. 235; *The King* v. *M.* (1926), 58 N.S.R. 512; *Rex* v. *Dawley* (1943), 58 B.C. 525; *Reid* v. *Regem* (1943), 79 Can. C.C. 311; *Rex* v. *Bush* (1938), 53 B.C. 252; *Mihalchan* v. *Regem* (1944), 82 Can. C.C. 306. The case of *Rex* v. *McKinnon* (1941), 56 B.C. 186 is in our favour. They were in possession of these goods: see *Rex* v. *Wong Yip Lan and Lee Lung* (1936), 50 B.C. 350; *Rex* v. *Lillian Elliott* (1942), 58 B.C. 96, at p. 98; *Rex* v. *McClellan* (1943), 59 B.C. 401, at p. 402. On the question of knowledge that the goods were stolen see *Rex* v. *Mandzuk,* [(1945), *ante* 16, at p. 28]. As to the charge under section 464 (*a*), they had safebreaking instruments in the car: see *Rex* v. *Mihalchan* (1944), 60 B.C. 450. The facts must be taken as a whole. As to the province of the Court of Appeal see *Rex* v. *Westgate* (1944), 82 Can. C.C. 62; *Rex* v. *Gfeller,* [1944] 3 W.W.R. 186, at p. 192; *The King* v. *Ellis* (1826), 6 B. & C. 145.

McAlpine, in reply, referred to *Baron* v. *Regem* (1930), 53 Can. C.C. 154.

Cur. adv. vult.

15th January, 1946.

O'HALLORAN, J.A.: At 7.55 p.m. on 19th April last at the

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corner of Broadway and Cambie Street in Vancouver two officers in a police car noticed the appellant Godbolt driving a Ford coupe with a companion later identified as the appellant Sullivan. The officers drove around the block and began following the Godbolt car which was proceeding westerly on Broadway. When the police officers got immediately behind the Godbolt car, they thought its occupants acted in a strange manner. Godbolt seemed to speak to Sullivan who turned around and looked through the rear window hard at the police officers. Sullivan then appeared to take something off the shelf behind him, and as he turned to his front, the Godbolt car veered sharply toward the kerb, its right-hand door opened, and "something like dirt" and then some white cards, fell or were ejected from it. The car continued in motion close to the kerb with its right-hand door remaining open.

When the police car came almost abreast the Godbolt car shortly afterwards, Sullivan seemed to be making motions with his legs (the officers could not see his feet). That caused the officers to believe he was trying to kick something out of the open door of the car. The police signalled Godbolt to pull into the side and stop, but the latter increased his speed and drove on until the police car caught up and his car was forced into the side a short distance on. A set of linesmen's pole-climbers was found in the car in front of Sullivan's feet. Godbolt said they were his. One of the officers (P.C. Frew) testified that after the Godbolt car was finally halted, he kept his eye on the approximate spot where it had veered toward the kerb, and saw a boy on a bicycle stop and pick up an object at that point which the boy brought to him. It was a Smith & Wesson revolver.

The appellants were arrested and their car taken to headquarters by other officers. P.C. Frew then went back to the approximate point where he had seen the revolver picked up and found six blank 1945 drivers' licence forms. All this happened on a busy street of the city of Vancouver. The car was searched at headquarters. In its trunk was found a three-pound hammer, and on the shelf behind the seat were two steel punches, two pieces of wire, a roll of brass wire, a pair of pliers, some red rubber tape and two pieces of soap.

The appellants were charged jointly on four counts:

(1) Unlawfully retaining possession of the revolver and six blank drivers' licence forms, all under the value of $25, knowing the same to have been stolen (Code section 399). (2) Unlawfully retaining possession of one set of linesmen's pole-climbers under the value of $25, knowing the same to have been stolen (Code section 399). (3) Unlawful possession of the revolver for a purpose dangerous to the public peace (Code section 115). (4) Unlawful possession by day of safebreaking instruments, *viz.*, one set of pole-climbers, one three-pound hammer, two pieces of soap, two steel punches, three pieces of wire, one pair of pliers and a quantity of rubber tape with intent to commit an indictable offence (Code section 464 (*b*)).

Godbolt testified in his own defence but Sullivan did not. After a four-day trial the learned county judge convicted the appellants jointly on all counts, and sentenced them to seven years' imprisonment on each count to run concurrently. In his report to this Court under Code section 1020 the learned judge directed to our attention that the sentences imposed in respect to the convictions under the third and fourth counts were in excess of the maximum provided in the Criminal Code. The appellants were represented by separate counsel during the three-day argument in this Court. In view of the different points arising on each of the four counts, and the conflict between the submissions of the two appellants on some main issues, it is found less confusing to treat each count under a separate caption.

I. Retaining possession of revolver and blank drivers' licence forms—Code section 399.

The car he was driving belonged to Godbolt, but he denied possession of the revolver and the licence forms. He testified he had not seen the revolver before the boy brought it to the police officer. He testified also that "to his knowledge" Sullivan did not kick the revolver or the licence forms out of the car. The learned judge did not believe Godbolt's story, and on the whole of the evidence could not regard it as a reasonable story. It is noted that counsel for the appellant Sullivan based his argument in this Court upon the assumption that the revolver and licence forms were kicked out of the car by Sullivan. In my judgment

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we must regard the evidence as conclusive that the revolver and the licence forms were in Godbolt's car and were ejected from the car at or near the point where they were found.

The question then arises, were they in the sole possession of Godbolt or of Sullivan or in their joint possession? Once Godbolt's story is rejected (as it must be) he becomes clearly fixed with possession, but not, of course, to the degree of necessarily excluding joint possession with Sullivan. It was established that the revolver and the licence forms were stolen from Government offices in Chilliwack on the night of 15th April. Godbolt did not volunteer any explanation for possession of the stolen articles (as he did in the case of the pole-climbers see Caption II. *infra*), nor does the testimony as a whole disclose an explanation. In such circumstances there exists a presumption warranting his conviction on the first count that Godbolt had knowledge the goods were stolen *cf. Rex* v. *Wilson* (1924), 35 B.C. 64, MARTIN, J.A. at p. 67; *Rex* v. *Mandzuk* [*ante* 16, at pp. 28 and 33]; [1945] 3 W.W.R. 280, at pp. 290 and 295.

There remains the question did Sullivan have joint possession of the revolver and licence forms? His counsel relied on the prosecution evidence to the effect that the car belonged to Godbolt, and that it was after Godbolt spoke to him that Sullivan took something off the shelf behind them and that the door opened and the revolver and licence forms were ejected. Sullivan's counsel submitted that evidence in its cumulative effect justified the inference that Sullivan was acting as Godbolt's agent, or acting under his orders, and invoked the principle in *Rex* v. *Parker* (1941), 57 B.C. 117, at p. 119. But in the *Parker* case, the defence of agency in the handling of the stolen sewing-machine was supported by independent documentary evidence. In my judgment the circumstances relied upon by Sullivan's counsel are too vague and indistinct standing alone, to found inferences of agency to supplant the joint control which was visible to the police officers.

Sullivan's counsel asks us in effect to conjecture upon what might have transpired between the two men. The opportunity to reduce that conjecture to factual reality was lost when Sullivan failed to testify, and Godbolt's evidence (his denials include

implicit denial of agency) lent no support to any hypothesis of agency. If, for example, it had been brought out in evidence that Godbolt had bought the revolver, or previously to the incident under review had exercised acts of sole ownership of or sole control over the revolver and the drivers' licence forms (as for example in the case of the pole-climbers considered in Caption II., *infra*) an hypothesis of agency could then have a reasoned ground of support which is entirely lacking now. Moreover on Godbolt's evidence the two men had been in the car together for nearly an hour and a half before they encountered the police. In the circumstances under review the learned judge was correct, with respect, in regarding the acts of the two appellants in association as pointing with a convincing degree of practical certainty to their joint control over the subject-matter and *cf. Rex* v. *McClellan* (1943), 59 B.C. 401.

After perusal of the appeal book I am led to apply to Sullivan what IRVING, J. (with whom CLEMENT, J. agreed) said in the murder case of *Rex* v. *Jenkins* (1908), 14 B.C. 61, at p. 69:

> It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent net-work of inculpatory facts, that man is bound to make some explanation or stand condemned.

Examination of the extracts from the judgments of Holroyd, J. and Abbott, C.J., later Lord Tenterden, in *The King* v. *Burdett* (1820), 4 B. & Ald. 95; 105 E.R. 873, at pp. 890 and 898 which IRVING, J. quoted in *Rex* v. *Jenkins, supra,* satisfies me that the foregoing quotation is not in conflict with *Woolmington* v. *Director of Public Prosecutions* (1935), 104 L.J.K.B. 433, in which case incidentally, the accused went into the witness box and gave an explanation. In *Rex* v. *Smart* (1945), 61 B.C. 321, at p. 322, it was said (and *cf. Rex* v. *Rea* (1945), 84 Can. C.C. 110 where proof was held insufficient):

> 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.

Having reached the conclusion Sullivan was in joint posses-

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sion of the stolen revolver and licence forms, it only remains to say that having failed to give an explanation for his joint possession of recently stolen goods, he like Godbolt, is presumed to have known they were stolen and his conviction is warranted accordingly.

I would sustain the conviction of both appellants on the first count.

II. Retaining possession of the pole-climbers (Code section 399).

The objections to the convictions on this second count are based on the rejection of Godbolt's explanation of possession. He claimed sole ownership and control. Godbolt testified he bought the pole-climbers on 18th April (they were stolen the night before) from a man named Waterson who brought them into the Owl Radio shop where he was employed. He said he wanted them to take down radio aerials in the course of his employment. The manner of Godbolt's obtaining the pole-climbers receives substantial corroboration in the evidence of an independent witness Demoray. The latter gave evidence that he went to Scott's Limited to have his radio repaired, but finding it closed (being Wednesday afternoon) he bethought himself of a little radio shop a few blocks on. He went there and while discussing his radio with one of the men in the shop he later found to be Godbolt, another man came in, a pair of pole-climbers was placed on the other end of the counter, Godbolt was called over there and after a few minutes' conversation which Demoray did not hear because of the noise of the radios, the man went out and Godbolt tried on the pole-climbers and made a remark to Demoray. Demoray fixed the date by the date of his receipt from the Owl Radio shop for payment for repair work on his radio.

The test of Godbolt's explanation is not whether the learned judge believed Godbolt and Demoray, but is whether the explanation "might reasonably be true"—*cf.* *Rex* v. *Schama* (1914), 84 L.J.K.B. 396, *Rex* v. *Ketteringham* (1926), 19 Cr. App. R. 159, and *Richler* v. *Regem,* [1939] S.C.R. 101 all discussed in *Rex* v. *Davis* (1940), 55 B.C. 552, at pp. 556-7; *cf.* also *Rex* v. *Parker* (1941), 57 B.C. 117, at p. 121; *Rex* v. *Reid* (1942), 58 B.C. 20, at pp. 21-22 and *Rex* v. *Mandzuk* [*ante* 16, at

pp. 28 and 33]; [1945] 3 W.W.R. 280, at pp. 290 and 296. I am unable to escape holding that Demoray's evidence "might reasonably be true," and hence that Godbolt's explanation ought not to have been rejected. Demoray's evidence is what one would expect from a five-minute casual visitor to a shop, preoccupied with his own affairs. The prosecution did not attempt to throw doubt upon the *bona fides* of his visit to the Owl Radio shop or to question the *bona fides* of the receipt by which he fixed the date. His evidence remains unshaken that the pole-climbers were placed on the counter after a third man had come in and while Godbolt was talking to him (Demoray) and that Godbolt openly tried them on.

Demoray admitted he did not see the third man bring the pole-climbers into the shop because the man came in behind him, and his attention was not drawn to the pole-climbers until he heard the noise caused by dropping them on the counter. He admitted also that he did not hear the conversation between Godbolt and the third man (because of the noise of the radios). Those admissions are *indicia* of a witness of truth. If he had been a witness brought in by Godbolt to bolster up a planned story, it would have been quite easy for him to say he saw the third man bring in the pole-climbers and that he had heard Godbolt agree to buy them. In his report to this Court under Code section 1020 the learned judge remarks that on cross-examination Demoray

could not say definitely whether the man brought the climbing-irons into the shop or not, or whether they had been laid on the counter by Godbolt.

It is true that when faced with the specific question

You couldn't swear that Godbolt didn't put them on the counter?

Demoray answered

No.

But the sum of his evidence points to the conclusion that Godbolt did not put them there. His unshaken evidence was that Godbolt was talking to him about his radio when the third man came in and Godbolt was called over to the third man, but that Godbolt was not called over until after the irons had been placed on the counter. That explains the answer Demoray gave almost immediately following the answer "No," *supra,* that

When I heard the noise, naturally I would think the man there [the third man who came in] put them there [on the counter] because I didn't see them there before.

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From the facts in evidence to which I have referred, I must regard it as a natural inference that the pole-climbers were placed on the counter by the third man who came in. That is sufficient for the adequacy of the explanation. It is unaffected by the possibility that Godbolt could have put them there by some unknown means, while he was talking to Demoray. In *Rex* v. *Carr-Braint,* [1943] 2 All E.R. 156 (applied in *Rex* v. *Lawson* (1944), 59 B.C. 536, at pp. 545-6, and *Rex* v. *Findlay* (1944), 60 B.C. 481, at p. 486) the Court of Criminal Appeal held that in any case, either at statute or common law where some matter is presumed against an accused person (here the presumption arising from recent possession of stolen goods), unless "the contrary is proved" the burden of proof required of the defence is less than that demanded of the prosecution which must prove its case beyond a reasonable doubt. The Court of Criminal Appeal held the defence had successfully established a preponderance or probability in its favour, and in my opinion the defence met that requirement here.

Accepting Godbolt's explanation as a reasonable explanation of his possession of the pole-climbers, there remains the question ought he to have realized that they were stolen when he bought them? There is no direct evidence one way or the other. There is nothing inherent in pole-climbers which is suggested ought to arouse a purchaser's suspicion that they may be stolen. Apparently they were disposed of openly across the counter, without the presence of any circumstances disclosed in evidence to indicate they might be stolen. But in his report under Code section 1020, the learned judge expressed the view that no matter how the pole-climbers came into Godbolt's possession, nevertheless the actions of both appellants in trying to get rid of them before the car was stopped by the police, showed they both knew the articles were stolen. Quite apart from what might be said of Sullivan's agency under *Rex* v. *Parker, supra,* and that this is not a case of "receiving" to which Code section 402 would apply, the testimony directed to prove their attempts to eject the pole-climbers from the car is not sufficiently conclusive, in my view at least, to exclude the reasonable doubt to which the appellants are entitled.

It will be remembered the police officers could not see Sulli-

van's feet. If the appellants wished to eject the pole-climbers they had half a long city block in which to do so. And if they had done so while the police car was driving abreast of them or passing them, the pole-climbers could have been ejected without the police being able to see what was ejected. The car door remained open it is true, but one of the police officers said he thought "the man [Sullivan] was going to jump for it." That evidence when read with acceptance of Godbolt's explanation of possession, is in my view too inconclusive to fix the appellants with knowledge that the articles were stolen. So regarded it does not extend beyond suspicion.

I would therefore set aside the convictions on the second count.

III. Unlawful possession by day of safebreaking instruments with intent to commit an indictable offence (Code section 464 (*b*).

(This caption concerns the convictions on the fourth count.) The revolver was not included among the "safebreaking instruments" which were listed in these convictions on the fourth count as one set of pole-climbers, one three-pound hammer, two pieces of soap, two steel punches, three pieces of wire, one pair of pliers and a quantity of rubber tape. All these articles could be used for legitimate purposes, and it lay on the prosecution to prove from other circumstances in the case, that these articles were not in the appellants' possession for an innocent purpose, but for the purpose of safebreaking and *cf. Rex* v. *Ward* (1915), 85 L.J.K.B. 483, at p. 484 (relating to an offence at night where the accused gave a reasonable explanation of possession). That is to say the prosecution must prove that the possession thereof by day (as distinct from possession at night under Code section 464 (*a*)), was "with intent to commit an indictable offence."

In my judgment the evidence fails to go that far. There is no evidence of any plan to commit any indictable offence, nor is there any act or conduct beyond conjecture or suspicion from which such an intent may be legitimately inferred. The appellants were driving through the busy streets of Vancouver. Their action in throwing away the revolver and drivers' licence forms is not *ad rem* to the offence charged in the fourth count, since the revolver and forms were not included among the safebreaking

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instruments described in this count. And even if the revolver had been included, their action in throwing it away would be equally consistent with an effort to avoid conviction for illegal possession of a revolver without a permit under Code section 121A. The prosecution testimony regarding the suggested attempt to eject the pole-climbers from the car is too inconclusive to found an intent for reasons already explained in the previous caption relating to the second count.

Rex v. *Mihalchan* (1944), 60 B.C. 450; affirmed [1945] S.C.R. 9, concerned an offence at night under Code section 464 (*a*) when intent is presumed (subject to explanation by accused) from mere possession. That is not this case. In my judgment the safety of law-abiding citizens requires that the language in Code section 464 (*b*) "with intent to commit any indictable offence" shall not be whittled down to the equivalent of Code section 464 (*a*), nor interpreted as if it read "suspected of an intent to commit any indictable offence," but ought to be given the full meaning of the words used, *viz.*, that the intent the statute contemplates shall be manifested by some act or conduct tending toward the accomplishment of the criminal object. It must be rare indeed that acts or conduct of a neutral or negative nature can be so described. There are, of course, cases like *Rex* v. *Ellis* (1943), 59 B.C. 393 and *Rex* v. *Smart* (1945), 61 B.C. 321, where such an intent has been held to emerge as the inevitable conclusion to be drawn from the cumulative effect of all the surrounding circumstances. But consideration of the whole of this case leads me to the firm conclusion that no circumstances of locality, time, conduct, plan, previous association or otherwise combine here to form any such cumulative effect.

For the foregoing reasons I would set aside the convictions on the fourth count.

IV. Possession of the revolver for a purpose dangerous to the public peace. (Code section 115).

(This caption concerns the convictions on the third count.)

I should have no difficulty in upholding the convictions on the third count, if I had been able to sustain the convictions on the fourth count for unlawful possession by day of safebreaking instruments with intent to commit an indictable offence. But

since I have not, for the reasons set forth in the third caption, and since I am unable to deduce from other circumstances in the case, possession of the revolver "for a purpose dangerous to the public peace," I must hold the convictions on the third count to be unwarranted by the evidence.

In *Rex* v. *Kube* [*ante*, p. 181] delivered on 12th December last this Court had occasion to consider the meaning of the words "for a purpose dangerous to the public peace" as they appear in Code section 115. Mere possession of a revolver is not enough, unless the Code is amended to make it so subject to an explanation by the possessor. Nor is it enough that the possessor of the revolver is suspected of planning to commit some crime, or is suspected of allowing it to be used in aid of the commission of some crime. If that were Parliament's intention the word "suspected" would have been inserted in section 115 as for example in Code section 114 which relates to the possession of explosives. I am unable to extract from all the surrounding circumstances when viewed objectively any purpose dangerous to the public peace, as was the inevitable inference in such cases as *Rex* v. *Camarati and Lacovoli* (1927), 33 O.W.N. 152; *Rex* v. *Yaskowich et al.* (1938), 70 Can. C.C. 15 and *Rex* v. *Cavasin* (1944), 60 B.C. 497 (as to bail), where the relevant circumstances are set out. (The *Cavasin* appeal was dismissed in an unreported oral judgment of this Court on 27th September, 1944.)

It is true the appellants sought to get rid of the revolver when they found the police were following them. But I find it hard to construe an act of that kind as dangerous to the public peace. I would be inclined to regard it as quite the reverse, *viz.*, a positive act to avoid a danger to the public peace. In any event as said before in Caption III. throwing away the revolver was equally consistent with an attempt to avoid arrest and conviction for unlawful possession of a revolver under Code section 121A, which offence the evidence discloses. I would set aside the convictions under Code section 115 and, invoking Code section 1016, subsection 2, would find the appellants guilty of an offence under Code section 121A and substitute convictions under the latter section.

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V. Sentences.

As the Court has set aside the convictions on the second, third and fourth counts, it remains to consider the sentence of seven years' imprisonment imposed on each of the appellants for their convictions on the first count, and also the sentences to be imposed upon them for their convictions under Code section 121A, which the Court has substituted for their convictions under Code section 115 on the third count.

One of the things the appellants "retained" was a revolver so frequently used in major crime. It was a stolen revolver and neither appellant attempted an explanation for its possession. Hence there exists a presumption warranting conviction, not only that they knew it was stolen, but that they stole it—*cf. Rex* v. *McKinnon* (1941), 56 B.C. 186-7. They both have bad criminal records extending over the past fifteen years. The learned judge described them as professional criminals. Godbolt was out of the penitentiary for less than four months where he had been serving ten-year concurrent sentences for shooting with intent and for attempted robbery imposed on 22nd May, 1936. Prior to that he had served four years for breaking, entering, stealing. And before that he had served concurrent two-year sentences for forgery and attempted robbery with violence.

Sullivan, known also as Leslie Patterson and Frank Webb, was sentenced at Edmonton on 29th November, 1941, to three years concurrently for breaking and entering (three charges) and for unlawful possession of explosives. Before that he had been sentenced to four years for breaking and entering by night to run from 18th January, 1937. Prior to that on 10th October, 1933, he was sentenced to three years concurrently for burglary (four charges). His first recorded sentence is dated 6th June, 1930, for three years for theft and breaking and a concurrent sentence for two years for theft.

In this case as in *Rex* v. *Woods and Langthorne (No. 2)* (1944), 82 Can. C.C. 218, the records of the appellants show they have remained unresponsive to the corrective influences which the law has imposed upon them from time to time in order to curb their depredations on society. Neither man has shown any intention of changing his criminal mode of life. We are all of opinion that sentences of six years' imprisonment effectively

reflect the punishment within this Court's jurisdiction which is appropriate in the conditions we have had presented in this case, and we vary to that extent the sentences to seven years' imprisonment imposed in the trial Court.

Regarding the substituted convictions under Code section 121A, we impose the maximum sentence upon each appellant of 30 days' imprisonment with a fine of $50 and in default of payment a further 30 days' imprisonment. These sentences shall run consecutively to the previous sentences of six years.

SIDNEY SMITH, J.A.: The learned trial judge pointed out in his report that he imposed sentences on counts 3 and 4 in excess of the five-year maximum sentences laid down in the Criminal Code. These should be corrected. Subject to this, I would dismiss the appeals of the two defendants, both from conviction and sentence. I think the circumstances were such as to justify the conclusions of the learned judge, and I see no reason to suppose that he misapplied any relevant principle of law.

The majority opinion of this Court however sustains the convictions on the first count only. In view of this finding, I concur in the sentence of six years on this one count.

BIRD, J.A.: I would sustain the conviction of both Sullivan and Godbolt on the first count, namely, on the charge of retaining possession of a revolver and blank drivers' licence forms and would set aside the convictions on the second and fourth counts, namely, for retaining possession of a set of pole-climbers and unlawful possession by day of safebreaking instruments with intent to commit an indictable offence.

In regard to the third count, being for possession of a revolver for a purpose dangerous to the public peace, I would set aside the conviction for this offence under Code section 115 and in respect of the offence charged would substitute a conviction under Code section 121A upon the application of Code section 1016, subsection 2.

I have had the advantage of perusal of the reasons for judgment about to be filed by my brother O'HALLORAN, with which I concur.

Appeal allowed in part, Sidney Smith, J.A. dissenting in part.

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Landlord and tenant—Agreement to vacate—Conditional—Wartime Prices and Trade Board order 294, Secs. 13 (f) and 33—Construction.

On an application by the landlord for possession of a house at 4511 Marguerite Avenue, Vancouver, one Mitton, the original owner, had as a tenant the defendant *Munro*, and, anticipating a sale of the property, entered into an oral agreement with *Munro* whereby *Munro* agreed that he would waive the requirements of the Wartime Prices and Trade Board regulations as to notice to vacate and would vacate the premises on or before the 31st of August, 1945, in consideration of Mitton assisting him to locate other premises in Vancouver and paying his moving expenses. Mitton sold the property to the plaintiff Cook who then asked *Munro* whether he had any arrangement with Mitton as to vacating the premises to which *Munro* replied that he had. Cook then asked him to put it in writing, which he did in a letter of the 28th of March, 1945, stating he had agreed to waive the requirements of the Wartime Prices and Trade Board regulations as to notice to vacate, etc., and that he would vacate the premises on or before August 31st, 1945, in consideration of Mitton assisting him to locate other premises in Vancouver and paying his moving expenses. *Munro* was unable to obtain other premises and he remained in possession of the premises in question. An order was made for possession.

Held, on appeal, reversing the decision of LENNOX, Co. J. (ROBERTSON, J.A. dissenting), that the appeal be allowed and the order for possession be set aside.

Per O'HALLORAN, J.A.: *Munro's* notice of willingness to vacate by the end of August as contained in his letter of March 28th, 1945, was plainly conditioned upon finding another suitable house and payment of his moving expenses. Since these events failed to materialize by the end of August, his notice of willingness to vacate lapsed. The letter of March 28th was not a "written notice of an intention to vacate on a stated date" within section 13 (*f*) of Wartime Prices and Trade Board order 294 and the order for possession was made without jurisdiction.

Per SIDNEY SMITH, J.A.: The notice to vacate referred to in said section 13 (*f*) is a unilateral act on the part of the tenant done in the exercise of his right to put an end to the tenancy. It must therefore conform strictly to the requirements of the section and must be unambiguous in its terms. Even if the letter stood alone, it was a notice to vacate which was effective only in the event of *Munro's* obtaining new accommodation before the 31st of August. By no act of his did he deprive himself of the protection of the regulations. The order for possession should be set aside.

APPEAL by defendant from the order of LENNOX, Co. J. of the 26th of September, 1945, whereby he ordered the defendant

to deliver up possession of lot 16, block 748, D.L. 526 in the city of Vancouver to the plaintiff, the landlord of said premises. One Mitton was the original owner of the property and the defendant *Munro* was his tenant on a monthly basis. They had entered into an oral agreement whereby *Munro* agreed to waive the requirements of the Wartime Prices and Trade Board regulations as to notice to vacate in consideration of Mitton assisting him to locate other premises for himself and family in Vancouver and paying his moving expenses. In the course of the plaintiff Cook's negotiations to purchase the property from Mitton, Cook asked *Munro* to put in writing the agreement he had entered into with Mitton in regard to vacating the premises and on March 28th, 1945, he wrote a letter to Cook concluding with the words

> I wish to confirm these arrangements and hereby advise you that I will vacate the said premises on or before August 31st, 1945 in consideration of Mr. Mitton assisting me to locate other premises in Vancouver and paying my moving expenses.

After further correspondence between the parties *Munro* being unable to find other premises for himself and family, maintained his notice to vacate was conditional upon his being able to obtain other premises and he remained in possession.

The appeal was argued at Vancouver on the 11th and 12th of December, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

McAlpine, K.C., for appellant: Cook purchased the property from Mitton on March 28th, 1945, when *Munro* was a tenant and previously there was an agreement between Mitton and *Munro* that *Munro* would waive the requirements of the Wartime Prices and Trade Board regulations as to notice to vacate if Mitton would find him another premises and pay his moving expenses. *Munro* could not get other premises so he would not leave. When Cook purchased, a new tenancy was created as the rent was fixed and the cost of care of the garden was agreed to by Cook paying $20 per month towards that expense. The purchaser is bound as to leases in force when the sale takes place: see *Taylor* v. *Stibbert* (1794), 2 Ves. 437; *Greenwood* v. *Bairstow* (1836), 5 L.J. Ch. 179; *Hunt* v. *Luck*, [1902] 1 Ch. 428.

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The waiver of the lessee was void under the regulations. There was not a notice to vacate because it was a conditional one: see *Farrance* v. *Elkington* (1811), 2 Camp. 591; *Gemeroy* v. *Proverbs*, [1924] 3 D.L.R. 579, at p. 582. Section 13 (*f*) of order 294 of the Wartime Prices and Trade Board requires termination by the notice on a stated date. Here the words are "on or before" and it is not a valid notice: see *Gardner* v. *Ingram* (1889), 6 T.L.R. 75; *Rowley* v. *Adams* (1943), 59 B.C. 36, at p. 38; *J. H. Munro Ltd.* v. *Vancouver Properties Ltd.* (1940), 55 B.C. 292; Williams on Landlord and Tenant, 2nd Ed., 568; *In re Sutherland* (1899), 12 Man. L.R. 543. Landlord and tenant matters are always construed strictly.

Bull, K.C., for respondent: As to the notice, all the Act requires is a demand and it does not matter if a mistake is made in dates so long as the tenant is not misled by it: see *Doe ex dem. Cox* v. *Roe* (1803), 4 Esp. 185; *Doe* v. *Spiller* (1807), 6 Esp. 70; *Doe dem. Armstrong* v. *Wilkinson* (1840), 12 A. & E. 743. The fault finding would come from the man who receives the notice, but here *Munro* finds fault with his own notice. When Cook bought, he became landlord and *Munro* was his tenant. On a certain contingency *Munro* was to vacate and the contingency was fulfilled. There was a binding agreement and section 33 of order 294 of the Wartime Prices and Trade Board does not apply. Neither was there a new tenancy. Under the agreement Mitton was to assist *Munro*. He did assist him, but he was unable to find other premises. If there was an obligation under the letter of March 28th, 1945, it was an obligation by Mitton and not by Cook.

McAlpine, in reply, referred to *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

Cur. adv. vult.

15th January, 1946.

O'HALLORAN, J.A.: Assuming (but without finding it necessary to so decide) that the learned judge had jurisdiction in other relevant aspects, his jurisdiction to make the impugned order for possession under the Landlord and Tenant Act, Cap. 143, R.S.B.C. 1936, depends upon whether a letter written on 28th March, 1945, by *Munro* the appellant tenant, to Cook the

respondent landlord, is "a written notice of his intention to vacate . . . on a stated date" within the meaning of section 13 (*f*) of order 294 of the Wartime Prices and Trade Board.

Before Cook came on the scene, *Munro* had what is described as a "gentleman's agreement" (*cf. Rose and Frank Co.* v. *J. R. Crompton & Bros., Ld.*, [1925] A.C. 445) with the then owner Mitton, whereunder he had agreed to waive the requirements of the Wartime Prices and Trade Board regarding notice to vacate, if Mitton would find him another suitable house and pay his moving expenses. In the course of buying the property from Mitton, Cook asked *Munro* to confirm that arrangement. When *Munro* did so, Cook asked him to put it in writing. *Munro* said "it would have to be worded carefully," and that afternoon wrote the letter of 28th March. In referring therein to his arrangement with Mitton he said:

> . . . I wish to confirm these arrangements and hereby advise you that I will vacate the said premises on or before August 31st, 1945 in consideration of Mr. Mitton assisting me to locate other premises in Vancouver and paying my moving expenses.

With respect, I am able to extract one meaning, and one meaning only from that letter, *viz.*, that *Munro* would waive his legal rights and vacate if he found another suitable house by the end of August and his moving expenses were paid. If *Munro* was to surrender his legal right to remain in possession, he would naturally demand a consideration which would protect him at least from the embarrassing situation of having no suitable place to house his family. But Cook, in acknowledging *Munro's* letter on 29th March, sought to construe it as an unequivocal and unqualified notice of intention to vacate at the end of August. Cook has persisted in that view despite *Munro* pointing out his error in letters of 4th and 6th April as well as in subsequent correspondence. In his letter of 4th April *Munro* said in part:

> . . . while I am anxious to co-operate in assisting you to take possession, I naturally would not waive my legal position if it meant moving my family into the street, all of which I made clear to you when you visited me in my office on March 28th. [*viz.*, the morning before the letter of 28th March was written.]

Cook took a firm stand, with which the learned judge agreed, that the reference in the letter of 28th March to the arrangement with Mitton was something between *Munro* and Mitton which

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did not concern him, and hence he expected *Munro* to vacate peremptorily not later than 31st August. I find the utmost difficulty in appreciating the force of that submission. Should A tell B he will meet him at the Court House at 3 p.m. if the garageman C will have his motor-car ready, surely B must realize that A's promise to meet him at 3 p.m. must be subject to the condition precedent that C has A's car ready in time. To my mind, this example brings into clear relief the fallacy which I think pervades the respondent's submission. It seems to me it ought to have been plain to Cook from the letter of 28th March, that *Munro's* willingness to vacate on 31st August was necessarily subject to the prior performance of certain essential conditions by Mitton. Cook ought to have known *Munro* could not vacate if these conditions were not first performed, just as in the illustration given above, B would know that A could not meet him at 3 p.m. if C did not have his car ready.

The evidence discloses that *Munro* made reasonable but unsuccessful efforts to find another suitable house and also that Mitton was unsuccessful in doing so and in consequence did not pay *Munro's* moving expenses. I am fully satisfied that *Munro's* notice of willingness to vacate by the end of August as contained in his quoted letter of 28th March was plainly conditioned upon the prior happening of two events, *viz.*, finding another suitable house and payment of his moving expenses. Since these events failed to materialize by the end of August, his notice of willingness to vacate naturally lapsed. For these reasons it is my judgment that the letter of 28th March was not a "written notice of an intention to vacate on a stated date" within section 13 (*f*) of Wartime Prices and Trade Board order 294. Hence I must conclude the order for possession was made without jurisdiction.

I would quash the order appealed from and allow the appeal accordingly.

ROBERTSON, J.A.: Mitton, the original owner of the premises in question, sold them to Cook on or prior to the 28th of March, 1945, the defendant *Munro* being then in occupation as a monthly tenant. Cook saw *Munro;* told him he had purchased the premises and asked him if there was a "gentleman's agreement"

between him and Mitton that in the event of Mitton having an opportunity to sell the property he would vacate if he was given a couple of months' notice. *Munro* said there was. Cook said it would be satisfactory to him if he would vacate some time in the early summer. Cook then asked him to "put it in writing." There was some talk about the expense of the garden, but this is of no importance, as *Munro* admits it had nothing to do with the matter.

The plaintiff Cook found it necessary to call *Munro* as a witness to prove the lease. His evidence in cross-examination was that Cook told him he had purchased the premises and would like to have an idea when he would vacate; that he understood he had a "gentleman's agreement" with regard to moving to some place else if "he could get located," that he, *Munro,* said he did have an agreement with Mitton, *viz.,* that if he would assist Mitton in selling the house and waiving the provisions of the Wartime Prices and Trade Board regulations as to notice to vacate, he would give him all he received over $10,500 and pay his moving expenses. He told Cook this arrangement "would stand with him." Cook then asked *Munro,* who was a solicitor, to give him a letter to that effect, and *Munro* said he "would have to think it over, and the letter would have to be worded carefully. That afternoon *Munro* gave Cook the letter of 28th March, 1945, as follows:

> Referring to the verbal arrangements I made some time ago with Mr. R. C. Mitten, when he advised me that he was anxious to sell the house I am occupying at 4511 Marguerite Avenue, Vancouver, B.C., and would be prepared to help me locate and compensate me for the expense of moving, if I would waive the requirements of the Wartime Prices and Trade Board regulations as to notice to vacate, etc., I wish to confirm these arrangements and hereby advise you that I will vacate the said premises on or before August 31st, 1945 in consideration of Mr. Mitten assisting me to locate other premises in Vancouver and paying my moving expenses.

After this some correspondence took place between the parties in which *Munro* maintained his notice to vacate was conditional on his obtaining other premises, and Cook, that it was absolute. It does not assist in the construction of the letter of 28th March, 1945.

Section 13, subsection (*f*) of order 294, later referred to, provides that a landlord may recover possession of the accommoda-

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tion in accordance with the law of the Province in which it is situated if the tenant has given to the landlord, after the making of the lease, for the accommodation but not as a term of the lease or a condition of obtaining it, a written notice of his intention to vacate the accommodation on a stated date, and has failed to so vacate.

It was objected that the notice was not good as it did not give notice of intention to vacate the accommodation "on a stated date," in that it stated the tenant would vacate on or before August 31st, 1945. This point is met by the decision of this Court in *Rowley* v. *Adams* (1943), 59 B.C. 36, at p. 38.

It is next submitted that the waiver provision in the letter was null and void because of section 33 of order 294 of the Wartime Prices and Trade Board, which reads as follows, *viz.*:

> 33. Any agreement in a lease under which the tenant agrees to waive any of his rights under this Order shall be null and void.

It is doubtful whether section 33 applies to anything not contained in the original lease, that is something agreed upon "after the making of the lease," otherwise the tenant could not lawfully give a notice to vacate under subsection (*f*) *supra;* but apart from this, it would seem that the arrangement as between Mitton and Moore being a "gentleman's agreement" was not of any legal force. See *Rose and Frank Co.* v. *J. R. Crompton & Bros., Ld.*, [1925] A.C. 445; *Jones* v. *Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626; *Appleson* v. *Littlewood, Ltd.*, [1939] 1 All E.R. 464. I shall therefore assume such an agreement was null and void. But it was between Mitton and *Munro*.

There is no agreement between Cook and *Munro* in the letter. Cook was not interested in any arrangement made between Mitton and *Munro*. All he wished to know was when *Munro* would vacate.

Before *Munro* wrote the letter of the 28th of March, 1945, he had a conversation with Mitton in which Mitton agreed to help him locate another place and to pay $200 for his costs of moving. Evidently *Munro* relied upon this. Cook didn't know what their arrangement was except as disclosed in the letter. Further, it is to be noticed that the date for vacating was over five months from the 28th of March, indicating that *Munro* was giving himself lots of time in which to find another place. If he had intended

to make his notice to vacate conditional on his getting another house he might easily have said so, and need not have mentioned any date. In my opinion there is nothing in the letter to show his vacating was conditional. I therefore think that *Munro's* notice of intention to vacate was for a stated date and as he failed to do so, the plaintiff is entitled under section 13 to the order which the learned judge made.

In my opinion the appeal should be dismissed with costs.

SIDNEY SMITH, J.A.: I think, with respect, that this appeal must be allowed. The question at issue turns upon what is the fair and reasonable construction that should be placed upon a single letter, to which reference will be made shortly.

The facts are of the simplest. One, Mitton, owned a house in Vancouver and had as the tenant thereof the defendant *Munro* on a monthly basis. Mitton sold the house to the plaintiff Cook, who thereupon, on the 28th of March, 1945, conferred with *Munro* as to his vacating the premises. There was some mention of a "gentlemen's agreement" which *Munro* had with Mitton, the terms of which we have in Mitton's own words as follows:

When Mr. Cook bought the place from me I went to Mr. *Munro* and told him I had the place sold providing he would move, and I said, "Is there any reason why you can't move?" and he said, "Well, if I could get a house, I would move," and I said, "Under those circumstances, Mr. *Munro*"—I have known Mr. *Munro* for a long time and we are very good friends—I said, "If it would be any inducement to you to move, it is worth to me $200 for you to move, so as Mr. Cook can get possession of the house." "Well," he said, "if I can find a place to move to, I will accept that proposition. Will you help me to get one?" I said, "Yes, I will do the best I can."

It was in this atmosphere that the letter of 28th March, 1945, was written by *Munro* at the request of Cook. It is in these words: [already set out in the judgment of ROBERTSON, J.A.].

This is not a very happily phrased letter. It is indeed couched in language singularly inapt for the purpose in hand. The language however must be read as a whole. One may not pluck out one phrase and ignore the context. And whatever that language taken as a whole may mean, I am satisfied that it does not mean an absolute undertaking on the part of *Munro* to vacate the premises "on or before August 31st, 1945." Such an undertaking Cook had to have to enable him to obtain possession of the

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house. This flows from the provisions of order 294 of the War-time Prices and Trade Board, of which the appropriate parts are as follows:

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 (*f*) has given to the landlord, after the making of the lease for the accommodation but not as a term of the lease or a condition of obtaining it, a written notice of his intention to vacate the accommodation on a stated date and has failed to so vacate;

33. Any agreement in a lease under which the tenant agrees to waive any of his rights under this Order shall be null and void.

The notice to vacate referred to in section 13 (*f*) is a unilateral act on the part of the tenant, done in the exercise of his right to put an end to the tenancy. It must therefore conform strictly to the requirements of the section and must be unambiguous in its terms. Even if the letter stood alone, I would hold that it was a notice to vacate which was to be effective only in the event of *Munro's* obtaining new accommodation before the 31st of August. When read in the light of the surrounding circumstances and of the correspondence that ensued between the parties (in which *Munro,* from the moment it became apparent to him that Cook regarded the notice as absolute in its terms, firmly and consistently maintained that it was conditional only) there can, in my opinion, be no doubt that such was the intention of *Munro* at all relevant times. It seems to me that this is the only reasonable interpretation consonant with the realities of the situation. As *Munro* put it repeatedly, he had no intention of giving possession if his doing so meant "having to move his family into the street." By no act of his did he deprive himself of the protection of the regulations. (Compare *Brown* v. *Draper,* [1944] 1 All E.R. 246).

I am therefore of opinion that the appeal should be allowed and the order for possession set aside, with costs.

Appeal allowed, Robertson, J.A. dissenting.

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondent: *W. W. Walsh.*

WHALEN v. CARIBOO GREYHOUND LINES LIMITED.

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Jan. 16, 21.

Practice—Costs—Action for damages for negligence—Money paid into Court —Acceptance of in satisfaction—Plaintiff to pay defendant's costs after payment in—Rules 255, 259 and 261.

In an action for damages for injuries caused by the defendant's negligence, the writ was issued and the statement of claim delivered on June 6th, 1945. An appearance was entered and a defence denying negligence and liability delivered on September 14th. No reply was delivered within ten days. On October 22nd defendant's solicitor wrote plaintiff's solicitor admitting liability to be assessed at trial and stating he proposed to amend at the trial making this admission. The plaintiff's solicitor assented. The plaintiff set the action down for trial on November 1st, 1945. On November 30th the defendant gave notice of motion for leave to amend his defence by admitting negligence and liability and for leave to pay into Court $2,079.01 in satisfaction of the plaintiff's claim. The motion was granted. On December 8th an amended defence was delivered and said sum was paid into Court. No reply was delivered. On January 14th the plaintiff's solicitor notified the defendant's solicitor by telephone that he intended to accept the sum paid into Court in satisfaction of his client's claim and on January 15th served him with notice to this effect. On the trial on January 16th, plaintiff's counsel claimed the right to payment out of the money in Court and to all his costs to be taxed. Counsel for the defendant conceded plaintiff's costs up to the time of payment into Court, but not thereafter and that the defendant should be given his costs thereafter.

Held, that the plaintiff will have all costs up to the payment into Court. Neither side will recover any costs incurred during the period from December 8th to December 17th allowed to the plaintiff to make his decision whether or not he should accept the sum paid in. From that date on, the plaintiff, who has conceded that the defendant is right on the issue of *quantum* must pay the defendant's costs.

APPLICATION for payment out of moneys paid into Court by the defendant in an action for damages resulting from the alleged negligence of the defendant and for settlement of the costs of the action. Heard by WILSON, J. at Vancouver on the 16th of January, 1946.

Sears, for plaintiff.
Tysoe, for defendant.

Cur. adv. vult.

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WHALEN v. CARIBOO GREYHOUND LINES LTD.

21st January, 1946.

WILSON, J.: This is an action for damages for injuries caused by the defendant's negligence. The writ was issued and the statement of claim delivered on June 6th, 1945. An appearance was entered on June 26th, and a defence, denying negligence and liability, delivered on September 14th. No reply was delivered within ten days, the time limited by rule 276, so that the pleadings may be said to have been closed on September 25th, pursuant to rule 302. On October 22nd, the defendant's solicitor wrote the plaintiff's solicitor admitting liability, to be assessed at the trial, and stating that he proposed to amend at the trial, making this admission. The plaintiff's solicitor assented. The plaintiff then, on November 1st, 1945, set the action down for trial. On November 30th, the defendant, having thought better of and abandoned his previous intention to amend at the trial, gave notice of a motion for leave to amend his defence by admitting negligence and liability, and for leave to pay into Court $2,079.01, by way of satisfaction of the plaintiff's claim. On the return of the motion, the Chamber judge granted the order asked for. Thereafter an amended defence was delivered on December 8th, 1945, and the sum of $2,079.01 was paid into Court. The time for reply to this amended defence, which must be taken to have reopened the pleadings, expired on December 17th, 1945, as provided by rule 309.

On January 14th, the plaintiff's solicitor notified the defendant's solicitor by telephone that he intended to accept the sum paid into Court in satisfaction of his client's claim, and on January 15th served him with written notice to this effect. The matter was on the trial list for January 16th, 1946, and counsel for both parties appeared. Counsel for the plaintiff took the stand that he was entitled to payment out of the moneys in Court and to all his costs to be taxed. Counsel for the defendant conceded the right to costs up to date of payment into Court, but denied plaintiff's right to costs thereafter and says that defendant should be given his costs thereafter.

The applicable part of rule 255 reads as follows:

Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court or a Judge, pay into Court a sum of money by way

of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made;

The payment into Court herein was made under this rule by leave of a judge.

Rule 259 says this in part:

(*b.*) When the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into Court is made is not denied in the defence; . . . the money paid into Court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a Judge shall otherwise order.

Rule 261 reads as follows:

The plaintiff, when payment into Court is made before delivery of defence, may within seven days after the receipt of notice of such payment, or when such payment is first signified in a defence, may, before reply, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the Form No. 4 in Appendix B, and shall be at liberty, in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the Court or a Judge shall otherwise order, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed.

Where there is, as there was here, a payment into Court with the defence under rule 255, the plaintiff may under rule 261, without leave, at any time before reply take the money out of Court and tax his costs and his right to do so is absolute (rule 259).

In this case no reply was delivered, and the plaintiff contends that, such being the case, he retained an absolute right to take the money out of Court at any time, and thereafter, under rule 261, to tax his costs, which costs, he says, must be taxed up to the date he took the money out.

I do not agree with this contention which, it appears to me, would lead to an inequitable result. I think that the words "before reply" must be read as including, or implying "before the expiration of the time limited for reply." The plaintiff's right to deliver a reply expired on December 17th, 1945, and he has secured no order extending the time. I think that his absolute right under rules 259 and 261 to payment out of the money in Court and the costs expired at that time, and that he can now only have payment out by order and on terms.

In arriving at this conclusion I am not ignoring the fact that

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the English rule, formerly the same as ours, has now been amended by adding, in rule 261, after "may before reply" the words "or, where no reply is ordered, within ten days from delivery of defence or the last of the defences." These words, as plaintiff's counsel points out, must have been considered necessary, but the fact that the English rules have been amended and clarified does not, I think, deprive me of the right to interpret our rule in a way which will avoid injustice. To hold that a plaintiff, after payment of moneys into Court, may continue to pile up costs until the eve of trial, is to leave an avenue open to injustice, and the interpretation to be followed, if the rule will bear it, is that which prevents injustice.

In this connection, I would refer to *Greaves* v. *Fleming* (1879), 4 Q.B.D. 226, where a Divisional Court, under rather similar circumstances, and under a similar rule, gave the plaintiff all the costs of the action.

The argument here is, of course, as to costs, and there are three periods to be considered. There is first the period up to payment into Court on December 8th. It is conceded that the plaintiff is entitled to all his costs up to that date. There is next the period of eight days between December 8th and December 17th, during which the plaintiff was allowed by rule 261 to make up his mind whether or not he should accept the sum paid in. It has been held by the English Court of Appeal in *Lomer* v. *Waters,* [1898] 2 Q.B. 326, at a time when the English rule was, as it is not now, the same as ours, that a plaintiff is entitled to recover the costs incurred by him during this period of consideration. But it is to be noted that in that case the plaintiff had complied with rule 261 by taking the money out of Court during the time allowed. Here he has not done so, and has no absolute right to costs under rule 261.

The plaintiff carried the action on up to the eve of trial. The defendant has continued to incur costs in preparation for trial. The plaintiff now, at the last moment, says that he does not want a trial but wants payment out of the amount in Court.

Since we are, unfortunately, without the discretionary powers English judges have in regard to costs, I feel that I can only rely on rule 1 of Order LXV., which says that costs must follow the

event, and on rule 2 of the same Order, which says that when there are several issues costs shall follow the event of each issue. Here the issue of liability was conceded by the defendant, and the plaintiff will have all costs up to payment into Court. Neither side will recover any costs incurred during the period from December 8th to December 17th allowed to the plaintiff to make his decision. From that date on, the plaintiff, who has conceded that the defendant is right on the issue of *quantum*, must pay the defendant's costs. The bills will be taxed and set off, and any balance due the defendant may be deducted from the amount in Court. Thereafter the remaining moneys in Court will be paid out to the plaintiff. Defendant's costs will not include costs of the day on trial; the argument before me will be treated as what it was—an application for payment out with an argument as to costs.

Order accordingly.

REX v. YATES.

Criminal law—Indecent assault—Identity of the accused—Uncorroborated evidence of ten-year-old child—Alibi—Charge—Misdirection—Appeal—Conviction quashed.

On the afternoon of the 12th of May, 1945, a girl, ten years of age, was the subject of an indecent assault in a motor-car driven by her assailant. The infant complainant was the only witness who gave evidence as to the identity of the man who assaulted her. She had not known him previously. On arriving home after the assault she described what took place to her mother who at once reported to the police. The girl stated in evidence that on June 20th following, over five weeks later, she recognized as her assailant the accused who was then sitting in a motor-car parked on a street in the city. She took the licence number of the car and the police then traced the accused as an employee at the shipyards. The next day the girl was taken to the shipyards where she identified the accused among a group of workmen when leaving the shipyards as the man who assaulted her. In her evidence the girl's description of her assailant was limited to that of "a young man with a low cut moustache" and she was unable to describe his features, characteristics or clothes. In support of an *alibi* the evidence of accused was that on the afternoon in question he took his car to a gas station where he

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installed a fan-belt, put his car on the hoist where he made incidental repairs, taking him most of the afternoon and then went home. In this he was supported by the evidence of the operator of the gas station and of his wife and a friend who saw him there. The accused was convicted.

Held, on appeal, reversing the conviction by COADY, J., that the evidence of the child was weak and barren of detail when there was ample opportunity for observation of the man and in the charge there was not that "detailed clear and careful" putting of the facts of identification and caution of the danger of founding a conviction thereon. Further there was misdirection when the jury were told that the child's mother had sworn on the trial that the child, when complaining of the assault, had said that the man's hair was brown. In fact the record discloses the mother said at the trial that she did not remember any reference being made to the man's hair. The case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty and in the recited circumstances a verdict of acquittal should be entered.

APPEAL by accused from his conviction before COADY, J. and the verdict of a jury at the Fall Assize at Victoria on the 27th of November, 1945, on a charge of unlawfully and indecently assaulting Sonia Slusarenko, a female. The facts are set out in the reasons for judgment.

The appeal was argued at Victoria on the 24th, 25th and 28th of January, 1946, before O'HALLORAN, ROBERTSON and BIRD, JJ.A.

Davey, K.C. (*Sinclair Elliott,* with him), for appellant: The girl Sonia, who was 11 years old, was indecently assaulted on the afternoon of May 12th, 1945. The defence is supported by an *alibi*. We say the verdict was unreasonable and there was non-direction amounting to misdirection on the facts. The girl did not see him again until June 20th, 1945, over five weeks after the alleged offence. Her evidence is uncorroborated. The accused had a good character and was married three months prior to the alleged offence: see *Rex* v. *Dent* (1943), 29 Cr. App. R. 120; *Rex* v. *Lee Fong Shee* (1933), 47 B.C. 205; *Rex* v. *Hayduk,* [1935] 2 W.W.R. 513. On the question of identification see *Rex* v. *Parker* (1911), 6 Cr. App. R. 285; *Rex* v. *J.*, [1929] 1 W.W.R. 625. The identity of accused has not been proved and the evidence of the girl not corroborated. There is absence of particularity: see *Rex* v. *Powell* (1919), 27 B.C. 252. There was misdirection to the jury in relation to the girl's evidence of

identity: see *Rex* v. *Hughes, Petryk, Billamy and Berrigan* (1942), 57 B.C. 521, at p. 541; *Rex* v. *Bundy* (1910), 5 Cr. App. R. 270, at p. 273. On when the Court will review the finding of the jury see *The King* v. *George Hubley* (1925), 58 N.S.R. 113; *The King* v. *M.* (1926), *ib.* 512. When it is obviously wrong and cannot be supported by the evidence see *Rex* v. *Jones* (1934), 49 B.C. 537. That it is unsafe to convict without corroboration see *Rex* v. *Barnes* (1942), 28 Cr. App. R. 141, at p. 142. Under section 1014 (*a*) of the Code the Court should find the verdict unreasonable, having regard to the evidence.

Harvey, K.C., for the Crown: The jury may find accused guilty on the uncorroborated evidence of the girl. In fact there was corroboration: see *Rex* v. *Pegelo* (1934), 48 B.C. 146, at p. 147. Her evidence was reasonable and supported sufficiently to establish the verdict as reasonable. There was no substantial wrong or miscarriage under section 1014 (*b*) of the Code. The *Jones* case [*supra*] does not apply here and has nothing to do with the jury's finding. As to reversing the decision below see *Reg.* v. *Boyes* (1861), 1 B. & S. 311; *Peterson* v. *Regem* (1917), 55 S.C.R. 115, at p. 119; *Rex* v. *Steele* (1923), 33 B.C. 197; *Rex* v. *Canning,* 52 B.C. 93 and on appeal [1937] S.C.R. 421. The Court would be retrying the case to allow the appeal: see *Rex* v. *McNair* (1909), 2 Cr. App. R. 2; *Rex* v. *Graham* (1910), 4 Cr. App. R. 218. The demeanour of witnesses is within the province of the jury exclusively: see *Rex* v. *Gaskell* (1912), 8 Cr. App. R. 103; *Rex* v. *Smith* (1914), 10 Cr. App. R. 232; *Rex* v. *Perfect* (1917), 12 Cr. App. R. 273; *Rex* v. *De Bruge* (1924), 55 O.L.R. 507. As to quashing a conviction see *Rex* v. *Fialka* (1934), 62 Can. C.C. 389. That corroboration is not required see *Hubin* v. *Regem,* [1927] S.C.R. 442. There is additional evidence that adds to the credibility of the girl's evidence: see *Rex* v. *Westgate* (1944), 52 Man. L.R. 161; *Rex* v. *Dobchuk,* [1944] 2 W.W.R. 319; *Rex* v. *Hall (No. 1)* (1943), 81 Can. C.C. 31.

Cur. adv. vult.

29th January, 1946.

O'HALLORAN, J.A.: At the last Victoria Assize the appellant

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was convicted of an indecent assault upon an 11-year-old girl and sentenced to 18 months' imprisonment. The appeal hinges on his identification and the manner in which the learned trial judge put that question to the jury. In my judgment the conviction cannot stand owing to misdirection of fact as well as non-direction amounting to misdirection in law and fact (*cf. Rex* v. *Vassilerva* (1911), 6 Cr. App. R. 228, at p. 231), both these objections relating to matters calculated to mislead the jury and to influence their minds prejudicially against the case of the appellant.

The misdirection of fact lies in the learned judge's instruction to the jury, that at the trial, the mother had testified her little girl told her almost immediately after the assault, that her assailant's hair was brown. The mother when examined at the trial regarding the evidence she had given at the preliminary inquiry, said "I don't remember the mention about the hair." The little girl herself testified at the trial that she saw her assailant's hair but did not remember its colour. On cross-examination she said she identified him by "his face," and when pressed to say in what way, she explained it was because he "looked young and had a moustache cut low" like the appellant. She could not remember the colour of his hair or his moustache, nor could she remember any other characteristics by which he could be identified. It appears beyond doubt, that in directing the jury as he did, the learned judge implanted in their minds an additional characteristic of "sameness" between the appellant and the girl's assailant, which was not brought out at the trial and which could react only to his prejudice.

The second objection to the learned judge's charge is even more serious. It concerns more than one aspect in which the weaknesses in the case for the prosecution were not brought out. It is true the jury were told identification was for them to decide. But they ought to have been warned of the danger of accepting as proof of identity such a vague general description as "young with a low cut moustache." With respect, the learned judge ought to have told the jury that such testimony, standing alone, could furnish nothing to distinguish the appellant from dozens of other men who easily fit that general description, and that,

standing alone, it was too weak and indefinite to establish any characteristic or combination of traits by which an individual may be recognized and his identity proven. In my judgment the jury were inadequately instructed upon that crucial aspect of the case involving the character and the weight of the little girl's evidence relating to the physical description of her assailant.

The learned judge did tell the jury the general rule that although a jury may convict without corroboration of the sworn evidence of a child of tender years if they believe it, yet it is unsafe to do so. He told them in particular that they were not prevented from acting on the little girl's evidence without corroboration. In my judgment the latter instruction while true as a general rule, was inadequate when baldly stated as it was, without the explanations and limitations which the peculiar circumstances of this case required to be carefully placed before the jury, if they were to be fully apprised of the strength of the case for the defence. As already explained, the little girl's physical description of her assailant, standing alone, was not evidence by which anyone could be identified. In this case, something more than that physical description was required, if identification was to be proven.

Again, the objection to the charge may be upheld on a wider ground, for if there was uncertainty in the learned judge's mind whether a person could be identified by that physical description standing alone, yet if he was disposed to regard it as "some evidence" of identification, he ought with respect, in justice to the appellant, to have pointed to the flimsy nature of that physical description as evidencing the double danger of acting upon it without corroboration, and at the same time, to have related to it the principle of reasonable doubt. The indefinite and inconclusive nature of the physical description furnished an additional reason in this case, to explain to the jury in a way they could not fail to appreciate, why it was particularly dangerous here to convict without corroboration of the little girl's story.

The force of what has just been said may appear in bolder relief, if we assume for a moment that identification by the physical description under review had been made, not by the little girl, but by an adult person. In that event, *viz.*, when the sole defence as here is an *alibi*, and the identification depends

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upon the evidence of a single witness, it is the duty of the trial judge to deal carefully in his charge with the evidence relating to the identification, and to draw the attention of the jury to the weaknesses in that evidence and to warn them that such evidence must be weighed with the greatest care—*cf. Rex* v. *Phillips* (1924), 18 Cr. App. R. 151, and see also *Rex* v. *Bundy* (1910), 5 Cr. App. R. 270; *Rex* v. *Finch* (1916), 12 Cr. App. R. 77 and *Rex* v. *Millichamp* (1921), 16 Cr. App. R. 83. The necessity for that course arises out of the opportunity for honest mistake peculiar to cases of identity and *cf.* Wills on Circumstantial Evidence, 7th Ed., p. 192 *et seq.*

Reading the charge as a whole, I must conclude the foregoing essential aspects of the appellant's defence were not present in the mind of the learned judge; or if they were present he failed to make them unmistakably clear to the jury. As Sir Lyman Duff, C.J. put it in *Markadonis* v. *Regem,* [1935] S.C.R. 657, at p. 662, the considerations weighing in favour of the accused were by no means brought out with their full effect. Quoted also as *apropos* in this observation in *Rex* v. *Hughes, Petryk, Billamy and Berrigan* (1942), 57 B.C. 521, at pp. 541-2:

> The jury have a right to expect from the judge something more than a mere repetition of the evidence. They have a right to expect that his trained legal mind will employ itself in stripping the testimony of non-essentials, and in presenting the evidence to them in its proper relation to the matters requiring factual decision, and directed also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permits.

In the view I am driven to take, this is not a case for a new trial, but a verdict of acquittal ought to be entered, since the evidence upon a proper charge could not be reconciled with any other verdict. Reverting to the evidence of physical description ("young with low cut moustache"), it cannot identify, because it lacks enough elements to show "sameness." There is no evidence whatever of (for example), voice, height, size, cast of countenance, complexion, physique, jaws, nose, eyes, forehead, carriage, colour of eyes and hair or otherwise (and *cf. Rex* v. *Minichello* (1939), 54 B.C. 294, at p. 296) of the assailant by which a positive declaration "this is he" can withstand reasoned scrutiny.

The little girl did not see her assailant before he picked her up in a motor-car in which the assault occurred, and she did not pick out the appellant until she saw him (unobserved by him) six weeks later sitting in a motor-car. It is almost axiomatic that it would be impossible for her to identify her assailant six weeks later unless she then remembered enough of his physical traits to justify her being able to say he was the same man, and *cf.* the observations of Mr. Justice Oliver Wendell Holmes speaking for the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Kennedy* (1897), 48 N.E. 770, at p. 772, and applied by the Supreme Court of Wisconsin in *Roszczyniala* v. *State* (1905), 104 N.W. 113, at p. 114. But the only traits she could remember were that he was "young with a low cut moustache," and that description can apply as easily to hundreds of men to be seen on the streets of Victoria.

It may be advisable to quote the apposite evidence:

Elliott: But you can remember that it was this man? Yes.

Now, Sonia, do you say it was this man or just a man that looked like the man who picked you up? That is the man who picked me up.

How can you be absolutely sure if you can't remember how he was dressed? I can tell by his face.

You can't remember whether he had a hat or a cap on but still you can tell by his face? Yes.

Why can you tell by his face? When he picked me up he had whiskers on, the kind he has now and he looked kind of young with a moustache and he looked kind of young.

Could you see his hair? Yes, I seen his hair but I don't remember what colour it was or how it looked.

Did you see the top of his head? Yes.

Then he didn't have a hat on? No, I don't think he had a hat on when I seen him at the Pantorium Dry Cleaners, the next time I seen him.

What colour do you describe his moustache? I don't remember what colour.

You can't say whether it was dark or brown? No, but I remember it was cut low.

Can you remember the man who picked you up the colour of his hair? No.

Do you remember that he was a young man? Yes.

And any other reasons now that make you feel sure that this was the man? No, I don't think so.

Just because he was a young man, that he had a moustache cut low like this man? Yes.

Did you have very long with him when you were riding with him at the time of the assault, were you very long with him? Quite long, about——

Were you——

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Harvey: I think the witness was going to add something.

THE COURT: Were you going to say anything else? You said you were quite long? I was going to say about an hour and fifteen or twenty minutes, no more than that.

It is difficult to understand why after more than an hour in his company the girl was able to remember so little about him. From the evidence it would not appear that she is below the average of intelligence or in powers of observation. Nor is there anything to indicate that she suffered "stage-fright" on the witness stand.

While it must be manifest such evidence standing alone cannot identify, it does not mean that a statement "that is the man," is not evidence of identification. But if on cross-examination it is broken down as it is here, to the point where no objective facts remain from which "sameness" may be legitimately inferred, then it loses all qualities of identification and *cf. Commonwealth* v. *Kennedy, supra,* at p. 772. For a description which fits 50 men equally, can identify no one of them. If the objective facts available here only through sensory perception do not exist, then no trustworthiness may be attached in this case to solemn asseverations of identification such as "I am positive that is the man."

It is not questioned that although a physical description may not in itself contain enough elements to identify, nevertheless when connected with other incidents bearing more or less directly on the case, including conduct of an incriminatory character, there may arise such a network of inculpatory circumstances, that the cumulative effect establishes identification with a convincing degree of practical certainty *(identitas vera colligitur ex multitudine signorum)* and *cf.* for example *Craig* v. *State* (1908), 86 N.E. 397 (Supreme Court of Indiana), and *Thomas* v. *Commonwealth* (1907), 56 S.E. 705 (Supreme Court of Appeals of Virginia).

There is no evidence here of conduct of an incriminatory character. Nor did the little girl identify the appellant's motor-car as the one in which the assault took place. Counsel for the Crown conceded at the trial, that it was no part of the prosecution's case that the accused was in his car at the time of the

assault, or that the Crown could identify the car in which the assault took place.

But counsel for the Crown sought to strengthen the evidence of identity and connect the appellant with the crime, by advancing what he submitted was corroborative circumstantial evidence relating to a lunch pail and several pennants which the little girl said were in the back of the car in which she was assaulted. The appellant testified he did not have his lunch pail in his car on the day the little girl said the assault took place. The lunch pail was not identified as his or even remotely connected with him. Hence it cannot relate to his identity and cannot be corroborative of the little girl's story—*cf. Hubin* v. *Regem*, [1927] S.C.R. 442. The appellant admitted he had quite a number of pennants and several flags in his car on the day in question—which was only a few days after the V.E. day celebrations. The little girl testified she saw no flags but did see several pennants, and explained the distinction between the two.

Crown counsel relied strongly on the appellant's admission that he had pennants in the back of his car, and submitted it was corroborative in that it was independent of the little girl's evidence and tended to connect the appellant with the crime. He urged that it came within *Rex* v. *Richmond* (1945), 61 B.C. 420, at p. 424 where it was said (with a cautionary warning regarding the peculiar circumstances there under review), that corroboration might be found in that case in the little girl's detailed description of the furniture in rooms in the house of the accused when contrasted with the latter's denial that he had shown her those rooms and the furniture therein. But difference in factual background distinguishes the *Richmond* case.

There is no evidence that the car used in the assault here belonged to the appellant, whereas the house in which the assault took place in the *Richmond* case admittedly belonged to the accused. The appellant's evidence regarding the pennants cannot connect his car with the crime, in the absence of evidence that his car was in that place at the time or was the car in which the assault took place, and *cf. Hubin* v. *Regem*, [1927] S.C.R. 442. But as already explained, the little girl could not identify

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the car, and the Crown conceded at the trial that it was no part of the prosecution's case that the appellant was in his own car when the assault took place. That implied acceptance by the Crown of what I think must be obvious in the circumstances, that the pennants in the appellant's car, were not necessarily the same pennants the little girl saw in the car in which she was assaulted. That means that the pennant evidence, even if it were consistent with the appellant's guilt, is also consistent with his innocence and hence in view of the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227, it cannot be corroborative.

For the foregoing reasons I am led to the conclusion that if the jury had been properly directed a verdict of acquittal must have resulted to avoid a miscarriage of justice under Code section 1014 (*c*). If the verdict of the jury appears to be unreasonable or without evidence to support it within the meaning of Code section 1014(*a*) then, in my judgment, it is because the jury were influenced prejudicially to the appellant's case by the fatal misdirections to which I have referred.

I would set aside the conviction and direct a verdict of acquittal to be entered. The appeal is allowed accordingly.

ROBERTSON, J.A.: The appellant was convicted of indecently assaulting a young girl, 11 years of age, in the afternoon (Saturday) of the 12th of May, 1945. She did not see again the man she alleges assaulted her until the 20th of June, when she says she saw him sitting in a motor-car in Victoria. She took the number of the car and communicated with the police and the next day she pointed him out to the police at Esquimalt, where he was employed. There was no corroboration of the girl's evidence. The accused gave evidence. He denied the whole story. He said that he was not working that afternoon and that for some hours prior to, and after the time of the alleged assault, he was at a garage making repairs to, and washing his car. His evidence was supported by other witnesses who saw him there. The jury were out just over an hour.

The appellant submits that his appeal should be allowed, pursuant to section 1014 (*a*) of the Code, which provides that on the hearing of an appeal against conviction the Court shall allow

the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported, having regard to the evidence.

The question of identification was the important issue. The girl had never seen the appellant prior to the 12th of May. Although she was with the man who assaulted her for over an hour in broad daylight her description of him was most meagre. She could not remember the colour of his hair or his eyes or any other feature which might enable him to be identified or to distinguish him from other men. She was only able to identify him by her recollection of his face and the fact that he was "young with a low cut moustache." Though such identification may, under certain circumstances, be considered satisfactory, I feel that it is not sufficient in the circumstances of this case, because of her youth, the time that elapsed between the assault and the next time she alleged she saw the appellant, *viz.*, 20th June, and more particularly because while in her evidence in chief, at the preliminary hearing, and also at the trial, she positively identified the appellant, yet under cross-examination at the preliminary hearing she was only "pretty sure" he was the man.

Then again on the question of identification the learned judge misdirected the jury in one important particular when he told them that the girl's mother had sworn that the girl when complaining to her of the assault, had described her assailant as having brown hair. The mother did not say this. The girl was unable to say what was the colour of the hair of the man who attacked her. Further in my opinion the learned judge did not instruct the jury sufficiently on the question of identification. There should have been a most complete and minute instruction. With deference, I thing the learned judge failed in this respect.

The evidence of *alibi* was very strong and in my opinion not broken down on cross-examination. The accused was a returned soldier and apparently of good character. He had been married only three months before the alleged assault. He was steadily employed. The learned judge gave the jury the usual instructions that it was dangerous to convict on the uncorroborated evidence of the girl although within their province to do so.

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"Every case must depend upon its own particular circumstances." See *Rex* v. *Rice* (1927), 20 Cr. App. R. 21, at p. 24. Apparently a jury's verdict should only be set aside under 1014 (*a*) where the circumstances are exceptional. In *Rex* v. *Dent* (1943), 29 Cr. App. R. 120 the accused had been found guilty of carnal knowledge and indecent assault in a case where there was no corroboration of the complainant's evidence. The jury had been properly warned by the judge of the danger of convicting without corroboration. In that case there was evidence upon which the jury could convict. The appellant had applied—*coram* Humphreys, Atkinson and Cassels, JJ.—for leave to appeal. In giving leave Cassels, J. said:

> This Court thinks that this is a matter which requires further consideration, and very serious consideration.

The appeal was heard by the Lord Chief Justice and Charles and Hallett, JJ. At p. 124 Hallett, J., who delivered the judgment of the Court, pointed out that:

> . . . Ordinarily speaking, there can be no doubt that, where the jury have been given proper warning, and notwithstanding that warning have convicted, the Court will not interfere; but it is sometimes advisable to go back beyond the decided cases to the Act of Parliament which constitutes this Court, and which is, after all, the final authority upon the principle which should guide this Court.

He then referred to that part of the Act which is practically the same as our 1014 (*a*) and then said:

> That is the direction to this Court in the statute by which it is constituted, that it shall allow the appeal if it thinks that the verdict of the jury should be set aside on either of those two grounds.

He then referred to what was said by the Lord Chief Justice in *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81, at p. 88 that

> . . . If after the proper caution by the judge, the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand, this Court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict "unreasonable," or that it "cannot be supported having regard to the evidence."

Hallett, J. then said (p. 125):

It is upon that principle that the Court proposes to act in the present case. The Court which heard the application for leave to appeal said that this matter required very careful consideration. Having given that consideration to this case, this Court does think that, notwithstanding that proper warning or advice given to the jury, the verdict of the jury on the exceptional circumstances of this case was unreasonable, and was a verdict which cannot be supported having regard to the evidence.

It is to be observed that in that case there was no question of identification.

In my opinion the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty. Therefore it is our duty to take the course indicated by the section of the Code, to which I have referred. See *Rex* v. *Wallace* (1931), 23 Cr. App. R. 32, at p. 35.

As I have said, the case must be exceptional in which the Court will exercise its power. I think this is one of those cases, for the reasons which I have mentioned.

As in my opinion a new trial would only result in a verdict of acquittal, I would quash the conviction and direct a judgment and verdict of acquittal to be entered.

BIRD, J.A.: This appeal is taken from the conviction of the appellant for an indecent assault upon a female child of about 11 years of age.

The assault is alleged to have taken place in a motor-car then operated by the child's assailant. The infant complainant was the only witness who gave evidence as to the identity of the man who assaulted her. She did not know, nor had she ever seen her assailant prior to the time of the commission of the alleged offence. She says that she was then in his company in the motor-car for a period in excess of one hour. She reported the incident on the same day to her mother, who at once complained to the police. Six weeks later this 11-year-old child assumed to recognize as her assailant the accused man who was then sitting in a motor-car parked on a city street. She then noted the licence number of the car by which means the police traced the accused to the shipyard where he was employed. On the day following her purported recognition of the accused as her assailant the complainant identified him among a group of workmen emerging from the shipyard premises as the man who had assaulted her

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six weeks before. The complainant was unable to describe either the features, characteristics or clothing of her assailant with that degree of particularity which in the circumstances might reasonably have been expected. Her description of him was limited to that of a young man with a low cut moustache.

Evidence of identification, particularly that of a young child, so weak and barren of detail, when there was ample opportunity for observation of the man, and particularly when it related to an incident so long past, in my opinion should be the subject of detailed and careful examination by the trial judge in his charge to the jury. These circumstances I think required specific directions to the jury as to the weakness of the evidence of identity, coupled with a pointed warning as to the danger of convicting on the testimony of one such witness. *Rex* v. *Phillips* (1924), 18 Cr. App. R. 151.

It is true that in his charge to the jury the learned judge referred in general terms to the evidence of identification and said that the question was one for determination by the jury but, with respect, there was not that "detailed, clear and careful" putting of "the facts of identification" and caution of the danger of founding a conviction thereon which was referred to with approval by MARTIN, then J.A., in *Rex* v. *Bagley* (1926), 37 B.C. 353, at p. 368. The lack of such examination, direction and warning in my opinion constitutes an omission calculated to mislead the jury and amounted to misdirection. *Rex* v. *Bagley, supra.*

Moreover, I think there was here misdirection in that the jury were told that the child's mother had sworn on the trial that the child when complaining of the assault upon her had said that the man's hair was brown. In fact, as the record discloses, the mother said at the trial that she did not remember any reference being made to the man's hair.

I think that in the recited circumstances a verdict of acquittal should be entered. If there had been directions as here indicated I am of opinion that a jury, acting reasonably, must have found the accused not guilty.

I would therefore allow the appeal and set aside the conviction.

Appeal allowed.

IN RE ESTATE OF GEORGINA HALE, DECEASED.

S. C.
In Chambers
Coady, J.
1945
Dec. 4, 19.

Practice — Letters of administration — Application for — Letters probate previously granted in England—Effect on application—R.S.B.C. 1936, Cap. 226, Sec. 4—Probate rule 65.

On an application for a grant of letters of administration with will annexed to an attorney named by the executors of the estate, letters probate of which estate had been granted to the said executors in England, it was held that section 4 of the Probates Recognition Act is permissive only and not mandatory. It is intended to provide executors appointed in jurisdictions to which the Act applies a more convenient procedure for dealing with the British Columbia estate if they wish to adopt it. If, however, they prefer to proceed as they could have done before the Act came into force, they may in their discretion do so. The application is granted.

APPLICATION for a grant of letters of administration with will annexed to an attorney named by the executors of the estate, letters probate of which estate had been granted to the said executors in England. Heard by COADY, J. in Chambers at Victoria on the 4th of December, 1945.

Maclean, K.C., for the application.

Cur. adv. vult.

19th December, 1945.

COADY, J.: This is an application for a grant of letters of administration with will annexed to an attorney named by the executors of the estate, letters probate of which estate had been granted to the said executors in England. The only question here is whether such grant can be made or must the application be for resealing of the English probate under the provisions of the Probates Recognition Act. Rule 65 of our Probate Rules would seem to make it obligatory for the executors to apply for resealing. Section 4 of the Probates Recognition Act, however, reads as follows:

Where the Court of Probate in the United Kingdom or in any British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, the Court of Probate in this Province, be sealed with the seal of that Court. . . .

S. C.
In Chambers
1945

IN RE ESTATE OF GEORGINA HALE, DECEASED

Coady, J.

I am of the opinion that the Act is permissive only, and not mandatory. It is intended, I think, to provide executors appointed in jurisdictions to which the Act applies, a more convenient procedure for dealing with the British Columbia estate if they wish to adopt it. If, however, they do not, but prefer to proceed as they could have done before the Act came into force, then it seems to me they may in their discretion do so.

The Act, it seems to me, grants a power which may or may not be exercised in the discretion of the donee of that power, but imposes no positive or absolute duty. In Maxwell on the Interpretation of Statutes, 6th Ed., 437, it is stated:

> In cases in which the donee of the power has only his own interests or convenience to consult, and word "may" is plainly permissive only, and a mere privilege or licence is conferred which he may exercise or not, at pleasure.

Under our rules the executors to whom probate has been granted, in jurisdictions to which the Act does not apply, can make application by an attorney for letters of administration with will annexed of the estate of the deceased situate in British Columbia. Should such jurisdictions receive recognition under the Act, then the executors may apply for resealing, but the former right which they had is not taken away. If it is still more convenient for them in the handling of the British Columbia estate of the deceased, and it is so urged in the present case, to appoint an attorney to apply for letters of administration with will annexed, I can see no reason why that cannot be done. There will therefore be an order for letters of administration with the will annexed, as asked.

Application granted.

GORDON PETER GARD, AN INFANT SUING BY HIS NEXT FRIEND, AUGUSTINE GARD, AND THE SAID AUGUSTINE GARD v. THE BOARD OF SCHOOL TRUSTEES OF THE CITY OF DUNCAN (CONSOLIDATED) SCHOOL DISTRICT, AND THE TRUSTEES THEREOF.

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Negligence—Damages—School children playing grass hockey—Injury to player—Whether dangerous game for children—Necessity of supervision—Liability of education authority—Public Schools Act, R.S.B.C. 1936, Cap. 253, Sec. 133.

On the 22nd of September, 1941, at about 3.30 in the afternoon the infant plaintiff, being a pupil at a public school under the jurisdiction of the defendants at Duncan, B.C., was hit in the eye by a hockey stick in the hands of another pupil when playing a pick-up game of grass hockey on the playground of the school premises. The boys were 11 years old. After school was over the children went to the teacher in charge of the game, Miss Burne, and asked permission to be allowed to play the game that afternoon. She told them they could have the equipment, that they should choose sides and commence play and she would be out later to supervise the game as at the time she had to attend a teachers' staff meeting. The children obtained the equipment, went outside, chose sides and commenced to play. Boys and girls were in the game. After playing for about 20 minutes and before Miss Burne arrived, a boy, one Purvey, got between Gard and the ball on his wrong side, thereby breaking a rule and then raised his stick above his shoulder, thereby breaking another rule, and in so doing he struck Gard in his right eye causing serious and permanent injury. In an action for damages against the Board of School Trustees it was held on the trial that the game may be dangerous when played by children with a slight amount of instruction, the teacher should have known it was dangerous and was negligent in permitting boys 11 years old with little experience to play the game without supervision. She was acting in the course of her employment and the trustees were liable for her acts.

Held, on appeal, reversing the decision of MACFARLANE, J. (O'HALLORAN, J.A. dissenting), that danger may eventuate in any game and in that sense injury to one of the players might be foreseen, yet that danger is one of the risks of the game which every parent knows goes with the game, and the chances of any risk eventuating in a game of grass hockey played by children is very slight. The possibility of danger emerging was only a mere possibility which would never occur to the mind of a reasonable man and therefore Miss Burne was not negligent in permitting the game to proceed without her supervision. To hold otherwise would be to lay down a standard of conduct which must be pronounced as much too exacting.

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APPEAL by defendants from the decision of MACFARLANE, J. of the 27th of March, 1945, in an action for damages for personal injuries sustained while playing in a pick-up game of grass hockey on the playgrounds of the school premises under the jurisdiction of the defendants in the city of Duncan, Vancouver Island, being accidentally hit in the eye by a hockey stick in the hands of another pupil also participating in the game. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 16th and 19th to the 23rd of November, 1945, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Guild (*Yule*, with him), for appellants: Miss Burne, a teacher in the school was in charge of grass hockey. The learned trial judge erred in holding that Miss Burne was negligent "in permitting these children, then 11 years old, to go out and play this game without any supervision." It was never laid down that a teacher must at all times, when pupils are on the ground to be herself upon the grounds: see *Ricketts* v. *Erith Borough Council*, [1943] 2 All E.R. 629; *Rawsthorne* v. *Ottley*, [1937] 3 All E.R. 902. It was what is called a pick-up game and not a regular match; not sufficient players to make up two full teams. The accident happened about 20 minutes after the game started and the staff meeting was still in progress where Miss Burne was in attendance. The evidence shows there was error in holding that the children "or the boys, at least, had practically no instruction in the game whatever." There was error in holding that, speaking of the game, "it may be dangerous to children who have not acquired a realization of its possible dangers if not played according to rules or who have not by practice acquired the habit of restraint in using their sticks," and that the "failure to acquire which was a contributing cause to the accident." There was error in holding that this accident in the circumstances was one "that she ought reasonably to have foreseen." There is no evidence justifying this finding. There was error in holding "that if the teacher had been there, as she should have been, she could have stopped the play before the damage was done." The accident

occurred so quickly that nothing could have been done to stop it. There was error in holding that the "duty of the teacher at common law is to take such care of his pupils as a careful father would of his children": see *Langham* v. *Governors of Wellingborough School* (1932), 101 L.J.K.B. 513, at p. 515. There was error in holding that the regulations required particular and close supervision of the particular game as distinguished from general supervision. This does not come within the provision to "have a care that games are honourably played." There was error in holding that under the Public Schools Act and regulations there was any duty upon the school board to supervise the particular game. The duties of teachers are set out in section 155 of the Act. The doctrine of *respondeat superior* does not apply in the circumstances here: see *Scoffield et al.* v. *Public School Board of North York*, [1942] O.W.N. 458; *Koch* v. *Stone Farm S. D.*, [1940] 1 W.W.R. 441; *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154; *Ritchie* v. *Gale and Board of School Trustees of Vancouver* (1934), 49 B.C. 251. The plaintiff did not comply with the mandatory provisions of section 133 of the Public Schools Act, R.S.B.C. 1936, Cap. 253 and by reason thereof the action fails. Notice of claim is not notice of action: see Clerk & Lindsell on Torts, 8th Ed., 113; *The City of Saint John* v. *Christie* (1892), 21 S.C.R. 1; *Union Steamship Company of New Zealand* v. *Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365; *Norris* v. *Smith* (1839), 10 A. & E. 188; *Lewis* v. *Smith* (1815), Holt 27; *Mason* v. *The Birkenhead Improvement Commissioners* (1860), 29 L.J. Ex. 407; *Carlton* v. *Sherwood* (1915), 9 W.W.R. 611; *Christie* v. *The City of Portland* (1890), 29 N.B.R. 311; *Traders Trust Co.* v. *Village of Krydor*, [1920] 3 W.W.R. 344; *Traves* v. *City of Nelson* (1899), 7 B.C. 48; *Edwards* v. *Vestry of St. Mary, Islington* (1889), 22 Q.B.D. 338; *Wilson* v. *The Mayor and Corporation of Halifax* (1868), 37 L.J. Ex. 44; *Jolliffe and Another* v. *The Wallasey Local Board* (1873), 43 L.J.C.P. 41, at p. 48; *Holland* v. *Northwich Highway Board* (1876), 34 L.T. 137.

T. E. H. Ellis, for respondents: The plaintiffs adopt the reasons for judgment of the trial judge. The formal facts are

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not in dispute. The pupils engaged in the game of grass hockey were young and inexperienced. The plaintiff Gard and Purvey who hit him were 11 years old. The teacher Miss Burne was in charge of the game and was supposed to supervise it, but was away temporarily at a meeting when the accident occurred, resulting from a breach of two rules of the game. Purvey was first on the wrong side of the ball and then he lifted his stick above his shoulder. If she had been supervising the game she would have stopped it after the first foul and the accident would not have happened. The school board is responsible for the negligence of the teacher, its employee: see *Smith* v. *Martin and Kingston-upon-Hull Corporation,* [1911] 2 K.B. 775, at pp. 781 and 783; *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154, at p. 157; Halsbury's Laws of England, 2nd Ed., Vol. 12, p. 137, par. 295; *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38, at p. 43. It is the duty of the teacher to take such care of her pupils as a careful father would of his children: see *Williams* v. *Eady* (1893), 10 T.L.R. 41, at p. 42; *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38, at pp. 42 to 49. *Powlett and Powlett* v. *University of Alberta,* [1933] 3 W.W.R. 322 and on appeal, [1934] 2 W.W.R. 209. The game when played by children is a dangerous one: see *Ching* v. *Surrey County Council,* [1910] 1 K.B. 736, at pp. 741 and 743; *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145, at pp. 146-7; *Gibbs* v. *Barking Corporation,* [1936] 1 All E.R. 115; *Jackson* v. *London County Council and Chappell* (1912), 28 T.L.R. 359; *Charonnat* v. *San Francisco Unified School Dist.* (1943), 133 P.2d 643, at pp. 645-6. If the danger is reasonably apparent or could be reasonably foreseen, it must be guarded against: see *Fryer* v. *Salford Corporation,* [1937] 1 All E.R. 617, at pp. 620 and 621; *Ellis* v. *Fulham Borough Council,* [1938] 1 K.B. 212, at p. 224; *Morris* v. *Carnarvon County Council,* [1910] 1 K.B. 159 and on appeal, *ib.* 840, at pp. 843-4; *Sullivan* v. *Creed,* [1904] 2 I.R. 317, at p. 325; *Gillmore* v. *London County Council,* [1938] 4 All E.R. 331, at p. 336. In addition to the common law, there is the statutory duty to supervise the conduct of pupils by the Public Schools Act and even without proof of

negligence: see Clerk & Lindsell on Torts, 9th Ed., 35; *Groves* v. *Wimborne (Lord),* [1898] 2 Q.B. 402, at pp. 404 and 412-3. With reference to section 133 of the Public Schools Act, the notice of action given by the plaintiffs reasonably complies with the section: see *Pearson* v. *Board of School Trustees of Vancouver et al.* (1941), 58 B.C. 157, at p. 158; *Iveson* v. *City of Winnipeg* (1906), 5 W.L.R. 118, at pp. 121-2 and 126; *Smith & Co.* v. *West Derby Local Board* (1878), 3 C.P.D. 423, at pp. 427-8; *Jones* v. *Bird* (1822), 5 B. & Ald. 837, at pp. 844-5. The word "action" and the word "claim" are synonymous: see *Iveson* v. *City of Winnipeg, supra,* at p. 123; *Mills* v. *Lethbridge,* [1927] 4 D.L.R. 1019, at p. 1020; *Green* v. *Town of Melfort* (1920), 53 D.L.R. 63, at p. 68. Section 133 does not apply to this case at all. In the cases of *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154 and *Ritchie* v. *Gale and Board of School Trustees of Vancouver* (1934), 49 B.C. 251 this point was not squarely before the Court. The finding of the trial judge is based on conflicting evidence and unless clearly wrong should not be disturbed: see *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462, at pp. 465-67; *Jacobson* v. *Huntley* (1941), 56 B.C. 322, at pp. 325 and 327.

Guild, in reply, referred to *Ching* v. *Surrey County Council,* [1910] 1 K.B. 736; *Morris* v. *Carnarvon County Council, ib.* 159; *Powlett and Powlett* v. *University of Alberta,* [1934] 2 W.W.R. 209; *Bradford Corporation* v. *Myers* (1915), 85 L.J.K.B. 146.

Cur. adv. vult.

29th January, 1946.

O'HALLORAN, J.A.: The appellant School Trustees and Board of School Trustees of the City of Duncan (Consolidated) School District appeal from a judgment for $3,133.70 (*Gard* v. *Duncan School Trustees,* [1945] 3 W.W.R. 485) given on 27th March, 1945, after a four-day trial before a judge without a jury, in favour of the respondents for damages for negligence resulting in serious injury to the eye of the 11-year-old respondent pupil Gordon Peter Gard while playing in an unsupervised game of grass hockey on the playgrounds which are beside the school and

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form part of the school premises, about 3.30 p.m. on 22nd September, 1941. He was hit unintentionally by a hockey stick wielded in the course of play by another boy who in breach of an essential rule of the game, attempted to play the ball from a position which the rule made illegal.

Since in my opinion the judgment must be upheld, I think it may be advisable to say it does not mean that a school board is an "insurer" of pupils from injury while they are playing games. It does not mean that every time a pupil is hurt while playing a game it follows the school board must be held responsible. I agree also that neither the game of grass hockey itself nor the sticks with which it is played are dangerous *per se* in the legal sense. Nor are we concerned with any latent defect or danger in the hockey sticks. Hence the legal principles peculiar to those aspects of the law are not *ad rem, cf. Glasgow Corporation* v. *Muir,* [1943] A.C. 448, Lord Wright at pp. 463-4. But grass hockey may become dangerous particularly so in the case of young children if played negligently in breach of essential rules of the game.

As I will attempt to show our main task is an examination of the testimony to ascertain if the findings of fact of the learned trial judge are supported by the evidence. Other decisions—and many were cited—depend upon their own facts, and can be of little if any help in determining if the learned judge misconceived the evidence or misapprehended its weight. In *Quinn* v. *Leathem* (1901), 70 L.J.P.C. 76, the Earl of Halsbury, L.C. made two oft-repeated observations at p. 81:

> . . . every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other [observation] is that a case is only an authority for what is actually decides.

In my judgment two closely related questions determine if the appellants were negligent; first, was there any duty upon the appellants or their servants to supervise the game of grass hockey in question; and secondly, if there was such a duty, is it a reasonable inference that a supervisor or referee could have prevented the injury which occurred. As I read his reasons for

judgment, that is the way the learned trial judge approached his decision. The learned judge held, in my opinion correctly, that there was a duty upon the appellants to see that the game was properly supervised or refereed, and that if it had been, the injury would not have occurred. As I regard it, the first question becomes one of mixed law and fact, while the second is a question of fact.

Regarding the first question (*viz.*, was there a duty to supervise the game of grass hockey in question), the duty to take reasonable care of young children is one which the law imposes, and hence is a question of law. But the standard of that duty at common law is not absolute, and depends on the facts of the particular case, and to that extent becomes a question of fact. In this case that involves a factual decision as to whether the appropriate degree of that legal duty in the pertinent circumstances ought reasonably to have included supervision of this particular game of grass hockey. That factual decision will necessarily depend upon whether the teacher ought to have anticipated that unsupervised play might likely result in an injury, which, of course, is a question of fact as its answer is governed by the evidence. And see *Glasgow Corporation* v. *Muir*, [1943] A.C. 448, Lord Thankerton at foot of p. 454. This reasoning, I think as the learned trial judge did, follows the *ratio* of *Langham* v. *Governors of Wellingborough School* (1932), 101 L.J.K.B. 513 (the golf ball case) where the Court of Appeal in England allowed the appeal because it held there was no evidence from which it could infer that the headmaster ought to have anticipated the occurrence of what caused the injury to the boy.

The foregoing is borne out by Lord Wright's statement in *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1933), 102 L.J.P.C. 123, at p. 131, that whereas statutory duty is conclusively fixed by the statute,

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

Again in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, Lord Wright after observing that negligence is the breach of that duty to take care which the law requires

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either in regard to another person or his property, continued at pp. 175-6:

> . . . The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury. . . . It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. . . .

That statement of the law was adopted by Sir Lyman Duff, C.J. in *The King* v. *Hochelaga Shipping & Towing Co. Ltd.*, [1940] S.C.R. 152, at p. 156. In *Wray* v. *Essex County Council*, [1936] 3 All E.R. 97 (the oilcan case), after conceding the special duty of the schoolmaster to take reasonable care of the boys, Lord Wright, M.R. proceeded to find (pp. 102-3) as a fact that the injury was not caused by any circumstance the schoolmaster ought to have anticipated, prefacing his factual analysis with these remarks—p. 102:

> . . . But in every case when you consider the standard by which the duty is to be tested and according to which it has to be ascertained whether there has been any breach of duty, it is necessary to consider whether there is something which the schoolmaster ought to have anticipated, something reasonably foreseeable and something, therefore, which, because it is foreseeable, the master ought to have guarded against.

The legal duty of the school board and its servants the principal and teachers of the school to take reasonable care of the safety of school children is not limited by the Public Schools Act, Cap. 253, R.S.B.C. 1936 and amending Acts. The common-law duty to take reasonable care is higher in the case of young children 11 and 12 years of age than in the case of those 17 and 18 years old, since the latter, by reason of their more mature years, have attained a certain discretion and an ability for prudent independent action necessarily lacking in the younger children and *cf. Edwards* v. *Smith* (1941), 56 B.C. 53, at p. 63 and cases there cited. Another circumstance of that duty is emphasized by Lord Esher, M.R. when speaking of a schoolmaster in *Williams* v. *Eady* (1893), 10 T.L.R. 41, that he is bound to take notice of the ordinary nature of young boys and their tendency to mischievous acts, *cf.* also *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154, at pp. 157-8. I do not think it is necessary to elaborate on the purely legal aspect of the undoubted common-law duty of the appellants and their servants to take reasonable care of the young children in their

charge. But the standard of that duty as measured by the degree of care to be exercised in the particular circumstances is one of fact under the authorities I have cited. It involves as I have said, an inquiry as to whether regard for the reasonable safety of these 11-year-old children demanded that this game of grass hockey be supervised, that is to say refereed by a teacher. There is considerable evidence relating to that question, and the learned trial judge carefully deliberated it in the reasons supporting his conclusion. His findings of fact to which I shall refer, relate in particular to the age of the children, the limited knowledge of the rules of the game and little playing experience of some of the boys, the essential rules of the game, and the likelihood of breach of these rules resulting in injury to the infant players, together with relevant circumstances concerning instruction in the rules of the game, the usual supervision of the games and why there was no supervision of this particular game.

I have discussed at some length the reasons why I regard the first question (*viz.*, was there any duty to supervise this particular game of grass hockey?) to be one not of law alone but of mixed law and fact. In my judgment there is no doubt about the law regarding the duty to take reasonable care, but the real controversial issue, *viz.*, the measure of that duty in the particular circumstances, is one of fact upon which the learned judge has made specific findings of fact. This aspect of the case is emphasized because an appellate Court will not reverse a trial Court on questions of fact, unless it is satisfied he has misconceived the evidence or misapprehended the weight of the evidence, *cf. Borrowman* v. *The Permutit Company,* [1925] S.C.R. 685. So viewed this appeal cannot be decided without an examination of the learned judge's findings of fact, as I propose to do, for the purpose, as it is sometimes expressed, of ascertaining whether my judgment is "coerced" to the conclusion that his findings of fact cannot be reasonably sustained on the evidence.

If there had been a jury in this case, it would have been the learned judge's duty to instruct them as a matter of law that it was the duty of the school board, its principals and teachers to take reasonable care of the children in their charge, but that it was for the jury as judges of the facts to find (a) whether in the

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circumstances disclosed in the evidence the measure or degree of that legal duty demanded that the game be supervised, and (b) if they found it did, whether the injury could have been prevented by such supervision. In the absence of a jury its fact-finding functions devolved upon the judge, and hence it is important to keep in mind the distinction between the two functions as Lord Thankerton took occasion to stress in the leading judgment in *Glasgow Corporation* v. *Muir,* [1943] A.C. 448, at p. 454. With this purpose in mind I will now turn to the evidence and the learned judge's findings of fact.

The grass hockey game in question was played by two sides of mixed boys and girls all about 11 years of age belonging to Grade VI. The girls had played the game in Grade V., but the boys had not. It took place about two weeks after the opening of school in September. Shortly after the September opening, the teacher to whom the principal had assigned the duty of supervising the playing of grass hockey by pupils in Grade VI., invited the pupils to assemble in her classroom. Prior to the day of the game in question she had given them some instruction respecting the rules of the game, and had supervised a few games. Most of the boys, and in particular the boy who swung the stick which caused the injury, had little instruction and little actual experience in play.

The pupils were required to obtain permission to take out the equipment, *viz.*, sticks, etc., to play the game. On the day in question the teacher was attending a staff meeting in the office of the principal. A number of children including the infant respondent went to the teacher for the equipment and asked her to supervise the game. The infant respondent said the teacher came to the door and told them to get the equipment and get organized and she would be out in a few minutes. Another pupil said they asked the teacher to come out and supervise the game, but she said she could not come then, but that they could get the equipment and she would come out later. The teacher said the infant respondent and some other boys came to her classroom and asked if they could have an organized game and she said "No," that she was going to a staff meeting.

The learned judge accepted the evidence of the children since

he was satisfied their recollection of what had transpired some three years before was superior to that of the teacher. The learned judge said of the teacher's evidence:

> When asked, "Have you any memory at all of any of the children coming to the meeting and asking for the equipment?" her answer was, "I can't remember definitely whether they did or not." This was after she had answered a previous and somewhat similar question by saying, "I have no memory." She did say that she remembered some people coming to the door during the staff meeting. But she added after a pause that that was "after the accident to enquire for Mr. Hanna." The children who gave evidence were a fine, bright, intelligent group of children, and impressed me most favourably by the frank and careful manner in which they gave their evidence. I accept their evidence in preference to that of the teacher, because her replies were indefinite and her answers did not convey to me the conviction that she had a clear memory of what had taken place.

It is thus seen that the learned judge found that the children asked the teacher to supervise the game, and received her permission to start the game upon her promise that she would be out in a few minutes to supervise the game. She failed to do so.

The foregoing factual findings govern the approach to this case. They establish that it was intended and expected by teacher and children alike that this game would be supervised. They bear strong support to the double implication that a tacit rule prevailed that a game of grass hockey such as the one in which the injury occurred, would not be played by pupils of Grade VI. without the teacher's supervision (else why did the children ask the teacher to supervise the game?), and also that this tacit rule was dictated by prudence and experience. These factual findings and their implications give this case a special complexion. They reflect the measure of reasonable care of the children which the school itself had set, as was done by the father in the spring-gun case of *Edwards* v. *Smith* (1941), 56 B.C. 53, at p. 65.

They also eliminate at the outset the applicability of arguments and decisions based on the lack of necessity for supervision of games, or which regard supervision of games in other circumstances as savouring of over-caution and coddling of the youngsters. I think most school-teachers know that while parents are glad to have their children engage in school sports, they naturally look to the school—particularly in the case of young children—to provide supervision when the game is one in which breach of the rules may easily result in lifelong injury to the players. But

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why, one may ask, is supervision of a game of grass hockey so essential in the case of young children with little experience in playing the game? The answer is contained in some of its peculiar rules, which youngsters are almost certain to forget in the excitement of play, if they are not checked immediately. A more simple answer perhaps would be that grass hockey is a game which of its very nature requires supervision in the form of a referee.

While grass hockey is not in itself a dangerous game if played in accordance with established rules, there are three rules of the game the non-observance of which may easily make it dangerous, particularly when played without supervision by inexperienced young children. One rule is that the hockey stick must not be raised higher than the shoulder at any time. The reason for that rule is obvious and the difficulty of not forgetting it in the course of play is one which can hardly be overcome except by supervision. A second rule is that the ball must be played from one side of the stick only. That is because the stick (unlike an ice-hockey stick) has only one flat side, and a player is not allowed to hit or slash the ball with the reverse or rounded side of the stick. The result is that all play must be right handed. A third rule forbids "obstruction," *viz.*, any opposition or interference by a player on the left or "wrong side" of the player who has the ball in play. It must be apparent, I think, that in the absence of supervision, *viz.*, a referee, "obstruction" or "high-sticking" is more than likely to make the game dangerous for young children. I would regard it as equally apparent, that the peculiar rule requiring the ball to be played from the right side only, and the prohibiting of play from the left or "wrong side," would require considerable practice under proper supervision to accustom young boys to obey it who are familiar with other games in which play from one side only is not the rule, if they are not to forget the unusual rule in the excitement of play.

In view of the foregoing facts which the evidence discloses, I agree with the learned trial judge that it ought to have been reasonably anticipated that 11-year-old boys with little instruction in the peculiar rules of the game and with little experience in putting those rules into practice by play, would likely commit

breaches of the essential rules to which I have referred. In my judgment the risk of injury resulting from almost certain breaches of these rules in the circumstances, was so distinctly foreseeable that the standard of duty in the particular circumstances demanded supervision of the game, and the failure to provide it as the teacher had promised, discloses a degree of want of care which constituted negligence.

Next arises the closely related question, could the injury have been prevented if a supervisor or referee had been present, that is, if the teacher had been there as referee, correcting breaches of the rules as they occurred and emphasizing the importance of doing certain things and not doing certain other things. A great deal of evidence was given regarding the course of play in the game immediately prior to the injury, for the purpose of finding out exactly how the injury occurred—Did it result from a breach of the rules and if so what rules?—all directed, of course, to the principal question, could the teacher have prevented it, if she had been supervising the game.

The learned judge summarizes the progress of the play which led to the injury in the following findings of fact:

> . . . I confess to some difficulty in determining, and with precision, the successive movements of the pupils, but after listening very carefully to the evidence and examining it, I have come to the conclusion that the boy wielding the stick that hit the infant plaintiff did cross the path of the infant plaintiff between him and the ball, and in order to drive the ball in the opposite direction, swung around before striking at it with the flat side of the stick, and that had the teacher been there, as she should have been, she could have stopped the play before the damage was done. I think also that in the circumstances the result was a foreseeable consequence of permitting these children with their very limited instruction to engage in the game without supervision.

It would seem the learned judge made no express finding upon the breach of the rule relating to "high-sticking," although I am inclined to regard that finding to be implied. However, even if it is not, the learned judge expressly finds that the injury was caused by what flowed from the breach of the rule relating to obstruction, in that after the opposing player who caused the injury had wrongfully interposed himself in front of the infant respondent, he necessarily had to turn his back to the latter in order to drive the ball away from his own goal with the right

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side of his stick, and in doing so the back swing of his upraised stick hit the infant respondent who was right behind him. That the latter was hit in the eye points very strongly to the conclusion that the opposing player also raised his stick above his shoulder. If the teacher had been present, the learned judge finds on the evidence, that she could have stopped the play immediately the obstruction took place or was in course of taking place. That is because a sufficient interval would have necessarily elapsed between the time the opposing player would be observed attempting to interpose himself in front of the infant respondent and the time it would take him to get into position to raise his stick to hit the ball, to enable the referee to stop the play. If the play had been stopped as it could have been if the teacher had been present, the opposing player's stick would never have been raised as it was and the injury could not have occurred.

The learned judge's findings of fact supported by the evidence demonstrate that in the absence of supervision the injury was foreseeable and that it ought not to have occurred if there had been supervision. Those findings do not permit conclusions that the injury resulted from inevitable accident, a fantastic probability or from any circumstances which the teacher ought not to have anticipated. I am satisfied accordingly that the learned judge did not misconceive the evidence or misapprehend its weight. I see no ground upon which his findings of fact may be disturbed. I leave this aspect of the case with the following conclusions of the learned judge, with which I am in entire agreement:

> . . . I am basing my judgment on the fact that I think this teacher was negligent in permitting these children, then 11 years old, to go out and play this game without any supervision when they, or the boys at least, had practically no instruction in the game whatever. It is not contended that grass hockey is a dangerous game when played by players who know the game; but it seems equally true that it may be dangerous to children who have not acquired a realization of its possible dangers, if not played according to the rules, or who have not by precept and practice acquired the habit of restraint in using their sticks, the failure to acquire which was in my opinion a contributing cause of the accident here. It was urged before me that children of 11 years of age are not coddlings. I agree that they are not that, and these children, in particular, are bright intelligent children, full of energy and spirit and not rough, but I think it is the responsibility and the duty of the teacher in such cases as the present, to see that the

children under her care have acquired or have had a fair and reasonable opportunity to acquire a normal safe response to situations in which danger lurks before permitting them to play, as she did here, without supervision. If the teacher fails in the exercise of that responsibility then I think she is liable for the results of that failure that she ought reasonably to have foreseen.

It was suggested that serious injury in a grass hockey game is unusual and hence was not foreseeable. But the danger to be anticipated from breach of the rules relating to obstruction and "high-sticking" was that someone would be hurt. Whether the resulting injury is of a serious or minor nature does not affect the principle if the injury has arisen in a way that ought reasonably to have been anticipated and *cf. Edwards* v. *Smith* (1941), 56 B.C. 53, at p. 65. The appellants' servant the teacher allowed these 11-year-old children, some of the boys having little knowledge of the game, to play the game without supervision and the learned judge has found as a fact after careful consideration of the evidence which supports his conclusion, that it ought to have been anticipated, as the event unfortunately proved, that harm might come to some child in the course of play. I say "might" because it is not necessary that the teacher should have foreseen the exact consequence of her breach of duty to supervise the game. One is responsible not only for the necessary but for the probable consequences of his act or omission, *cf. Sullivan* v. *Creed,* [1904] 2 I.R. 317, Palles, C.B. at p. 328, *Edwards* v. *Smith, supra,* at p. 65 and also *Hay or Bourhill* v. *Young,* [1943] A.C. 92, Lord Wright at p. 107.

Some reference perhaps ought to be made to several decisions considered in the course of reaching a conclusion. In *Chilvers* v. *London County Council and Others* (1916), 80 J.P. 246 (the toy soldier lancer case) Bailhache, J. said the accident could have happened even if several nurses had been present. Here the trial judge found the teacher could have prevented the injury by stopping the play in time. In *Wray* v. *Essex County Council,* [1936] 3 All E.R. 97 (the oilcan case) Lord Wright, M.R., at pp. 102-3 upheld the trial judge on the fact that the injury was not foreseeable. In this case there is a finding of fact by the trial judge that the injury was foreseeable and could have been prevented by supervision of the game, and for reasons previously developed I can see no grounds upon which that finding may be

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disturbed. I doubt if *Blacker* v. *Lake and Elliot Limited* (1912), 106 L.T. 533 (latent defect in a lamp) a divisional court decision of Hamilton and Lush, L.JJ. can be regarded as helpful in any aspect of this case in the light of its critical examination in *Donoghue* v. *Stevenson,* [1932] A.C. 562, at pp. 593, 609, 612, and 615-6. In *Jones and Another* v. *London County Council* (1932), 48 T.L.R. 368 the game of "riders and horses" was played under supervision and there was no evidence how the accident actually happened. In this case there was no supervision, and there is abundant evidence of the manner in which the injury was received.

Counsel for the appellants submitted as well (1) that even if the teacher was negligent the appellant Board of School Trustees was not liable for her negligence; (2) that there was no duty to supervise play imposed upon the Board of School Trustees by the Public Schools Act, Cap. 253, R.S.B.C. 1936 and amending Acts, and (3) that the action was barred because no notice was given to comply literally with section 133 of the Public Schools Act, *supra.* These submissions were advanced before the learned trial judge and rejected for grounds appearing in his reasons for judgment (see [1945] 3 W.W.R. 485, at pp. 489-90).

As to the first ground, the evidence is clear the teacher was acting within the course of her employment in her instruction, supervision and control of the children in the playing of grass hockey. She had been assigned to that duty by the principal. She did not supervise the game in question as she had promised the children she would, because she was detained to perform another duty, *viz.,* to attend a staff meeting in the office of the principal, which of course ought not to have been allowed to conflict with her duty to supervise the grass hockey game. In my judgment the relationship between the school board and the teacher was in legal effect that of master and servant and *cf. Smith* v. *Martin and Kingston-upon-Hull Corporation,* [1911] 2 K.B. 775, and *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154, at p. 157.

That the principal was acting within the scope of his authority in assigning to the teacher the duty of instructing, supervising and controlling the playing of grass hockey by the children

appears from the evidence of the secretary-treasurer of the school board since 1934 who testified:

As far as these games are concerned you heard Mr. Chapman [who was then Reeve of North Cowichan Municipality and had been a Duncan school trustee for five and a half years ending in August 1941] through his board and teachers and principals encourage these games and expects the children to take part in them? Yes.

It is part of the educational programme? Part of the programme yes.

As far as the school board itself is concerned I think you agree with Mr. Chapman's statement that it is up to the teachers and the principals to look after the welfare of the children on the school premises? That is correct.

They [the school trustees] delegate that duty, if you call it as such, to the principal and teachers? The trustees, yes.

And the principal is paid partly for that? Yes.

Some point was made also that the accident happened at 3.30 p.m. after the school had closed at 3 p.m. I do not think it was intended to argue that the duty of the school board and its servants ceased on the sound of the 3 o'clock bell. The school playgrounds were right beside the school and the equipment to play grass hockey had to be obtained from the teacher and, of course, had to be put back when play was finished—presumably returned to the custody of the teacher. It was to be expected children would use the playgrounds for a reasonable time after 3 o'clock, which is early in the afternoon. The boy who wielded the stick which caused the injury was questioned on this point by defence counsel when giving evidence in chief:

. . . , how often did you play after 3 o'clock? We were not supposed to play after 4 and we played up until that time and then put the sticks away.

You played until 4 o'clock. Yes

And then went in with the sticks? Yes.

That refers to the general practice at the school. It is not confined to the game in question which stopped when the accident happened about 3.30 p.m.

The next ground taken by appellants' counsel was that the Public Schools Act imposed no obligation on the trustees to supervise children's games. I fail to see that is an answer since the Public Schools Act does not prohibit the Board of Trustees doing so, *cf.* the decision of the House of Lords in *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145, and also *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38. In my judgment the legal responsibility of the school board

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arises primarily at common law. That responsibility has not been taken away by the Public Schools Act. Moreover the power to supervise children's games is found in section 140:

> The Board of School Trustees of any school district may establish and maintain in any public school in the district a course of instruction in games and physical training, including gymnastic exercises and cadet instruction, and the expenses incurred in equipping and maintaining the course shall form part of the ordinary expenses of the Board.

In view of the evidence of the secretary-treasurer of the appellant school board which I have quoted in discussing the previous point, it seems clear to me that the Board of School Trustees exercised at least some part of its power under section 140 by delegating to the principal of the school, authority to instruct in, encourage and supervise games among the children. The principal in his evidence describes the system prevailing at the school in respect to games including grass hockey. I have previously referred to the teacher's assignment to this duty by the principal, and to the learned judge's findings of fact upon the teacher's duties and conduct under that assignment.

Lastly the appellant submitted the action is barred because the notice given did not comply literally with section 133 of the Public Schools Act, *supra,* which provides that no action shall be brought against the school trustees corporately or individually

> for anything done by virtue of the office of trustee or secretary, unless within six months after the act committed, and upon four months' previous notice thereof in writing.

The injury occurred on 22nd September and the boy's father notified the school board in writing on 1st October "I intend to make a claim against the school board . . ." The writ issued on 17th March following within the six-month period. But it is said the written notification of October 1st is not a notice of action, and a further letter of December 1st was in any event two weeks less than the required four-month period.

Section 133 in its present form provides a wide scope for technical legal objections such as the Judicature Act sought to discourage. For one thing it does not give power to the Court to extend the times when the circumstances warrant. More than 20 decisions were cited by counsel as bearing on its interpretation. The great bulk of these decisions relate to other statutes but the language of this section must be construed upon its peculiar

phraseology which ought not to be lifted out of its own statutory context. In my judgment the section does not apply to this case, and alternatively, if it may be held to apply, there has been substantial compliance with its requirements.

I am led to the view that it does not apply to this case, because it is confined to a specific type of completed act, *viz.*, "anything done by virtue of the office of trustees or secretary." It is not a general provision applying to all actions, and hence it cannot include actions which do not come within the meaning of the restrictive language. In *Edwards* v. *Vestry of St. Mary, Islington* (1889), 22 Q.B.D. 338, the wider statutory language "done or intended to be done" was applied by the Court of Appeal to statutory acts which were badly done in the course of performance. The action in this case is not for negligence in the performance of supervision but in the omission to supervise.

Some of the older decisions such as *Wilson* v. *The Mayor and Corporation of Halifax* (1868), 37 L.J. Ex. 44 seem to deny this distinction. But the statute there read "done or intended to be done." The word "intended" negatives restriction to completed acts beyond which the word "done" in section 133 cannot be extended without straining its recognized meaning. It is to be observed also that the older decisions regarding notices of action and limitations of action are not always reliable guides in more modern times and *cf.* remarks of Channell, J. in *Parker* v. *London County Council,* [1904] 2 K.B. 501, at p. 507. Section 133 does not contain the words "neglect or default" and see *Huyton and Roby Gas Company* v. *Liverpool Corporation,* [1926] 1 K.B. 146 and also section 11 (2) of the Statute of Limitations, Cap. 159, R.S.B.C. 1936.

Alternatively I am of the view the letter of October 1st constitutes substantial compliance with the section, and I concur in what was said in this respect by my brother SIDNEY SMITH when sitting as a trial judge in *Pearson* v. *Board of School Trustees of Vancouver et al.* (1941), 58 B.C. 157, at p. 159. In my opinion the words in the letter of October 1st "I intend to make a claim against the school board . . . " when related to their context and attendant circumstances necessarily known to the

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appellants, carry the reasonable implication that suit would be commenced if the claim was not admitted.

I would dismiss the appeal.

ROBERTSON, J.A.: This appeal of the defendant Duncan School Board raises several important questions of law; but in the view I take, it is only necessary to consider one, *viz.*, whether or not there was a duty upon the school board with regard to supervision under the circumstances of this case.

The facts, shortly, are that the infant plaintiff Peter Gard and Rickey Purvey in September, 1941, were pupils attending the Duncan school. The School Act compelled them to go there. Grass hockey had been played at this school since about 1934 by the girl pupils and by the boys only since the beginning of September, 1941. Miss Burne, a member of the school staff, was in charge of grass hockey. She drew up a schedule of practise and match games to be played during school hours under her supervision as referee. All these scheduled games, up to the time of the accident, were played under her supervision. On the 22nd of September, a number of the pupils, including Peter and Rickey, obtained leave from Miss Burne to engage in a pick-up game (that is an unscheduled game) after school hours. She told them that she could not come out then, but would come out later to supervise, as she was attending a meeting of the staff. While she was at this meeting and about 20 minutes after the game commenced, the accident occurred. At this time there was a general supervision of the playgrounds by teachers, but no special supervision of this hockey game.

There are two rules which it is said Rickey broke, one immediately after the other, which caused the accident; the first by obstruction, that is, by passing from the left between the ball and Peter, who was "dribbling the ball"; the second when turning around to strike the ball in the opposite direction to which Peter was dribbling it he raised his stick above his shoulder. In doing so, his stick struck Peter's eye causing the injury, to recover damages for which this action is brought.

It is clear from the evidence that if Rickey had not raised his stick above his shoulder the accident would not have occurred.

It is alleged that if Miss Burne had been supervising the game she would, when Rickey committed the first breach of the rules, namely, passing between Peter and the ball, at once have stopped the game by blowing her whistle, and Rickey would not have broken the second rule, *supra,* and the accident would not have happened.

Both Peter and Rickey, who were each 11 years of age, had played about five scheduled games under Miss Burne's supervision; and the rules had been explained to them, particularly the one about not raising the stick above the shoulder.

The learned trial judge said he was basing his judgment on the fact that

> I think the teacher was negligent in permitting these children, then 11 years old, to go out and play this game without any supervision when they, or the boys at least, had practically no instruction in the game whatever";

and

> that in the circumstances the result was a foreseeable consequence of permitting these children with their very limited instruction to engage in the game without supervision.

It has been laid down that it is the duty of a school board to take such care as a reasonably careful parent would take of his boy—*Williams* v. *Eady* (1893), 10 T.L.R. 41; *Jackson* v. *London County Council and Chappell* (1912), 28 T.L.R. 359; *Shepherd* v. *Essex County Council and Another* (1913), 29 T.L.R. 303; *Chilvers* v. *London County Council and Others* (1916), 32 T.L.R. 363; *Duncan* v. *The Board of School Trustees of Ladysmith* (1930), 43 B.C. 154, at pp. 157-8; *Ricketts* v. *Erith Borough Council,* [1943] 2 All E.R. 629—and the duty of their teacher is to take reasonable care to protect children under her charge from danger. *MacDonald's Tutor* v. *County Council of Inverness,* [1937] S.C. 69. No doubt the extent of the supervision depends upon the age of the pupils and what they are doing at the material time. But as Hilbery, J. says in *Rawsthorne* v. *Ottley,* [1937] 3 All E.R. 902, at p. 903, it is not the law and never has been the law, that a schoolmaster must keep boys under supervision during every moment of their school lives. The duty should not be determined from the happening of the extraordinary accident in this case, but from the danger that was reasonably foreseeable before the game.

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Whether or not a thing is dangerous in itself is a question of law. *Blacker* v. *Lake and Elliot Limited* (1912), 106 L.T. 533, at pp. 535 and 539; referred to in Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 676, and Charlesworth on Negligence, 208-9. Denny, a witness for the plaintiff, was of the opinion that grass hockey was not in itself a dangerous game, but played by school children without supervision would be dangerous. Miss Bardley and Miss Burne, witnesses for the defence, thought it was not a dangerous game; and that if played by school children without supervision, would not be dangerous; and that even if Miss Burne had been supervising the game on the 22nd of September she could not have prevented the accident. The learned trial judge, however, thought that had Miss Burne been there she would have stopped the game immediately Rickey broke the first rule and that would have been in time to prevent the accident; and that she was negligent in not supervising the game. If Rickey had broken the second rule only the accident could not have been prevented if Miss Burne had been supervising because it is obvious, as the evidence of Miss Bardley and Miss Burne shows, it would have occurred before Miss Burne could blow her whistle. Who could have foreseen that there would be two breaches of the rule and an opportunity when the first breach occurred to stop the game and thus prevent the second breach?

No doubt accidents from breaches of rules do occur in grass hockey games. The same is true of lacrosse, football, cricket, baseball or any other game played under rules. A stanza attributed to Adam Lindsay Gordon (see 14 Can. Bar Rev. 821-2) reads:

> No game was ever yet worth a rap
> For a rational man to play,
> Into which no accident, no mishap,
> Could possibly find a way.

A distinction lies between things which are obviously dangerous, in which case the duty to protect is absolute (see cases cited in Charlesworth, *supra,* p. 209, note (*d*)) and those which are not, but in which there may be potential danger under certain circumstances. It is difficult to draw the line; as was said by Scrutton, L.J. in *Langham* v. *Governors of Wellingborough School* (1932), 101 L.J.K.B. 513, "there may be border-line cases."

In *Williams* v. *Eady, supra,* a stick of phosphorous was considered a dangerous thing. It was clearly so, because, without any action at all on the part of anyone, it might burst into flame. Then again, a loaded gun or pistol left about, in a condition in which it might go off if handled a certain way, would be dangerous. The risk of such danger would be obvious. See *Dixon* v. *Bell* (1816), 5 M. & S. 198 and *Sullivan* v. *Creed,* [1904] 2 I.R. 317.

When there is a breach of a duty through want of reasonable care, there is liability, as is shown by *Gibbs* v. *Barking Corporation,* [1936] 1 All E.R. 115. In that case the facts were that the plaintiff was required to undergo gymnasium training in the school which he attended. He was injured while "vaulting over a horse." The learned trial judge found as a fact that it was the duty of the games instructor who was there at the time, to see that each boy as he jumped over the horse and came to the other side should not fall and that the instructor failed to use reasonable care and as a result the plaintiff was injured. The Court of Appeal dismissed the appeal.

The head-note in *Wray* v. *Essex County Council,* [1936] 3 All E.R. 97 is as follows:

The plaintiff, a boy of 12 years of age attending a school owned and conducted by the defendant council, was "trotting" from one classroom to another, when at a blind corner he collided with another boy, B., carrying an oilcan. The spout of the oilcan, about 6 ins. long, struck the plaintiff in the eye and severely injured him. The boy B., who was carrying the can in a perfectly proper way, had been told to take it from one room to another by a master. The plaintiff sued the council as the employer of the master, alleging that the latter was negligent in not taking special precautions when entrusting a boy with a dangerous article:—

Held: the oilcan was not an inherently dangerous thing, nor was it a dangerous thing in the special circumstances of a school for young children, and the master was under no duty in such a case to take special precautions.

Lord Wright, M.R. said at p. 102:

. . . It may not be possible precisely to say what article is inherently dangerous and what is not by any general definition, yet when you come to particular articles there is, I think, no difficulty in drawing the line you take as the standard in the one case. Things like a naked sword or a hatchet or a loaded gun or an explosive are clearly inherently dangerous—that is to say, they cannot be handled without a serious risk. On the other hand, you have things in ordinary use which are only what is called "potentially dangerous": that is to say, if there is negligence or if there is some mis-

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chance or misadventure then the thing may be a source of danger; but that source of danger is something which is not essential to their ordinary character; it merely depends on the concurrence of certain circumstances—in particular, generally, negligence on the part of someone. I feel, I am bound to say with no doubt at all, that this can does not come within the category of inherently dangerous articles. It is an ordinary article of domestic use; apart from something quite extraordinary, it is not likely to cause damage and is not calculated to cause damage to anybody.

Then Lord Wright points out at p. 102 that even if "it is not inherently dangerous" there may be circumstances in which it would be proper for the schoolmaster to exercise, as Lord Esher, M.R. said in *Williams* v. *Eady, supra,* he is bound to exercise, such care of his boys as a careful father would take of his boy; and that he would be bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts and their propensity to meddle with anything that came in their way. He continued that therefore the schoolmaster had undoubtedly a special duty towards the boys at school. He proceeds:

> . . . But in every case when you consider the standard by which the duty is to be tested and according to which it has to be ascertained whether there has been any breach of duty, it is necessary to consider whether there is something which the schoolmaster ought to have anticipated, something reasonably foreseeable and something, therefore, which, because it is foreseeable, the master ought to have guarded against. I say "foreseeable," because the mere fact that he did not foresee a risk or a particular contingency would not excuse him if it was something which he ought to have foreseen. But when I look at the facts of this case, it seems to me to be a misadventure which could not have been reasonably foreseen by anybody;
>
> . . . .

And further on he says (p. 103):

> . . . If you get a foreseeable risk it is, of course, material to consider what are the chances against that risk eventuating; if there is a real risk there is a duty to guard against it, even though the precise damage which follows has not been carefully foreseen and contemplated.

The *Wray* case was followed in *MacDonald's Tutor* case, *supra.*

While, as I have said, danger may eventuate in any game, and in that sense injury to one of the players might be foreseen, yet that danger is one of the risks of the game, which every parent knows goes with the game; and I would think the chances of any risk eventuating in a game of grass hockey played by children would be very slight. The possibility of danger emerging was only a mere possibility which would never occur to the mind of a

reasonable man; and therefore there was no negligence: see *Fryer* v. *Salford Corporation,* [1937] 1 All E.R. 617, at p. 620; and it is difficult to say that anyone would have foreseen a possible double breach of the rules in sufficient time after the first breach and before the second breach to stop the game.

In *Chilvers* v. *London County Council and Others* (1916), 80 J.P. 246, a child five years of age was injured by the point of a lance which was part of a toy soldier brought to the school by another child. It was held that toy soldiers in themselves were not dangerous. Bailhache, J., whose statement Scrutton, L.J. quotes at p. 515 of *Langham's* case, *supra,* said:

> You cannot say that toy soldiers in themselves are dangerous; to play with them has been the right of every nursery in the Kingdom for centuries, and the fact that the master or mistress had allowed a toy soldier to be in the room could not be treated as evidence of negligence or lack of proper supervision.

In *Jones and Another v. London County Council* (1932), 48 T.L.R. 368, the facts were that the infant plaintiff was undergoing a compulsory course of instruction at the Council Instruction Centre of the defendant and was ordered by the council's instructor to take part in an organized game called "riders and horses" in which one boy mounted the back of another and endeavoured to bring to the ground the foot of the boy who was acting as "rider" in an opposing pair. During the game the infant plaintiff who was taking the part of a "horse" fell on the wooden floor and injured his arm. An action was brought against the council for negligence, on the ground that the game was so dangerous in itself that to order a boy to play it amounted to negligence. The trial took place before a county court judge and a jury which gave a verdict for the infant plaintiff and for his mother the second plaintiff.

On appeal it was held that there was no evidence that the game itself was a dangerous game or one likely to cause injury and that even if it were assumed that the game was one in which one or more of the competitors were likely to fall, that in itself was not sufficient to establish a case of negligence, or, otherwise, it might be said that any instruction in physical exercises or games could not be given in school without the authorities being liable if a boy happened to fall and hurt himself. Avory, J. said:

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It had been stressed on behalf of the respondents that the game had been played on a wooden floor and that there was no matting; if there had been matting it would have been said that there ought to have been a mattress; and if there had been a mattress it would have been said that there ought to have been a feather-bed; and if there had been a feather-bed, that the boys ought to have been wrapped up in cotton-wool or rubber. He further said that the instructor had no reason to anticipate that any injury would result.

Now it must have been obvious in that case that if a boy engaged in the game in question were to fall, he might suffer a broken arm or other injury and in one sense therefore it should have been anticipated that injury would or might result to anyone engaged in the game. In the same way it might be anticipated that injury might result to any 11-year-old boy engaged in any game. If this were the standard to be adopted, it would be negligent for any parent to allow his child of such age to engage in any game without supervision; and likewise for any junior school authority to permit any game to be played upon the school grounds without supervision. I do not think this is the law.

I can see no distinction in principle between the *Chilvers* and the *Jones* cases and the case at Bar. It seems to me that a "careful father" would not hesitate to allow his boy of 11 years of age to engage in a game of grass hockey without supervision. With respect for the view of the learned trial judge, I am of the opinion that Miss Burne was not negligent in permitting the game to proceed without her supervision. In my opinion, to hold otherwise would be to lay down a standard of conduct which must be pronounced much too exacting.

While I very much regret the unfortunate accident to the infant plaintiff, I have no other recourse under the circumstances than to say that in my view the appeal should be allowed.

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON.

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

Solicitor for appellants: *W. S. Lane.*
Solicitor for respondents: *C. F. Davie.*

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Practice—Costs—Notaries—Court of Appeal Act—"Good cause"—Application for enrolment—Appeal—R.S.B.C. 1936, Cap. 57, Sec. 28; Cap. 205, Secs. 4 and 15.

Pursuant to the provisions of the Notaries Act the defendant obtained an order directing his enrolment as a notary public. The order was set aside on appeal. On motion to settle the judgment:—

Held, that "good cause" in the terms of section 28 of the Court of Appeal Act is shown for departure from the rule that costs follow the event. In the circumstances disclosed, it is neither fair nor just as between the parties that payment of costs should be ordered.

MOTION to settle the judgment herein of the 8th of January, 1946 (reported, *ante*, p. 247) on appeal from an order of HARPER, J. under the Notaries Act whereby the order directing enrolment of the respondent as a notary public was set aside.

The motion was heard at Vancouver on the 29th of January, 1946, by O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

Caple, for the motion: That there should be no costs see Craies' Statute Law, 4th Ed., 310 and 316. The Notaries Act is special legislation and the Court of Appeal Act general: see *In re Notaries Act and J. A. Stewart* (1929), 41 B.C. 467; *In re Notaries Act and Worsoe* (1939), 53 B.C. 376; *Rex* v. *Hartt (No. 1)*, [1942] 3 W.W.R. 385, at p. 392; *Laidlaw* v. *Rehill*, [1943] 1 W.W.R. 796, at p. 799.

McPhillips, contra: Under section 28 of the Court of Appeal Act, the costs follow the event. "Good cause" for refusing costs is not shown here. This is a vexatious and unreasonable application. The rules under the Notaries Act do not apply to the Court of Appeal: see *Corporation of District of Oak Bay* v. *Corporation of City of Victoria* (1941), 56 B.C. 415.

Per curiam (BIRD, J.A.): This is a motion to settle the judgment of this Court pronounced January 8th, 1946, upon appeal from an order of HARPER, J., made pursuant to the provisions of the Notaries Act, R.S.B.C. 1936, Cap. 205, whereby this

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Court set aside the order, directing enrolment of the respondent as a notary public.

The successful appellant seeks to recover the costs of the appeal pursuant to the Court of Appeal Act, R.S.B.C. 1936, Cap. 57, Sec. 28, which reads in part as follows:

> 28. Unless the Court of Appeal shall for good cause otherwise order, the costs of and incident to appeals to the Court of Appeal shall follow the event, except:— . . .

None of the exceptions, nor the proviso to that section apply here.

Counsel for the appellant contends that the judgment should carry costs by virtue of that section and the appellant's successful appeal.

On the other hand, counsel for the respondent submits that this Court should not award costs to either party, for the following reasons, *viz.*: 1. That under rule 5 of the Rules, dated September 15th, 1927, promulgated by HUNTER, C.J.B.C., pursuant to section 17 of the Notaries Act, no costs are taxable upon an application for enrolment under that Act, except in special circumstances therein enumerated, none of which is applicable here. 2. That "good cause" for departing from the provisions of section 28 of the Court of Appeal Act is shown here since (a) this appeal presents a question of first impression and it would be unjust to penalize the respondent in costs in the circumstances; (b) it is not in the public interest that costs be allowed upon an application for enrolment under the Act.

Rule 5, relied upon by counsel for the respondent, reads:

> No costs shall be taxed or allowed to or against any party unless the Court or Judge shall expressly direct that costs unreasonably or vexatiously occasioned to any party shall be borne by the party blameable therefor.

We entertain considerable doubt whether, in view of section 28 of the Court of Appeal Act, rule 5 can be said to apply to an appeal to this Court, but do not find it necessary to attempt to resolve the doubt, since, for other reasons, we consider that costs should not be allowed on this appeal.

Here there is no *"lis."* The appellant appears in these proceedings not as a litigant but in a *status* analogous to that of *"amicus curiæ," i.e.*, as a member of the public entitled to be heard in opposition to the respondent's application by virtue of rule 3 of the Rules promulgated as aforesaid.

No costs were awarded in the Court below, no doubt in consequence of rule 5; and we are unable to find that costs have ever been awarded upon any such proceeding, whether upon appeal or in a Court of first instance, since the enactment of the Notaries Act in 1926. The *bona fides* of the respondent's application is not questioned. His right to seek enrolment was denied solely upon the ground that need was not shown for a notary public in the particular area, proof of which is essential to a successful application under section 5 of the Notaries Act.

Therefore we are of opinion that "good cause," in the terms of section 28 of the Court of Appeal Act, is here shown for departure from the rule that costs follow the event. We consider that in the circumstances disclosed it is neither fair nor just as between the parties that payment of costs should be ordered.

As was said by Bowen, L.J., delivering the judgment of the Court of Appeal in *Forster* v. *Farquhar,* [1893] 1 Q.B. 564, a decision involving the definition of "good cause," under Order LXV., r. 1 (967), at p. 567:

> . . . No nearer and no closer definition can be given than that there will be good cause whenever it is fair and just as between the parties that it should be so.

The judgment will be settled accordingly.

Judgment accordingly.

THE VETERANS' SIGHTSEEING AND TRANSPORTATION COMPANY LIMITED v. PUBLIC UTILITIES COMMISSION AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Appeal—From Commission under Public Utilities Act—Form of judgment—Ancillary certificate on points of law.

Section 103 of the Public Utilities Act contemplates that on the disposition of an appeal on questions of law by the Court of Appeal, the Court shall give judgment on the questions of law, and any certificate given to the Public Utilities Commission is merely ancillary to the judgment and not a substitute for it. The Court can award the costs of an appeal under the Act.

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IN delivering judgment in this case (reported, *ante*, p. 131) the Court of Appeal announced that it dismissed the appeal on facts and that it would issue a certificate to the Commission on the questions of law involved.

On settlement of the formal judgment SLOAN, C.J.B.C. asked for written submissions on the point whether the Court should give judgment at all on questions of law, or whether section 103 of the Public Utilities Act did not substitute a certificate to the Commission. Later the Chief Justice referred the point to the Court for oral argument.

Argued at Victoria on the 8th of January, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

D. M. Gordon, for respondent B.C. Electric Railway Co., Ltd.: We say the Court gives a judgment on questions of law as well as of fact, and the certificate to the Commission under section 103 is merely ancillary, and to carry out the judgment. Section 102 governs appeals on law, and it contemplates the same procedure as in an ordinary appeal from the Supreme Court, *i.e.*, judgment should be delivered and formally entered. Section 103 does not cut this down. Section 103 does not contemplate a formal certificate at all; all standard dictionaries show that the primary meaning of "certify" is merely to "make [a thing] certain"; the making of a formal certificate is only a secondary meaning of "certify." In *Roberts* v. *Watkins* (1863), 14 C.B. (N.S.) 592, Byles, J. says that *prima facie* any certificate may be oral only. The Court should "certify" its views to the Commission through its reasons for judgment and formal judgment. Section 103 does not indicate that a formal certificate is to be substituted for a judgment. If the Court cannot give judgment on the law, it cannot award us costs on this branch of the case.

[SLOAN, C.J.B.C.: What is the effect of section 100? Does it enable the Commission to award you the costs of appeal?]

No. Section 100 enables the Commission to collect for us under section 90 costs awarded by the Court; but only the Court can award them. Section 100 is analogous to section 26 of the Court of Appeal Act. In an ordinary appeal from a court,

appellate costs are collected through the Court below under section 26. In an appeal under the Public Utilities Act, there is no Court below; so section 26 cannot apply. But section 100 gives the Commission equivalent powers. Section 97 enables a judge of the Court to award the interlocutory costs of getting leave to appeal on law; and it would be highly anomalous if these can be given, yet the Court cannot deal with costs of the appeal itself. No anomalies arise if a certificate, whether formal or not, is merely ancillary to a judgment.

[SLOAN, C.J.B.C.: Under the Constitutional Questions Determination Act our practice has been not to have a formal judgment entered, but merely to send a certificate to the Lieutenant-Governor in Council.]

That Act has no resemblance to the Public Utilities Act. Under the former Act the Court merely answers specific abstract questions; there is no *lis,* no parties, often no controversy, and the decision binds no one: *In re References by the Governor-General in Council* (1910), 43 S.C.R. 536, at p. 588 *per* Duff, J. In the present case there is a *lis,* there are parties, and the decision is binding. Under the Manitoba Act, R.S.M. 1940, Cap. 142, Sec. 57 (5) is the same as our section 103, yet the Court gives a judgment, and the certifying to the utilities board is effected by the registrar's sending to the board a copy of the judgment and the reasons for judgment: see section 57 (9). That seems a convenient practice here.

[SLOAN, C.J.B.C.: If you are right, then we must supplement our original judgment by a further judgment on the law. No doubt we could do this *nunc pro tunc.*]

Harvey, K.C., for appellant: I shall not present any argument on section 103, but the formal judgment drawn by the respondent gives it the general costs of the appeal, and we say the Court cannot award any costs at all. This is not a case within section 28 of the Court of Appeal Act, so there is no authority for awarding costs.

[O'HALLORAN, J.A.: Does not section 102 of the Public Utilities Act cover the point? It gives the Court the same powers as in an ordinary appeal.]

The power of the Court is purely statutory, and the statute

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gives no power over costs. The Court has no inherent jurisdiction.

[ROBERTSON, J.A.: Section 100 refers to costs, and if the Court gives a judgment, as is my present view, then this must mean costs awarded by the Court.]

The Court's power must be expressly conferred.

Gordon, in reply: All the appellant's arguments were raised in *Corporation of District of Oak Bay* v. *Corporation of City of Victoria* (1941), 56 B.C. 415 and MCDONALD, J.A. held against them, in an elaborately reasoned judgment.

Cur. adv. vult.

30th January, 1946.

O'HALLORAN, J.A. (oral): The judgment of the Court is that the order be drawn in the form suggested by the respondent. In consequence, the Court now gives judgment *nunc pro tunc* dismissing the appeal on questions of law. I concur in that disposition of the judgment, although I would allow the appeal on questions of law for reasons appearing in my reasons for judgment already handed down.

I am authorized by his Lordship the Chief Justice to deliver this judgment, and I am filing his authority to do so.

Judgment accordingly.

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REX v. CAPELLO.

Criminal law—Charge of attempting to break and enter—Previous conviction of indictable offence—Application of section 1053 of Criminal Code —Criminal Code, Secs. 461, 571 and 1053.

Section 1053 of the Criminal Code provides that "Every one who is convicted of an indictable offence not punishable with death, committed after a previous conviction for an indictable offence, is liable to imprisonment for ten years, unless some other punishment is directed by any statute for the particular offence."

Accused was charged with attempting to break and enter under Code section 571. The maximum sentence of seven years for breaking and entering under Code section 461 is limited by Code section 571 in an

attempt to commit that offence to one-half the term of imprisonment, namely, three and one-half years. The accused had been previously convicted of an indictable offence and holding that Code section 1053 is an "express provision" to which Code section 571 refers, accused was sentenced to seven years' imprisonment.

Held, on appeal, affirming the decision of LENNOX, Co. J., that Code section 571 makes an "attempt" an indictable offence in itself. It is, therefore, an indictable offence committed after a previous conviction for an indictable offence referred to in section 1053 which imposes a maximum penalty of ten years. The appellant had been previously convicted of an indictable offence and accordingly comes within the maximum penalty of ten years provided for in section 1053. The present sentence of seven years is within that maximum. From the facts and the accused's record no sound reason emerges for disturbing the sentence of seven years.

APPEAL by accused from his sentence on conviction by LENNOX, Co. J. of the 11th of December, 1945, on a charge of attempting to break and enter a shop with intent to commit an indictable offence. The accused was sentenced to seven years' imprisonment.

The appeal was argued at Victoria on the 29th of January, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Wismer, K.C., for appellant: The maximum penalty under section 461 of the Code for breaking and entering is seven years and the maximum under section 571 for attempting to commit the offence is three and one-half years. The learned trial judge in sentencing the accused to seven years proceeded under section 1053 on the ground that he had previously been convicted of an indictable offence. He proceeded on a wrong principle. The charge is under section 571 and he should proceed under that section. In any case the sentence is excessive and unjust.

Remnant, for the Crown: The offence is under section 571, but where it is shown there was a previous conviction for an indictable offence by section 1053 the maximum penalty is ten years. The record shows there has been continuous criminal action by the accused.

Cur. adv. vult.

1st February, 1946.

Per curiam (O'HALLORAN, J.A.): This appeal is confined to the sentence of seven years' imprisonment imposed on the appel-

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lant upon his conviction for attempting to break and enter a shop with intent to commit an indictable offence. His counsel questions the jurisdiction of the learned judge to impose a greater sentence than three and a half years, and in the alternative submits that the sentence of seven years is excessive.

The jurisdictional point is, that the maximum sentence of seven years for breaking and entering under Code section 461, is limited by Code section 571 in the case of an attempt to commit that offence, to one half the maximum, *viz.*, three and a half years. Counsel for the Crown respondent upholds the learned judge's view that Code section 1053 is an "express provision" to which section 571 refers, and this supports a maximum sentence of ten years in the case of a second indictable offence such as it is said this is. Counsel have been unable to furnish the Court with any reported decision on the point, and in the time at our disposal we have found none which helps.

We are all of opinion the appellant's objection cannot be sustained. Section 571 makes an "attempt" an indictable offence in itself. It is therefore an indictable offence committed after a previous conviction for an indictable offence referred to in section 1053. The appellant had been convicted previously of an indictable offence. Accordingly the maximum sentence for conviction for the "attempt" as an indictable offence in itself, becomes ten years' imprisonment. So viewed the present sentence of seven years is well within that maximum. We express no opinion upon a construction relating section 465 to section 570 which in this case would result in a maximum sentence of seven years' imprisonment.

Following what this Court said in *Rex* v. *Woods and Langthorne (No. 2)* (1944), 82 Can. C.C. 218, which the learned judge applied, no sound reason emerged to disturb the sentence of seven years. The appellant is 34 years of age, but his record shows no effort to depart from the life of violence in which he has been engaged. He was not out of the penitentiary for more than seven months, when he committed this offence, resorting again to the same type of crime for which in 1939 he had received a sentence of five years to run concurrently with another sentence of seven years. From the facts stated to the Court, it

would appear, that had it not been for the efficiency of the police, who opportunely interrupted his criminal activities, the appellant would have been successful in breaking, entering and robbing the shop in question.

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Appeal dismissed.

REX v. LOGAN AND INGLEE.

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Criminal law — Breaking and entering — Presumption from possession— Improper statement by constable when witness—Effect on jury—Criminal Code, Sec. 1014, Subsec. 2.

The accused were charged with breaking and entering. They were found in joint possession of the goods which were proven to have been very recently stolen, and offered no explanation whatever.

Held, that added to the other evidence in the case pointing to the commission of the offence charged, there were the presumptions not only that they knew the goods were stolen, but that they were the thieves, and if they were the thieves, they must have committed the breaking and entering as the evidence is such that the goods could not have been stolen without breaking and entering.

A police constable, called for the prosecution, made a statement before the jury without being asked, that the appellant Logan told him "he had not been out of Oakalla long enough to obtain work." The learned judge overruled defence counsel's objection thereto and in summing-up did not instruct the jury to disabuse their minds of the improper testimony.

Held, that although objection advanced to this evidence was well taken, this was a case in which section 1014, subsection 2 of the Criminal Code should be applied as the case against accused is so conclusive that even if the objectionable testimony were excluded, no jury acting judicially would have found any verdict other than they did.

APPEALS by accused from their conviction before MANSON, J. and the verdict of a jury at the Fall Assize at Vernon on the 7th of November, 1945, on a charge of breaking and entering a store and stealing certain goods therefrom.

The appeal was argued at Victoria on the 29th of January, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

Logan, in person, submitted that there was no evidence whatever of breaking and entering.

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Jackson, K.C., for the Crown: The goods were stolen at Armstrong between Tuesday evening and Wednesday morning and a valise containing the goods was shipped by Inglee from Armstrong to himself at Kamloops on Wednesday afternoon.

Cur. adv. vult.

1st February, 1946.

Per curiam (O'HALLORAN, J.A.): The appellants were jointly convicted of breaking and entering a shop and stealing certain goods therein named. They submitted in person that there was no evidence of breaking and entering. They were found in joint possession of those goods which were proven to have been very recently stolen. They offered no explanation whatever.

Added to the other evidence in the case pointing to the commission of the offence as charged there are the presumptions not only that they knew the goods were stolen, but that they were the thieves (*cf. Rex* v. *Sullivan and Godbolt* delivered 15th January, 1946 [*ante,* p. 278] citing *Rex* v. *McKinnon* (1941), 56 B.C. 186-7), and further that if they were the thieves, that they committed the breaking and entering, since the evidence is such, that the goods could not have been stolen without breaking and entering, *cf. Regina* v. *Exall and others* (1866), 4 F. & F. 922.

The only other aspect of the appeal to which we need refer is a statement blurted out before the jury in the evidence in chief of a police constable called by the prosecution that the appellant Logan had told him "he had not been out of Oakalla long enough to obtain work." The learned judge overruled defence counsel's objection thereto, and in his summing-up to the jury did not instruct them to disabuse their minds of that prejudicial and improper testimony. With respect, the learned judge acted in error.

However, under Code section 1014, subsection 2 even though the Court of Appeal is of opinion the objections advanced by the appellants in this respect are well taken, nevertheless it may dismiss the appeals if it is also of opinion that no substantial wrong or miscarriage of justice has actually taken place. In our judgment that is the situation here. For the case against the

appellants is so conclusive, that even if the objectionable testimony had been excluded, no jury acting judicially could have found any verdict other than they did, *cf. Rex* v. *Dillabough* (1944), 60 B.C. 534, at p. 536; *Rex* v. *Featherstone* (1942), 194 L.T. Jo. 190; *Levesque & Graveline* v. *Regem* (1934), 62 Can. C.C. 241, Lamont, J. in Chambers at p. 245 and *Stirland* v. *Director of Public Prosecutions* (1944), 60 T.L.R. 461, at p. 464.

The appeals are dismissed.

Appeals dismissed.

REX v. HAND.

Criminal law—Conviction following plea of guilty under section 301 of Criminal Code—Conviction vacated and case remitted for trial.

A plea of guilty made by accused without any clear understanding of the effect of the plea was set aside and leave to appeal granted, it appearing that he did not intend to admit that strict proof could be made of every fact necessary to establish guilt. Order made remitting case for trial. *Rex* v. *Roop* (1924), 42 Can. C.C. 344, followed.

MOTION by accused to the Court of Appeal for leave to appeal under section 1013 (*c*) of the Criminal Code from his conviction by the police magistrate at Port Alberni that he unlawfully had carnal knowledge of a girl four years of age contrary to section 301 of the Criminal Code.

The motion was heard at Victoria on the 29th of January, 1946, by O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

McAlpine, K.C., for the motion: The charge was of having carnal knowledge of a young girl four years old. He pleaded guilty. The alleged assault was at about 12.30 a.m. on November 3rd, 1945. We are asking that there be a new trial on the ground that he was ill-advised when he pleaded guilty under section 1013 of the Criminal Code. The motion is for leave to appeal on mixed questions of fact and law.

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Des Brisay, K.C., for the Crown, referred to *Rex* v. *Forde* (1923), 92 L.J.K.B. 501; *Rex* v. *Dawson* (1924), 18 Cr. App. R. 111; *Rex* v. *Adams,* [1944] 1 W.W.R. 573, at p. 587; *The King* v. *Ah Tom* (1928), 60 N.S.R. 1; *Bouchard* v. *Regem. Demers* v. *Regem* (1930), 49 Que. K.B. 221; *Rex* v. *Richmond,* [1917] 2 W.W.R. 1200; *Rex* v. *Wyatt* (1921), 16 Cr. App. R. 57. Drunkenness is not a defence: see *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479, at pp. 504-5.

McAlpine, replied.

Cur. adv. vult.

1st February, 1946.

Per curiam (BIRD, J.A.): Hand seeks leave of this Court under Code section 1013 (*c*) to appeal from his conviction at Port Alberni by police magistrate Patterson, that he unlawfully had carnal knowledge of a young girl four years of age, contrary to section 301 of the Criminal Code. The accused had entered a plea of guilty. No evidence was led before the magistrate, nor does it appear that there was made, in open Court and prior to conviction, any sufficient explanation of the circumstances upon which the charge was based

The affidavits filed in support of the motion for leave to appeal disclose that the plea of guilty was made by the accused without any clear understanding of the effect of the plea (in such circumstances this Court may entertain the appeal)—*Rex* v. *Forde* (1923), 17 Cr. App. R. 99; *Rex* v. *Olney* (1926), 37 B.C. 329—in that he did not thereby intend to admit that strict proof could be made of every fact necessary to establish guilt; for those factors are involved in a plea of guilty: *Rex* v. *Roop* (1924), 42 Can. C.C. 344.

It appears from these affidavits that were it not for what has just been said evidence could have been led on his trial to show that due to drunkenness the accused, at and subsequent to the time of the alleged commission of the offence, had no knowledge of the incidents upon which the charge is founded, nor had he the capacity to form an intent if he did commit the assault—*Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479, at p. 504.

This Court in two recent cases has had occasion to express the

opinion that a plea of guilty ought not to be accepted unless the judge or magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to provide assurance that the accused understands the offence to which his plea relates —*cf. Rex* v. *Theriault* (unreported) and *Rex* v. *Johnson and Creanza* (1945), 85 Can. C.C. 56. This course is more particularly essential where the offence, as here, involves a maximum sentence of life imprisonment and whipping.

In those circumstances and in view of the material filed, which indicates that the accused may have a good defence, we are of opinion that a miscarriage of justice has occurred.

Therefore leave to appeal is granted. There will be an order remitting the case for trial. The conviction below to be vacated. Compare *Rex* v. *Olney* (1926), 37 B.C. 329.

The appeal is allowed accordingly.

Appeal allowed.

IN RE THE TRUSTEE ACT AND *IN RE* ESTATE OF LAURA MILLER DUNSMUIR.

Practice—Costs—Custody of securities—Fees charged for—Whether allowed as disbursements or items of expenditure.

An application to vary the report of the registrar by allowing as "disbursements" or as "items of expenditure" two fees charged in the accounts of The Royal Trust Company for safe custody of securities of considerable value in the estate was dismissed.

APPLICATION to vary the report of the registrar by disallowing as disbursements or as items of expenditure two fees charged in the accounts of The Royal Trust Company for safe custody of securities. Heard by MACFARLANE, J. in Chambers at Victoria on the 18th of January, 1946.

Martin, K.C., for the application.

Moresby, K.C., for the beneficiaries.

Cur. adv. vult.

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IN RE TRUSTEE ACT AND ESTATE OF LAURA M. DUNSMUIR

4th February, 1946.

MACFARLANE, J.: This is an application to vary the report of the registrar by allowing as disbursements or as items of expenditure two fees charged in the accounts by The Royal Trust Company for safe custody of securities of considerable value in this estate. These fees represent charges against the Victoria office by the Winnipeg office of the company for these services and are based on what the company estimates it cost them to provide the service. I do not think that charges of this kind are in fact expenditures any more than payments of upkeep of the offices of the company trustee are. It may well be that the carrying out of its duties in taking care of securities forming part of the assets of an estate are greater in some circumstances than in others but they are part of the operating expenses of the company and should be covered by the remuneration which they are allowed, in this case, subject to application for further remuneration, by their own contract. In my opinion they are not properly "disbursements" or "items of expenditure" but are as they are called fees or remuneration. I think the registrar was correct in disallowing them as disbursements or as items of expenditure.

I would dismiss the application.

Application dismissed.

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Feb. 5, 7.

E. A. TOWNS LIMITED v. HARVEY, RUCK AND MOORE, EXECUTORS OF THE ESTATE OF S. C. RUCK, DECEASED.

Practice—Application for leave to appeal to Supreme Court of Canada—Approval of security—Notice of appeal out of time—Application to extend—R.S.C. 1927, Cap. 35, Secs. 64 and 66.

The judgment under appeal was pronounced on the 27th of November, 1945, and entered on the 7th of January, 1946. On the 3rd of January, 1946, the appellants' solicitors received instructions to appeal to the Supreme Court of Canada and notified the respondent's solicitors by letter on the same day. The judgment sum of $9,109.43 together with the taxed costs of trial and appeal were deposited with the respondent's solicitors

to abide the result of the appeal to the Supreme Court of Canada. This motion was taken out on February 1st, 1946, to approve the security of $500 deposited on February 1st, 1946, and to allow an appeal to the Supreme Court of Canada, and as the time for appeal expired on January 26th the motion included an application to extend the time for bringing the appeal.

Held, a *bona fide* intention to appeal was shown before the time expired on January 26th, 1946. In the recited circumstances one is unable to say the appellants are asking for anything "so eminently unjust" that it ought to be refused. What constitutes "special circumstances" must depend upon the "interests of justice" as reflected in the particular case. The appeal is allowed accordingly and the time for appeal is extended until the 16th of February, 1946. Security as deposited is approved.

Levi v. *MacDougall et al.* (1944), 60 B.C. 492, applied.

MOTION to a judge of the Court of Appeal to approve the security of $500 deposited on February 1st, 1946, and to allow an appeal to the Supreme Court of Canada, including an application to extend the time to bring the appeal. Heard by O'HALLORAN, J.A. in Chambers at Victoria on the 5th of February, 1946.

Whittaker, K.C., for the motion.
A. Bruce Robertson, contra.

Cur. adv. vult.

7th February, 1946.

O'HALLORAN, J.A.: This is a motion to approve the security of $500 deposited on 1st February, 1946, and to "allow" an appeal to the Supreme Court of Canada. Since the time for appeal expired on 26th January (*cf. Levi* v. *MacDougall et al.* (1944), 60 B.C. 492) the motion which was taken out on 1st February includes an application to extend the time for bringing the appeal, and see sections 64 and 66 of the Supreme Court Act, Cap. 35, R.S.C. 1927, and *Levi* v. *MacDougall et al., supra,* at pp. 494-5.

The judgment under appeal was pronounced on 27th November, written reasons were handed down on 28th December, and the formal order for judgment was entered on 7th January. From the affidavits filed it appears the solicitors received instructions on 3rd January to appeal to the Supreme Court of Canada, and notified the respondent's solicitors by letter on the same day.

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It appears also that the judgment sum of $9,109.43 together with the taxed costs of the trial and the appeal to this Court have been deposited with the respondent's solicitors to abide the result of the appeal to the Supreme Court of Canada.

I conclude a *bona fide* intention to appeal was shown before the time expired on 26th January. In the recited circumstances I am unable to say the appellants are now asking for anything "so eminently unjust"—*per* Bowen, L.J. in *In re Manchester Economic Building Society* (1883), 24 Ch. D. 488, at p. 503—that it ought to be refused. What constitutes "special circumstances" must depend upon the "interests of justice" as reflected in the particular case and *cf. Levi* v. *MacDougall et al., supra,* at p. 496.

I would "allow" the appeal accordingly and extend the time until 16th February, 1946. Security as deposited is approved. I see no occasion to impose terms. But in the circumstances, the respondent is entitled to the costs of the motion in any event of the appeal.

Motion granted.

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1946
Feb. 1, 8.

KYLE v. HALL.

Practice—Appeal from magistrate to county court—Security not deposited in time—Application to extend time to deposit security refused—Appeal from refusal to Supreme Court—Dismissed.

Section 55 of the Small Debts Court Act provides that an appeal shall lie either to the nearest county court or a judge of the Supreme Court. Notice of appeal from the decision of the magistrate at Duncan, B.C., was given to the county court at Duncan, but security was not given within one week after the decision appealed from, as required by section 55 of said Act and the magistrate refused to allow further time to do so as he may under said section 55. The appellant appealed to a judge of the Supreme Court from the refusal of the magistrate to extend the time. On preliminary objection by the respondent that the appellant had chosen his forum and must therefore appeal to the forum he had chosen:—

Held, dismissing the appeal, that when notice of appeal is given to the county court that court becomes seized of the matter and any interlocutory or other relief should be obtained from that court.

APPEAL from the refusal of the magistrate of the small debts court at Duncan, B.C., to extend the time for depositing security as required by section 55 of the Small Debts Court Act. Heard by MACFARLANE, J. at Victoria on the 1st of February, 1946.

P. R. Leighton, for appellant.
H. W. R. Moore, for respondent.

Cur. adv. vult.

8th February, 1946.

MACFARLANE, J.: This is an appeal from the refusal of the magistrate of the small debts court at Duncan, V.I., to extend the time for depositing security as required by section 55 of the Small Debts Court Act. By section 54 it is provided that an appeal from the decision of the magistrate shall lie in all cases both as to law and fact. By section 55 it is provided that

The appeal shall lie either to the nearest County Court or a Judge of the Supreme Court.

In this case notice of appeal from the decision of the magistrate in the case was given to the county court at Duncan, being the nearest county court but by a slip of the solicitor security was not given "within one week after the decision appealed from" and the magistrate has refused to allow further time to do so as he may under section 55. The appellant now brings an appeal to a judge of the Supreme Court from the refusal of the magistrate to extend the time. Mr. *Moore* takes the preliminary objection that the appellant has chosen his forum and if he desires to appeal from the refusal of the magistrate, he must appeal to the forum he has chosen. Sittings of the nearest county court are held only at intervals and none will be held for some weeks and none earlier than the time when the appeal from the decision of the magistrate in the case itself might come on for hearing; and as the appeal is by way of rehearing that involves the attendance of all parties. Neither counsel has submitted any authority and I have found none. It is submitted, of course, that there are two decisions, one on the hearing and the other, the decision of the magistrate refusing to extend time for giving the security. Section 55 also refers to "the decision or verdict." Section 10 says that every "decision" shall be given in open Court. Verdict

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may be added to cover punishment for contempt under section 11. The right of appeal is purely statutory. The power of the magistrate to allow further time within which to deposit security is discretionary. Naturally a small amount—I think the judgment is $58.50—is involved. I think section 54 contemplates one appeal from the decision of the magistrate. I think that when the notice of appeal is given to the county court, that court becomes seised of the matter and any interlocutory or other relief should be obtained from that court. I do not think the Act contemplated anything more than a provision for alternative forums. I do not think that concurrent appeals in the same cause or matter at different stages to different forums are in contemplation.

I think the preliminary objection should be sustained and the appeal be dismissed with costs.

Preliminary objection sustained and appeal dismissed.

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Feb. 6, 12.

REX v. TELLIER.

Criminal law—Conviction—Appeal—Sentence reduced—No warrant of conviction by judge on appeal or by convicting magistrate—Habeas corpus—Order directing issue of proper warrant by magistrate.

Accused was convicted on November 15th, 1945, under Part XV. of the Criminal Code of an offence against the Canada Shipping Act and sentenced to serve eight weeks in gaol. He filed notice of appeal to the county court under section 750 of the Criminal Code and was released on bail pursuant to said section. On January 14th, 1946, the conviction was affirmed in the county court, but the sentence of imprisonment was reduced from eight weeks to seven weeks and three days. No warrant of commitment was made by the county court judge to cover the new sentence, nor was any new warrant of commitment made by the convicting magistrate. Upon an application for a writ of *habeas corpus*:—

Held, that the prisoner be detained pending the execution and delivery to the warden of a proper warrant of commitment from the deputy police magistrate covering the new sentence, and that the deputy police magistrate immediately execute such a warrant.

APPLICATION for a writ of *habeas corpus*. Heard by WILSON, J. at Vancouver on the 6th of February, 1946.

Stanton, for accused.
Swencisky, for the Crown.

Cur. adv. vult.

12th February, 1946.

WILSON, J.: Gerald O. Tellier was on November 15th, 1945, convicted by police magistrate McInnes, acting under Part XV. of the Criminal Code, of an offence against the Canada Shipping Act and sentenced to serve eight weeks in gaol.

After he had served some few days in gaol notice of appeal to the county court under section 750 *et seq.* of the Criminal Code was filed and he was, pursuant to the said sections, released on bail. On January 14th, 1946, BOYD, Co. J. heard the appeal and affirmed the conviction but reduced the sentence of imprisonment from eight weeks to seven weeks and three days. No warrant of commitment was made by Judge BOYD to cover the new sentence, nor was any new warrant of commitment made by the convicting magistrate. A writ of *habeas corpus* directed to the warden of the Provincial gaol at Oakalla brought the prisoner before me. The grounds on which his release is asked are these: That the original warrant of commitment executed by the police magistrate was exhausted when the accused was released on bail or, alternatively, was exhausted when a new sentence was imposed by the county court judge and that, since no new warrant has been issued, the accused is illegally held in custody.

Section 754 of the Criminal Code says that the county court judge on appeal may—

1. . . . confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the justice whose decision is appealed from might have exercised.

2. Such conviction or order . . . may be enforced in the same manner as if it had been made by such justice.

3. Any conviction or order made by the court on appeal may also be enforced by process of the court itself.

Section 756 of the Criminal Code reads as follows:

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If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought.

A series of cases fathered by the decision of the Court of King's Bench in *Rex* v. *Governor of Pentonville Prison* (1902), 67 J.P. 206, and including *Re Rex* v. *Sipes,* [1925] 3 D.L.R. 361, *Re Rex* v. *Chomik, ib.* 1126, *Rex* v. *Gray,* [1925] 1 W.W.R. 831, and *Ex parte Shepherd,* [1940] 3 D.L.R. 396, has held that the release of the appellant on bail following notice of appeal exhausts the magistrate's warrant of conviction and that thereafter, if the conviction is affirmed there must be a new warrant of commitment. The decision of MURPHY, J. in *Rex* v. *Durlin* (1912), 17 B.C. 207, the only British Columbia judgment on the subject, is an authority directly to the contrary, for there that learned judge, for whose opinions I have the profoundest respect, held that (p. 208)

> . . . There seems no reason in principle, or in the wording of section 751 of the Criminal Code, for holding that the original warrant is vacated by the lodging of an appeal and the granting of bail.

Despite any doubts the conflicting opinions of other judges might arouse in my mind I would unhesitatingly follow MURPHY, J.'s decision if I thought it applicable here.

As I see this case, it is not necessary for me to determine whether the original warrant of commitment was exhausted by the lodging of an appeal and the giving of bail because it is, I think, quite clear that the original warrant of commitment is expunged or destroyed by the order of the county court judge imposing a new sentence. The sentence now imposed on the accused is a new and different one not described in the original warrant of commitment, and a warrant authorizing the detention of a man for eight weeks can no more be said to justify his detention for the lesser period of seven weeks and three days, imposed by a new sentence at a trial *de novo,* than would a warrant of commitment for seven weeks and three days operate to hold a man for a new sentence, if such had been passed on appeal, of eight weeks.

In *Rex* v. *Samuel Murphy* (1923), 39 Can. C.C. 256, the Supreme Court of Nova Scotia considered the case of a man who had been convicted under Part XV. and had appealed to the

county court. The county court judge had affirmed the conviction but reduced the penalty, exactly what happened in the case I am considering. It was there held *per* Rogers, J. at pp. 269-70:

> The appeal was in substance decided in favour of respondent although it is obvious inasmuch as the penalty was reduced that a commitment for execution of the same "as if no appeal had been brought" [s. 756] was quite impossible. The provisions of subsec. 2 of sec. 754 however I think upon careful consideration are applicable and the modified conviction is to have the same effect and may be enforced in the same manner as if it had been made by the justice. That is, the conviction in the case of amendment may be enforced in the same manner, by commitment by the magistrate as if it had been made as amended by him, while sub-sec. 3 would imply that if a new conviction were made, as for instance against a respondent who was acquitted by the magistrate below, it would properly "be enforced by process of the court itself," that is, the appeal Court. This construction is that approved by Cross, J., in *Collette* v. *Regem* (1909), 16 Can. C.C. 281.

The meaning of these words is somewhat obscured by the words of the learned judge at the foot of p. 270:

> In the case at Bar there is not a new conviction; it is a modified or amended one and it seems to me that it could be enforced as amended either by the magistrate more especially if as here the County Court so requires . . . or by process of the Court itself.

From this case, and from *Collette* v. *Regem, supra,* which I have read, I have no trouble in concluding that the correct process for the enforcement of the modified sentence pronounced by BOYD, Co. J., in affirming the appeal is the issue of a new warrant of commitment by him or by the deputy police magistrate, and that such procedure has not been followed here. Since, as I have held, the original warrant of commitment lost its validity when a new sentence was imposed, Tellier is not presently legally in the custody of the warden of Oakalla prison.

I was not referred to section 1121, but I have considered it, and must hold that it does not apply here. It says that

> no warrant or commitment shall be held void by reason of any defect therein.

This warrant is not void by reason of any defect therein, but has ceased to have any effect because a new sentence has been imposed. But as has been pointed out to me by the respondent, the commitment is merely a ministerial act and the conviction stands. Such being the case he argues that I should order the prisoner detained and a new warrant of commitment executed.

Since the offence of which the accused was convicted is not indictable, section 1120 does not apply and the authority for

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doing what I am asked by the Crown to do must be found, if at all, in the common law.

In *Collette* v. *Regem,* Cross, J., finding the warrant of commitment defective, ordered that the prisoner be held and an amended warrant of conviction issued. In so doing he made these remarks (p. 292):

> I have said that, in making this order, I avail myself of the authority given by article 1120 of the Code, but it may be added that the order is justifiable as a mere exercise of the inherent power of this Court to control its proceedings, and quite apart from the specific authority given by that article.

Meredith, J.A. in *Rex* v. *Frejd* (1910), 18 Can. C.C. 110, at p. 120, says this:

> But the inapplicability of sec. 1120 is not conclusive of the case. Though the order in appeal was made under the provisions of that section of the Criminal Code only, and no attempt to support it here, otherwise, was made, that does not prevent a consideration of the question whether the order can be otherwise supported.
>
> It is, in no sense, the purpose of any writ of *habeas corpus* to thwart the due administration of justice, and so, in many cases, even under the common law, one who is unduly restrained of his liberty, in one respect, and entitled to his discharge from such detention, may nevertheless be further detained, and dealt with, so that justice may be done regarding him.

This pronouncement is followed by references to several authorities which appear to afford abundant support to the proposition elucidated by the learned judge.

I therefore order that the prisoner shall be detained pending the execution and delivery to the warden of a proper warrant of commitment from the deputy police magistrate covering the new sentence. The deputy police magistrate will please execute such a warrant immediately.

Application dismissed.

BROWN v. BATCO DEVELOPMENT CO. LTD.

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1946
Feb. 8, 12.

Practice—Action for damages resulting from negligence—Statement of claim—Delivery of statement of defence—Application by defendant for particulars—Matters peculiarly within knowledge of defendant—Discovery—Rule 203.

In an action for damages, the plaintiff alleged that he lent certain logging equipment to the defendant for the defendant's use, gratis, that the equipment was destroyed by fire and that the fire was the result of the defendant's negligence. The defendant pleaded to the statement of claim by delivery of a statement of defence and then pursuant to rule 203 asked for particulars of negligence. The plaintiff refused, claiming that the facts upon which the allegations of negligence are based are peculiarly within the knowledge of the defendant and he cannot give particulars until after discovery. Upon the defendant's application for particulars:—

Held, refusing the application, that this is a case in which discovery may well precede particulars.

Fairburn v. *Sage* (1925), 56 O.L.R. 462, applied.

APPLICATION by defendant after delivery of defence pursuant to rule 203 for particulars of the matters referred to in the statement of claim. Heard by WILSON, J. at Vancouver on the 8th of February, 1946.

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

Cur. adv. vult.

12th February, 1946.

WILSON, J.: In this case the plaintiff alleges that he lent certain logging equipment to the defendant for the defendant's use, gratis, that the equipment was destroyed by fire, and that such fire was the result of the defendant's negligence. The allegations of negligence set out in the statement of claim are general in their nature and of such a kind as would ordinarily justify an order that they be particularized.

The defendant has pleaded to the statement of claim by delivery of a statement of defence and now, pursuant to rule 203, asks for particulars of negligence.

The plaintiff has refused these particulars, saying that the facts on which the allegations of negligence are based are pecu-

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liarly within the knowledge of the defendant and that he cannot give particulars until after discovery.

The defendant has referred me to the unreported decision of the Court of Appeal in *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.* In that case it was claimed that the defendants negligently allowed a fire to break out on their premises and sweep on to the plaintiff's property, destroying it. Particulars of the negligence were demanded and the Court of Appeal ordered that they must be given. Counsel for the defendant points out that in that case, as here, the details of the origin of the fire must have been peculiarly within the knowledge of the defendants, and yet the order was made.

The very brief judgment of MARTIN, C.J.B.C., refers to *Fairbairn* v. *Sage* (1925), 56 O.L.R. 462, at p. 471, and I assume that he refers to it with approval. In that decision the Court of Appeal for Ontario considered a case where the plaintiff had leased certain premises to the defendants, which premises had been destroyed by fire. The plaintiff sued, claiming only that the fire was due to gross negligence on the part of the defendant. Particulars of the gross negligence were demanded by the defendant and the judgment of the Ontario Court of Appeal held they need not be given.

Since the learned Chief Justice referred to this case, while making a contrary decision in the case before him I can only assume that he approved of the principles cited in the *Sage* case, but considered that the facts in the *Elk River Timber* case justified a different decision. The outstanding difference apparent in the two cases is that in the *Sage* case there was a contractual relation between the plaintiff and defendant whereby the thing destroyed was in the keeping of the defendant, a circumstance which did not exist in the *Elk River* case. The case before me is one of gratuitous bailment, a loan for use, described by Lord Holt in *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, at p. 913; 92 E.R. 107, at p. 109 as a *commodatum,* so that the bailee is answerable for the least neglect. Certainly the things bailed were in the exclusive keeping of the defendant. It seems to me the circumstances here are more nearly akin to those in the *Sage* case than to those in the *Elk River* case, and, in fact, that the

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plaintiff is in a better position here than was the plaintiff in the *Sage* case, since he need only prove "the least neglect" and not gross negligence. I can see the sense of the contention by plaintiff's counsel that, if he must give particulars at this time they will be more inventive than factual. I think this is a case in which discovery may well precede particulars, and I reject the application. Costs in the cause to the plaintiff in any event of the trial.

Application dismissed.

CRABBE v. CRABBE AND STEPHENSON.

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In Chambers
1946
Jan. 18;
Feb. 13.

Costs—Petition for dissolution of marriage—Claim for damages against co-respondent — Petition dismissed—Co-respondent's costs—Taxation—Review.

A petition for dissolution of marriage included a claim for $500 damages against the co-respondent. Upon the petition being dismissed, the district registrar taxed the co-respondent's bill of costs under Column 2 of Appendix N. Upon an application to review the taxation on the ground that the amount involved between the petitioner and the co-respondent is the amount of damages claimed, namely, $500, the scale to apply to the taxation is Column 1.

Held, dismissing the application, that the amount claimed does not arise for determination until the issue of adultery of the wife with the co-respondent has been found in favour of the petitioner. In this case the petition was dismissed. The only issue determined is that of adultery. When the petitioner fails to establish his case, the claim for damages fails with the main issue. In a suit such as the present where the issue determined is that of adultery alone, there is no amount involved which can be determined. The costs are taxable with respect to the main issue under Column 2.

APPLICATION to review the taxation of the co-respondent's bill of costs in a petition for dissolution of marriage. Heard by MACFARLANE, J. in Chambers at Victoria on the 18th of January, 1946.

Martin, K.C., for the application.
Monteith, contra.

Cur. adv. vult.

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CRABBE v. CRABBE AND STEPHENSON

13th February, 1946.

MACFARLANE, J.: This is an application to review the taxation of the co-respondent's bill of costs, the objection being that the district registrar taxed the said bill of costs under Column 2 of Appendix N, instead of Column 1 of the said Appendix. It is submitted that the amount involved between the petitioner and the co-respondent is the amount of the damages claimed and that the damages claimed in the petition being $500 the scale to apply to the taxation is Column 1.

The rule requires that in all cases where the amount involved can be determined, the costs shall be taxed under the column applicable to that amount. Rule (2) provides that

> In all other actions, causes, [or] proceedings, . . . the costs shall be taxed under Column 2. Provided, . . . , that . . . the Court or a Judge may at any time before taxation order the costs . . . to be taxed on a higher scale than that which would be otherwise applicable,

in certain specified cases, or in any other case for special reason.

The questions here are then whether (1) the amount involved can be determined; and (2) if the amount involved cannot be determined then whether the first part of rule (2) applies and requires an application before taxation to fix a higher scale "than that which would be otherwise applicable." In other words, reducing the problem here to more concrete terms, can a petitioner by claiming damages under $3,000 fix the scale of costs applicable as against him, in case he fails, to Column 1? If he can, the anomalous situation arises that if a petitioner claims no damages against a co-respondent then there is no amount involved to be determined and the costs are taxable under Column 2, while if he claims $2,500 in damages, the costs are thereby reduced and taxable under Column 1. It is urged that the issue between the petitioner and the co-respondent as to whether the co-respondent was guilty of adultery with the respondent, the wife of the petitioner, may be to the co-respondent much more serious than the amount of the damages claimed against him. Does the fact that that issue if such it is as between these parties involves a degree of obliquity, evidence of the appreciation of which is apparently unfortunately seldom present in the majority of cases today, make it the governing factor here considering the language of Appendix N, which in

terms provides that the scale to be applied is to be selected according to the amount involved where that can be determined.

The point appears on first sight to have merit, although if the argument of the applicant is accepted, it would mean a departure from what has been so far as I can find a practice which has been consistently followed in this and the other registries of the Province ever since the introduction of the block system of taxing costs. The accepted practice is based, I think, on the fact that the claim for damages in divorce has been treated as a distinct cause of action which under section 18 of the Divorce and Matrimonial Causes Act may be made

either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only.

Where the claim for damages is made in the petition for dissolution, the amount claimed does not arise for determination until the issue of adultery of the wife with the co-respondent has been found in favour of the petitioner. In the instant case, where the petition has been dismissed it never did arise. The only issue "determined" in such an action is that of adultery. When the petitioner fails to establish his case, the claim for damages falls with the main issue. Whether or not the claim for damages is made, the person with whom the adultery is alleged to have been committed must be made a party and although it has been held that the amount of the claim for damages, if any, must state the amount of such claim, I think it can well be held that in a suit such as the present where the issue determined is that of the adultery alone, there is no amount involved which can be determined. In view of the established practice and more particularly in the circumstances of this case, I think I should hold that the costs are taxable with respect to the main issue and that the scale to be selected is not that which might otherwise be appropriate to the amount of the damages claimed.

I would, therefore, confirm the taxation and dismiss the application.

Application dismissed.

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Jan. 23;
Feb. 13.

REX v. CROSS.

Criminal law — Justices and magistrates — Jurisdiction — Section 407 of Municipal Act — Effect of — Prohibition — R.S.B.C. 1936, Cap. 199, Sec. 407.

Section 407 of the Municipal Act provides: "No justice of the Peace shall admit to bail or discharge a prisoner, or adjudicate upon or otherwise act in any case for a city or district municipality where there is a Police Magistrate, except in the case of the illness, or absence, or at the request of the Police Magistrate.

Accused applied for a writ of prohibition directed to a stipendiary magistrate for the county of Nanaimo prohibiting him from further proceeding with an information laid against accused upon the ground that the alleged cause of the information arose in the city of Port Alberni for which said city there is a duly appointed police magistrate and it is not within the jurisdiction of a stipendiary magistrate of the county of Nanaimo to proceed with the information, except at the request of the police magistrate. The magistrate did not propose to sit at Port Alberni but at Nanaimo. The information was laid at Nanaimo, the offender residing in Ladysmith.

Held, that the words "case for a city" may apply not only to cases where the offence is committed, but to cases having other elements, namely: "where the offender is apprehended within the limits" or where the administration of the Act was in the hands of officials of the city, or where initiatory proceedings were taken or where the trial was proposed to be held. The application is dismissed.

APPLICATION for a writ of prohibition. Heard by MACFARLANE, J. in Chambers at Victoria on the 23rd of January, 1946.

Cunliffe, for the application.
Arthur Leighton, contra.

Cur. adv. vult.

13th February, 1946.

MACFARLANE, J.: This is an application for a writ of prohibition directed to Lionel Beevor-Potts, Esquire, a stipendiary magistrate in and for the county of Nanaimo, prohibiting him from further proceeding with an information laid by John Edward Banks against Harold Norman Cross and dated the 14th day of December, A.D. 1945, for that he the said Harold Norman Cross on or about June 18th, 1945, at Port Alberni in the county

of Nanaimo unlawfully did attempt to collect compensation for assisting Aldon John Tyndall, a person who has been on service in the forces during the war which commenced on the 10th day of September, A.D. 1939, in obtaining a benefit, namely, a re-establishment credit to which he, the said Aldon John Tyndall, was entitled, under The War Service Grants Act, 1944 and regulations thereunder, upon the ground that the alleged cause of the information arose in the city of Port Alberni in the county of Nanaimo, for which said city of Port Alberni there is a duly appointed police magistrate able and present, and it is not within the jurisdiction of a stipendiary magistrate for the county of Nanaimo to hear or otherwise proceed with an information in respect of an alleged offence arising within the city of Port Alberni, except at the request of such police magistrate.

It is submitted that the matter is concluded by the judgment of GREGORY, J. in *Rex* v. *Harry Fong,* [1930] 3 W.W.R. 479, at p. 480. That case was decided on a section in the Vancouver Incorporation Act in terms not substantially distinguishable from section 407 of the Municipal Act which is invoked here. The only reasons given by GREGORY, J. are to be extracted from a statement that the point was covered by *Rex* v. *Holmes* (1907), 14 O.L.R. 124, a judgment of the Divisional Court in Ontario. In the *Holmes* case, a police magistrate for one town, being *ex officio* a justice of the peace for the county of Essex, purported to act in his capacity as such *ex officio* justice of the peace in respect of an offence committed in another town in the same county for which there was a police magistrate. It was held in that case first that as police magistrate for the town of Essex apart from his *ex officio* character as justice of the peace for the county, he had no jurisdiction to try the charge against the defendant. It was also held that section 7 of the Act respecting Police Magistrates (R.S.O. 1897, Cap. 87), which except for a phrase which does not affect us is in terms similar to section 407 of the Municipal Act (R.S.B.C. 1936, Cap. 199) vested in the police magistrate for the city prior and exclusive jurisdiction over all cases for the city which are within his cognizance as such magistrate. It was also said that any case for a city included at least any case arising out of an offence committed in such city

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by offenders found within its limits. In Ontario, it appears that the uncertainty of the meaning of the expression "case for a city" has been removed in later legislation by substituting the words "in a case arising in a city . . . for which there is a police magistrate where the initiatory proceedings have been taken before the regular Police Magistrate."

It may be interesting also to remark that the same learned judge who gave the principal judgment in *Rex* v. *Holmes, supra,* in 1907, while a judge in the Supreme Court of Canada interpreted the expression "absence" in *Brunet* v. *Regem* (1918), 57 S.C.R. 83, at p. 91, as connoting, "physical non-presence from whatever cause," and later to mean absence from the bench or at the utmost absence from the Court room in which the trial takes place, adding:

> That is a fact of which the replacing judge can be personally cognizant when the trial is beginning. Beyond that his actual knowledge ordinarily cannot extend. Reason and authority would seem to concur in indicating this to be the proper construction of what must be conceded to be . . . . an ambiguous term. . . .

In the *Fong* case, GREGORY, J. treated the *Holmes* case, *supra,* as governing the case of a stipendiary magistrate for the county of Vancouver who was, I assume, proceeding to sit within the city for which there was a police magistrate in a case arising out of an offence committed in such city and also, it would appear, by a man found within its limits. Here the magistrate does not propose to sit at Port Alberni but at Nanaimo. The information was laid at Nanaimo and if I may refer to the affidavits filed on the application, the offender resides in Ladysmith. In a peculiar case *Regina* v. *Chipman* (1897), 5 B.C. 349, DRAKE, J. refused a writ of prohibition where the offender himself was the police magistrate for the city of Kaslo. While he held that section 212 of the Municipal Clauses Act which is similar to the present section 407 of the Municipal Act, the circumstances making obvious the magistrate's inability to act, did not apply to that case, he said that if there is jurisdiction in the justice who tried the case, this Court will not interfere by prohibition. In the concluding paragraph of his reasons he said that

> the writ of prohibition is a discretionary writ only, and will not be granted unless there is a clear failure of jurisdiction.

In *Rex* v. *Lynch* (1927), 38 B.C. 124, at p. 127, in the Court of Appeal, MACDONALD, C.J.B.C., declared that

> there never was, either by custom or statute, a local venue in cases before magistrates in this Province.

In *Regina* v. *Riley* (1884), 12 Pr. 98 referred to in *Rex* v. *Holmes, supra,* Rose, J. referring to the provision there in question says this provision was probably introduced to prevent unseemly squabbling between magistrates having concurrent jurisdiction. In the circumstances here, it does not appear that there could be any unseemly conflict between the magistrates. It perhaps should be said in justice to the magistrate at Nanaimo that he is not anxious to act, but what I am asked to do is to find that he has no jurisdiction to act in respect of an offence alleged to have been committed at Port Alberni because there is a police magistrate there. That would in effect compel me to hold that there is a local venue for offences in British Columbia in every case where a city has a police magistrate appointed to act in a city. That I am not prepared to do. I would, therefore, find that "cases for a city" means not only cases, where the offence is committed there, but cases having other elements as well, *e.g.,* as stated by Anglin, J. "where the offender was apprehended within the limits," or I should add, I would think, where the administration of the Act was in the hands of officials of the city or where the initiatory proceedings were taken or the trial was proposed to be held there.

It was submitted that the matter arising under a Dominion enactment, Provincial statutes did not apply. I think that where justices are dealing with matters under Provincial statutes their powers and jurisdiction and all questions connected therewith are determined entirely by Provincial law. Where, however, they are acting under the Code or some other Dominion statute reference must be made to both bodies of enactment. The question within what limits territorial or otherwise a justice is entitled to act is determined by Provincial law and by it alone. *Rex* v. *Isbell* (1928), 62 O.L.R. 489 (affirmed 63 O.L.R. 384).

But when justices are acting under the Code or some other Dominion statute, the nature of the authority which may be exercised by them is to be determined by the Code or other

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Dominion statute. The question here is one which affects only territorial jurisdiction and the Provincial law applies.

I would dismiss the application with costs.

Application dismissed.

S. C.
1945
Nov. 28.
1946
Feb. 14.

IN RE ESTATE OF GEORGE THOMAS LAW, DECEASED, AND *IN RE* TRUSTEE ACT.

Estate—Proceeds from insurance policies — Distribution — Trustee Act—Insurance Act—Commorientes Act—R.S.B.C. 1936, Cap. 292; Cap. 133, Sec. 123—B.C. Stats. 1939, Cap. 6, Sec. 2 (1) and (2).

Section 123 of the Insurance Act reads as follows: "123. Where the person whose life is insured and any one or more of the beneficiaries perish in the same disaster, it shall be *prima facie* presumed that the beneficiary or beneficiaries died first."

Section 2 (1) and (2) of the Commorientes Act read as follows: "2. (1.) Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, subject to subsections (2) and (3), for all purposes affecting the title to property be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.

(2.) The provisions of this section shall be read and construed subject to the provisions of section 123 of the 'Insurance Act.'"

Petition for directions as to the disposition of the proceeds of three insurance policies all of which were payable to the wife of the deceased as named beneficiary. The insurer, his wife and father were lost from a row-boat during a storm at Campbell River. All died intestate. The wife had a daughter by a former husband and the mother of deceased is his sole next of kin.

Held, (1) Vera Natalie Law as named beneficiary in the insurance policies in the petition is to be presumed to have predeceased George Thomas Law, deceased; (2) the proceeds of the said insurance policies do not become part of the general assets of the estate of George Thomas Law; (3) the administrator in distributing the proceeds of the said insurance policies, should give effect to the presumption as to the order of death created by section 123 of the Insurance Act and the provisions of the Commorientes Act do not apply; (4) the proceeds of said insurance policies should be paid to Adeline C. Law, the mother of George Thomas Law, deceased. Costs of all parties to be paid out of the subject-matter before payment over to the mother.

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IN RE ESTATE OF GEORGE THOMAS LAW, DECEASED.

IN RE TRUSTEE ACT

PETITION for directions as to the distribution of the proceeds of three insurance policies, all of which were payable to the wife of the deceased as named beneficiary. Heard by MACFARLANE, J. at Vancouver on the 28th of November, 1945.

L. St. M. Du Moulin, for administrator.
Thomas E. Wilson, for A. C. Law.
Gould, for infant.

Cur. adv. vult.

14th February, 1946.

MACFARLANE, J.: This is a petition for directions as to the distribution of certain moneys, being the proceeds of three insurance policies referred to in the petition, all of which were payable to the wife of the deceased as named beneficiary. The insurer, his wife and father, were lost from a row-boat during a storm at Campbell River, B.C. There was no survivor from the boat and no one saw the boat capsize or the actual drowning. All parties died intestate.

The wife had a daughter by the former husband and the mother of the deceased is his sole next of kin and claims the proceeds of the policies of the insurance. The question for decision involves consideration of section 123 of the Insurance Act, being Cap. 133, R.S.B.C. 1936, which reads as follows:

123. Where the person whose life is insured and any one or more of the beneficiaries perish in the same disaster, it shall be *prima facie* presumed that the beneficiary or beneficiaries died first.

and of section 2 (1) and (2) of the Commorientes Act, Cap. 6, B.C. Stats. 1939, which reads as follows:

2. (1.) Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, subject to subsections (2) and (3), for all purposes affecting the title to property be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.

(2.) The provisions of this section shall be read and construed subject to the provisions of section 123 of the "Insurance Act."

Both these provisions create a presumption as to the order of death. The presumption created by the Commorientes Act is to be construed subject to that created by the Insurance Act. I think there can be no question that if the presumptions are to be considered as created with reference to the death of individuals

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as such that that created by the Insurance Act and not that created by the Commorientes Act would prevail. In other words, the real problem is one of the construction to be placed upon section 123 of the Insurance Act rather than one of conflict between the two statutes. It is admitted that for the purpose of deciding the immediate destination of the insurance moneys, that section 123 of the Insurance Act governs but it is contended that as soon as this is done, that section ceases to be operative or to control the title to the moneys which then fell into the estate of the insured and that then the presumption created by section 2 (1) of the Commorientes Act revives and governs the ultimate destination of the property included in the estate even though that property consists of these same moneys. It is claimed that immediately the money reaches the personal representatives of the deceased, it ceases to have any special character as insurance money. On the other hand, it is contended that the Commorientes Act can have no operation at all as there are no circumstances rendering it uncertain which survived, that question having been settled by section 123 of the Insurance Act.

I have had the benefit of careful written arguments by counsel. I will not deal with all the points raised. It is sufficient, I think, for me to say that in my opinion, as the Commorientes Act is expressly directed to be construed subject to the provisions of section 123 of the Insurance Act that where the circumstances set out in that section arise the presumption as to the order of death thereby created is to be followed. That presumption in this case is that the beneficiary, here the wife, is presumed to have died first in so far as the insurance moneys represented by the proceeds of the policies of which she was designated as the beneficiary are concerned, I do not think I should allow the issue to be confused by consideration of the possible devolution of other property to which that section has no application. I do not think that being "construed subject to" means that the statutes are complementary and are to be read together or that that provision is one for their joint application. To my mind the intention is that where the circumstances set out in section 123 of the Insurance Act arise, the presumption as to the order of death thereby created is to be followed for all purposes connected with

that subject-matter. I think the language used involves more than a cross-reference and is what counsel submits it is not, *i.e.*, "a whittling down of the scope of the Commorientes Act." Nor do I accept the contention that that section is one simply designed "to solve the difficulties of an insurance company" and as soon as that is done it is "*functus.*" To admit this contention, I am asked to find that though by the Insurance Act, which is the predominant or controlling Act, the insurance money shall not go to the estate of the wife, yet by the Commorientes Act which is directly declared to be "construed subject to" it, the money shall go to the estate of the wife. I think that by necessary intendment, the insurance moneys under these provisions go to the estate of the husband as insurance moneys, and are there to be dealt with on the basis of the presumption that the wife died first. I do not think that I can accept as reasonable, the construction that in respect of the same thing, a presumption is declared to have effect at one moment and a moment later to be set aside by another when the first presumption is declared to be the prevailing one in respect of that subject-matter.

I am impressed also by consideration of the provisions of the Insurance Act dealing with the disposition of insurance moneys, when I come to consider whether the moneys pass to the estate of the deceased as insurance moneys or whether when received there they lost colour as insurance moneys. Under the terms of the policies these moneys are payable to one of a class of preferred beneficiaries. That Act includes certain statutory directions as to the disposition of such moneys which are found in section 104. I need not deal with these in detail as they are clearly set out there, but I think that in view of the provisions of this section, it is all the more reasonable that the presumption created by section 123 should be held to continue and control the disposition of the insurance moneys once they have reached the estate.

My view is also strengthened by the fact that the Commorientes Act applies only where two or more persons die in circumstances rendering it uncertain which of them survived. In respect of the subject-matter here, the insurance moneys, the Insurance Act takes away that element of uncertainty for it settles the order of death with regard to it.

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IN RE TRUSTEE ACT

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I would therefore answer the questions asked by saying that (1) Vera Natalie Law as named beneficiary in the insurance policies mentioned in the petition is to be presumed to have predeceased George Thomas Law, deceased. (2) The proceeds of the said insurance policies do not become part of the general assets of the estate of George Thomas Law. (3) The administrator in distributing the proceeds of the said insurance policies should give effect to the presumption as to the order of death created by section 123 of the Insurance Act and the provisions of the Commorientes Act do not apply. (4) The proceeds of the said insurance policies should be paid to Adeline C. Law, the mother of George Thomas Law, deceased.

As to the costs I think that as the matter is one of first impression, that the costs of all parties should be paid out of the subject-matter before payment over to the mother.

Order accordingly.

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Mar. 8, 11.

REX v. HAND. (No. 2.)

Criminal law—Speedy trial—Appeal—New trial ordered—Formal judgment entered—Motion to direct mode of new trial—Refused.

On appeal by accused from his conviction by a police magistrate, the conviction was quashed and a new trial directed. After the formal judgment was entered the appellant moved the Court for a direction that the new trial be before a jury.

Held, dismissing the motion (SIDNEY SMITH, J.A. dissenting), that the Court lacked jurisdiction.

MOTION to the Court of Appeal for an order to amend the judgment of the Court of Appeal of the 1st of February, 1946, quashing an appeal from the police magistrate at Alberni and directing a new trial by adding a direction that the new trial shall take place before a different tribunal than that before which the accused was first tried. Alternatively for an order granting leave to amend the notice of appeal from the conviction, and in the further alternative for an order directing that the

appellant be permitted upon the new trial to re-elect as to the method of the new trial.

Heard on the 8th of March, 1946, at Vancouver by O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

McAlpine, K.C., for the motion.
Des Brisay, K.C., contra.

Cur. adv. vult.

11th March, 1946.

O'HALLORAN, J.A.: I must hold this Court lacks jurisdiction to entertain the present motion to direct the mode of the new trial ordered when the appeal was heard in Victoria. I am of that opinion because the formal order for judgment has been entered and perfected, *cf. Kimpton* v. *McKay* (1895), 4 B.C. 196, at p. 203; *Rithet Consolidated Ltd.* v. *Weight* (1932), 46 B.C. 345, at pp. 347-8 and *Mainwaring* v. *Mainwaring* (1942), 58 B.C. 24, at p. 29, and it is conceded that order for judgment as entered admittedly reflects correctly the considered judgment of the Court as delivered on 1st February last.

Nor am I able to accede to the alternative submission that the language of Code section 1014, subsection 4 is wide enough to permit such a motion to be entertained after the appeal has been disposed of by the Court of Appeal and its judgment entered and perfected. I can extract one meaning and one meaning only from that section, *viz.*, that any direction as to the mode of a new trial shall be given while this Court is seised of the appeal, and before it becomes *functus officio* by entry and perfecting of the judgment the Court has rendered.

The motion was based upon the desire of the accused to have the new trial take place before a tribunal other than that in which the conviction was obtained. But I see no reason why the accused should suffer injustice by refusal of the present motion.

In the first place, without, of course, reflecting upon any magistrate in particular, or upon lay magistrates in general who have contributed so much towards the administration of justice in isolated portions of this Province, it is not, in my view at least, in the best interests of justice that this serious charge, *viz.*, carnal knowledge of a girl under 14 years of age (the girl is four

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years of age) should be adjudicated upon by a magistrate untrained in the law, whose lack of legal training necessarily renders him incapable of sustaining the judicial burden such a trial must impose. For one thing, knowledge of the rules of evidence and of course knowledge of how to apply those rules is indispensable in a case of this kind if a proper judicial determination is to be obtained.

Secondly, it is to be observed that under Code section 775 the Attorney-General is empowered, notwithstanding a consent to summary trial by the accused under Code section 774, to require that the charge be tried before a jury. Thirdly, no provision in the Criminal Code has been cited which requires that a consent to summary trial under Code section 774 remains in force after a new trial has been directed by the Court of Appeal. It is true that in *Rex* v. *Deakin* (1912), 17 B.C. 13 and *Rex* v. *Chow Wai Yam* (1937), 52 B.C. 140, which related to convictions in speedy trials before county judges, it was held that an order for a new trial *simpliciter* did not require re-election by the accused under Code section 827 as to whether he would be tried before a jury or by a judge alone.

But an election by an accused under Code section 827 is not to be confused with his consent to summary trial by a magistrate under Code sections 774 and 781, subsection 2. The magistrate's jurisdiction to try this charge must rest wholly on the consent of the accused under Code sections 774 and 781, subsection 2. But the jurisdiction of an assize court or county court judge does not arise by consent of the accused, although of course the statutory procedure must be complied with, and *cf. Sayers* v. *Regem*, [1941] S.C.R. 362, at pp. 365 and 368.

This Court in *Rex* v. *Gilmore* (1928), 43 B.C. 57 (breaking and entering by day and stealing goods to the value of $200) in granting a new trial directed that it be held before the same police magistrate "at such time as he may appoint," thereby seeming to recognize the continuing force of the consent to summary trial resulting in the conviction the Court of Appeal set aside. Apart from the fact that the vital distinction between Code sections 774 and 827 does not seem to have arisen in that appeal, it is distinguishable in at least two other respects. First,

while the Court made the order it did, it does not follow that was the only order which could have been made. There appears to be no statutory provision which compels an order for a new trial on an appeal from a summary conviction founded on jurisdiction by consent to be regarded as a denial of the right of an accused to invoke sections 774 and 781, subsection 2 as an essential part of the new trial.

In the second place the accused's plea of guilty in this case (there was no plea of guilty in the *Gilmore* case) was so intimately connected with his consent to summary trial before the magistrate that it is difficult for one to stand without the other. From what was made to appear on the hearing of the appeal, it seems that the consent to give the magistrate jurisdiction to hear the case was influenced largely, if not entirely, by the prior determination to plead guilty and the desire to have that plea accepted by the quickest legal procedure. In its essence objectively viewed, it was not so much a consent to a mode of trial, as a method adopted to plead guilty with the fewest possible legal entanglements.

If that is a correct appreciation of what occurred, as I must conclude it is, then in my view it would be a denial of justice to compel him to stand trial summarily on this grave charge before a magistrate untrained in the law, whose jurisdiction to try the case must rest wholly on the consent of the accused, and the only consent upon which that jurisdiction can now seek to rest is a consent given not for the purpose of a trial to ascertain his guilt or innocence, but for the purpose of pleading guilty by the shortest legal route.

I would dismiss the motion.

SIDNEY SMITH, J.A.: At its recent sittings at Victoria this Court, on an appeal from a conviction by a magistrate, directed that the accused be given a new trial. The judgment of the Court was duly entered in circumstances that need not now be related. Counsel for the accused now moves the Court for a direction that the new trial be before a jury. The Attorney-General concurs. Has the Court jurisdiction to so order? This is the single question before us. All other considerations are, I think, irrelevant.

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There can, in my opinion, be no doubt that section 1014, subsection 4 of the Code gives the Court the appropriate jurisdiction; and I think there is equally no doubt that the Court is not deprived of the jurisdiction, so entrusted to it by Parliament, by the mere fact of an oversight on the part of counsel, in omitting to ask for the direction during the hearing of the appeal, or prior to the entry of the judgment of the Court granting the new trial. Had it been intended that the jurisdiction should be so circumscribed the section would have so stated. On the contrary, the language is perfectly plain and unambiguous, and in my view we would be quite wrong in reading into it any such limitation.

I would therefore, in the circumstances, direct that the new trial be before a jury.

BIRD, J.A.: The conviction against the accused was quashed on appeal to this Court and a new trial directed by judgment pronounced at Victoria on February 1st, 1946.

The formal judgment having been duly entered in the circumstances hereafter mentioned, the appellant now moves the Court for an order to amend the judgment by adding a direction that the new trial shall take place before a different tribunal than that before which the accused was first tried. Alternatively for an order granting leave to amend the notice of appeal from the conviction; and in the further alternative for an order directing that the appellant be permitted upon the new trial to re-elect as to the method of the trial.

Crown counsel does not oppose, but in effect supports the appellant's motion, since Crown counsel stated on the hearing of the motion that the law officers of the Crown consider that the new trial should take place before a different tribunal.

The question then for determination is primarily one of jurisdiction, *i.e.*, whether the Court has power to make any such order after formal entry of the judgment.

There is power to amend a judgment, although duly entered: (1) Where the judgment as entered does not truly express the intention of the Court, or (2) where there has been a slip in drawing the order—*Craig* v. *Sinclair* (1944), 61 B.C. 253. Otherwise the Court which pronounced the judgment has not

jurisdiction to review it after entry—*Kimpton* v. *McKay* (1895), 4 B.C. 196; *Stephen et al.* v. *Stewart et al.* (1943), 59 B.C. 410.

Here the judgment as entered is in terms the judgment pronounced by the Court. Consequently in my opinion this Court is *functus officio* and has not jurisdiction to make an order either for the amendment of the judgment or of the notice of appeal.

I regret the necessity for this conclusion in the present case as I think there is a real possibility that injustice may be done the accused as a result if he is required to stand trial in the Court wherein he was first convicted. I wish to add that this remark involves no reflection upon the magistrate who presided at the first trial, but relates solely to the fact that the accused was first tried in a small community wherein the very nature of the alleged offence (carnal knowledge of a girl under 14) may well have aroused strong public feeling and that the accused then entered a plea of guilty, which this Court has held was entered in the circumstances showing that the accused then had no clear understanding of the effect of the plea.

In my opinion it is most unfortunate that counsel before submitting the draft judgment for signature, did not make formal application to the Court for the exercise of the discretion which the Court undoubtedly had under section 1014, subsection 4 of the Criminal Code, to direct that the new trial take place before another tribunal.

It now appears that instead of so doing counsel by agreement between themselves included in the judgment a direction that the new trial should take place in the County Court Judge's Criminal Court for the county in which the alleged offence was committed, a direction which was not made by the Court when judgment was pronounced.

Consequently when the draft judgment came up for signature this direction was struck out without further reference to counsel and the judgment was entered in the terms pronounced by the Court.

I do not think that effect can be given to counsel's submission that a slip occurred in that the Court did not exercise the discretion conferred by section 1014, subsection 4.

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I think that the form of the judgment as entered prescribes by implication that the new trial shall take place in the Court from which the appeal was taken. In the absence of express direction that the new trial shall take place before one of the other tribunals mentioned in that section, it necessarily follows that the case is remitted for trial before the tribunal from which the appeal was taken, and in that sense the discretion has been exercised.

There remains the alternative motion that this Court direct that on the new trial the accused shall have a right of re-election. Counsel cites no authority for the adoption of any such course and I think that none can be found. In my opinion it does not lie in the power of this Court to make any such direction.

In the peculiar circumstances of this case it is perhaps desirable to point out that it has been authoritatively held that where a new trial has been directed on appeal after conviction by a county court judge before whom an accused has elected to be tried, that the order for a new trial does not give the accused the right to re-elect, that the election is no part of the trial—*Rex* v. *Deakin* (1912), 17 B.C. 13; *Rex* v. *Gee Duck* (1937), 51 B.C. 61; *Rex* v. *Chow Wai Yam* (1937), 52 B.C. 140.

In so far as the question of election or consent relates to a new trial directed, on appeal under Code section 1014, to be had before the same Court before which the accused was first tried, I can see no distinction in principle between the effect of an election made under Code section 827 and that of a consent given under section 774. In my opinion the consent once given remains in effect and is no part of the trial, just as the election has been held to continue in force, being no part of the trial.

Upon a new trial so directed the accused has not the right either to re-elect or to withdraw his consent given prior to the commencement of the former trial.

I think that the very words of section 1014, *i.e.*,

> but otherwise shall, in the discretion of the court of appeal, be either before the proper magistrate . . .

carry the implication that consent once given under section 774 remains operative upon a new trial had before the same magistrate pursuant to an order made by an appellate Court under that section. If it were not so the "proper magistrate" whose

jurisdiction is derived solely from consent given under section 774, would not have jurisdiction to retry the accused notwithstanding the order of the appellate Court.

I am fortified in this conclusion by the decision of this Court in *Rex* v. *Gilmore* (1928), 43 B.C. 57 where upon an appeal from conviction for an offence under Code section 458 (*a*) the Court ordered a new trial and directed that the new trial be held before the same magistrate. There MACDONALD, C.J.A. said at p. 59:

> He has not an absolute right to elect, because he should have done that in his notice of appeal.

But when the accused has consented to be tried summarily, the magistrate under Code section 784 has full discretion, which may be exercised at any stage of the proceedings prior to the opening of the defence evidence, to refuse to try the case and instead to treat the proceedings before him as a preliminary inquiry.

In the circumstances of this case I think it is to be expected that an experienced magistrate will decline to proceed with the trial and will exercise his discretion to treat the proceeding as a preliminary inquiry, more particularly since the giving of the consent in this instance must have been influenced by the accused's intention to enter a plea of guilty.

Accordingly, and as I have said, with regret, I have reached the conclusion that this Court now has no jurisdiction to make any of the alternative orders sought. The motion must be dismissed accordingly.

Motion dismissed, Sidney Smith, J.A. dissenting.

C. A.
1946
March 11.

REX v. MYLES AND SANDERSON.

Criminal law — Appeal by Crown — Charge of theft — Question of fact — Criminal Code, Secs. 347 and 1013, Subsec. 4.

A United States Army ordnance reservation is situate about one and a half miles west of Fort St. John and a short distance south of the Alaska Highway. Within the reservation is an area known as the "motor pool" or "truck compound" and close by is the camp in the centre of the reservation where those in charge have their quarters. On New Year's Eve, 1945, the motor pool contained a large number of disused trucks and parts of motor-vehicles. On that night the ground was covered with snow and the area was guarded by one George Johnston. As he made his rounds he discovered fresh tracks, including those of a toboggan leading from the "motor pool" towards the Alaska Highway and near the Alaska road he found a pile of parts of motor trucks, including differential carrier assembly and axle shafts which had disappeared from the motor pool. After notifying the officer in command at the camp, Johnston with another guard hid by the Alaska road and at about 5.30 on New Year's morning a car stopped where the parts were collected. Two men jumped out and started loading the parts into their car. Johnston then showed himself and they jumped into their car and tried to get away, but on Johnston and his guard firing three shots they stopped and on getting out of their car were arrested. On a charge of stealing two Eaton two-speed differential carrier assemblies for a three-ton G.M.C. dump truck and two axle shafts of a total value exceeding $200, it was held that there was no evidence whatever that the accused committed the actual theft and they were discharged.

Held, on appeal, reversing the decision of MCGEER, Co. J., that the learned judge directed his attention as to whether the evidence was such as to satisfy him that the two accused were the men who had removed the parts from the motor pool, but this was not the point of the case. The question was whether the incidents that happened at the roadside in the early morning were sufficient proof of theft regardless of whether the accused were the men who removed the parts from the motor pool. The facts need not establish theft from the pool. It is sufficient if they establish theft from the roadside. There must be a new trial.

APPEAL by the Crown from the decision of MCGEER, Co. J. dismissing a charge against accused of stealing certain parts of motor-trucks, the property of the United States Government. The United States Army maintained an ordnance reservation about one and a half miles west of Fort St. John and a short distance south of the Alaska Highway. Within this reservation is an enclosure known as the "motor pool" or truck compound in

which was stored a large number of disused motor-trucks and parts of motor-vehicles. The camp where the men in charge of the ordnance reservation were quartered was at the centre of the reservation and close to the motor pool. On the night of the 31st of December, 1945, one of the men in the camp named George Johnston was acting as a guard in and about the motor pool and the camp. That evening it had been snowing and while on inspection Johnston found tracks in the snow at about 9 p.m. leading from the motor pool to the Alaska Highway. He followed the tracks and on reaching the highway he found just off the road various parts of trucks which he identified as having been removed from the vehicles stored in the motor pool. He then went back to the camp to notify the officer in command. Then on instructions from the commanding officer, he and another soldier hid behind a fence close to the stolen articles and at about 5.30 on the morning of New Year's Day a motor-truck stopped close to where the articles were lying and two men got out of the truck, started loading the material on the motor-truck. Johnston then stepped out and ordered them to stop loading, but they jumped back into the truck and attempted to drive away, but when Johnston fired two shots at them, they stopped and were taken in charge. A charge against them for theft of motor-truck parts was dismissed, it being held that the evidence was not such as to satisfy the Court that the two accused were the men who had removed the parts from the motor pool.

The appeal was argued at Vancouver on the 11th of March, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Pepler, K.C., D.-A.G., for appellant: Accused were charged with the theft of parts of motor trucks, the property of the United States Government. On New Year's Eve of 1945 a guard named Johnston was on watch in the American reservation. Inside the reservation was a motor pool containing a number of disused motor-trucks and a number of parts of motor-vehicles, including differential axles and a short distance away in the centre of the reservation was a camp where the men in charge lived. It had been snowing and Johnston found, when going his rounds, that some of the parts of motor-vehicles had

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been taken. There was snow on the ground and tracks in the snow starting from the motor pool led in a northerly direction. He followed the tracks and they led to the Alaska Highway. Just off the road and partly covered with snow he found the parts of motor-vehicles that had disappeared from the motor pool. He then reported the matter to the officer in charge at the camp. Johnston and another man then hid behind a fence and at 5.30 o'clock on New Year's Day the two accused came in a car and stopped close to where the stolen articles lay and started putting the material into their car. Johnston and his man then came from behind the fence and put them under arrest. The two men were caught in the act of stealing when they put the parts into their car. What they did at 5.30 in the morning of New Year's Day was sufficient to convict them of the crime charged. How the parts got from the motor pool to the Alaska road does not affect the case.

Wismer, K.C., for accused: These men were picking up articles near the roadway. There is nothing connecting the articles with the motor pool. There is no jurisdiction to hear the appeal. The question presented to the Court is one of mixed law and fact: see *Rex* v. *Turner* (1938), 52 B.C. 476; *Rex* v. *Ashcroft* (1942), 58 B.C. 182. Here we have the trial judge in our favour.

Pepler, replied.

Per curiam (SIDNEY SMITH, J.A.): This matter comes to us from His Honour Judge McGeer, sitting at Pouce Coupe. The appeal is by the Crown from the acquittal of the two accused on a charge of theft of certain motor-truck parts, the property of the United States Government. The circumstances need be stated in no more than a few words and quite broadly.

The United States Army maintained an ordnance reservation (used as an equipment repair shop camp) about one and a half miles west of Fort St. John and some distance south of the Alaska Highway. Within the reservation there was an area known as "the motor pool" which was employed for the storage of trucks not being used. On New Year's Eve, 1945, the motor pool contained between 70 and 80 trucks, and was under guard

of one George Henry Johnston. On the night in question the ground was covered with snow, and during the evening Johnston discovered in the snow fresh tracks (including those of a toboggan) leading from the pool toward the Alaska Highway. He followed these tracks and found at the side of the highway various parts of trucks which he identified as having been removed from the vehicles in the pool, including the differential carrier assembly mentioned hereafter. Johnston hid by the roadside behind a fence and awaited the event. At about 5.30 o'clock next morning an automobile stopped at the place where the parts were collected. Two men jumped out and proceeded to load them into the car. Johnston called on them that they had gone far enough and to stop where they were; but they jumped into the car and sought to escape. Johnston fired two shots and another guard who just then arrived on the scene, fired a third shot. The men then stopped and came out of the car. Johnston noticed that the car licence plate had been removed. It was found inside the car, together with one differential carrier assembly, which the men had just loaded into the car. They were arrested and in due course appeared before the learned judge, and were acquitted. Neither of them gave evidence.

I think, with great respect, that the learned judge misdirected himself on the law. It would seem to be quite apparent from his reasons that he directed his attention to the question of whether the evidence was such as to satisfy him that the two accused were the men who had removed the parts from the pool. But this was not the point of the case. The question was whether the incidents that happened at the roadside in the early morning were sufficient proof of theft, regardless of whether the accused were the men who removed the parts from the pool to the road (section 347 of the Code). In other words, to state the matter shortly, although perhaps inartistically, the facts need not establish theft from the pool. It is sufficient if they establish theft from the roadside. These propositions negative the reasoning on the law adopted in the Court below and there must therefore be a new trial.

Appeal allowed; new trial ordered.

S. C.
1946
Jan. 17;
March 4.

WILEY AND WILEY v. FORTIN *ET AL.*

Contract—Sale of lots—Innocent misrepresentation—Rescission—Restitutio in integrum—Just allowances—Construction of house—Cost of.

The plaintiffs agreed to buy certain building lots on the representation of the agents of the vendors that the lots were served by sewer and water and they commenced construction of a house on one of the lots. The lots were not in fact so served. In an action for damages and specific performance of the contract and alternatively for rescission on the ground of fraudulent misrepresentation, it was found that the representation was not fraudulently made.

Held, that the plaintiffs are entitled on the alternative pleading to rescission of the contract by reason of innocent misrepresentation and such additional relief a misled party is entitled to on the rescission of a contract induced by innocent misrepresentation, namely, the return of the moneys paid by them under the contract and the costs of the construction of the house and costs of the action.

ACTION for a declaration that the plaintiffs were induced to enter into a contract by reason of the fraudulent misrepresentation of the defendants McMillan and Fortin or alternatively, by the misrepresentation of the said defendants and claim for damages and specific performance of the contract. Alternatively they claim for rescission on the ground of fraudulent misrepresentation, or misrepresentation, and for damages. Tried by COADY, J. at Vancouver on the 17th of January, 1946.

Hodgson, for plaintiff.
Guild, for all defendants but Yen Ho.
Greenberg, for defendant Yen Ho.

Cur. adv. vult.

4th March, 1946.

COADY, J.: On or about the 23rd of February, 1945, the plaintiffs entered into an agreement with the defendants, McMillan and Fortin, agents of the defendant, Parsons Brown Realty Ltd., to purchase lots 1 to 16 and lots 20 to 26, block 8, district lot 705, city of Vancouver, at the price of $3,000, and paid as a deposit thereon the sum of $1,000, and received an *interim* receipt in the usual form but bearing an endorsement, inserted at the request of the plaintiffs, as follows:

All the above lots are served by sewer and water . . .

The plaintiffs relied on this representation and were induced to enter into the contract by reason thereof. Confirmation of the sale was given to the purchasers on the 28th of February, 1945. Lots 1 to 13 were in fact not served by sewer and water. The plaintiffs bought the property with the intention of erecting houses thereon, and proceeded forthwith with the construction of a house on lot 5. The defendants knew of this intention and were aware that the plaintiffs had proceeded as intended.

In due course the plaintiffs made application to the city of Vancouver for sewer connections, when they were advised that there was no sewer on the street adjoining lots 1 to 13 to which connection could be made. There was in fact a sewer-pipe on the adjoining street, but it was at too high a level to serve the lots in question. Certain negotiations were then carried on between the plaintiffs and the defendant and the city of Vancouver, with respect to sewer connections, but these were of no avail. The plaintiffs thereupon demanded rescission of the contract and damages. This was refused. The plaintiffs now sue for a declaration that they were induced to enter into the contract by reason of the fraudulent misrepresentation of the defendants, McMillan and Fortin, or, alternatively, by the misrepresentation of the said defendants, and claim for damages and specific performance of the contract. Alternatively they claim for rescission on the ground of fraudulent misrepresentation, or misrepresentation, and for damages. I cannot find that there was fraudulent misrepresentation on the part of these defendants. I think it is clear on the evidence that they believed at the time that the representation was made that the said lots were served by sewer and water. They had an honest belief in the truth of the representation made. I cannot find that the statement was made recklessly to a degree that would make it fraudulent within the meaning of *Derry* v. *Peek* (1889), 14 App. Cas. 337, at p. 375; and that line of authorities. That being so, the plaintiffs are not entitled to affirm the contract and recover damages, nor are they entitled to a rescission of the contract based upon fraudulent misrepresentation and damages. They are entitled, however, it seems to me, on the alternative pleading to rescission of the contract by reason of innocent misrepresentation and such addi-

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tional relief a misled party is entitled on the rescission of a contract induced by innocent misrepresentation. This consequent relief is a point of considerable nicety, and the authorities are not easily reconciled. Clearly they are not entitled to damages as in the case of rescissions based upon fraudulent misrepresentation. But they are nevertheless entitled to equitable compensation on the rescission of the contract. The law is set out in the case of *Newbigging* v. *Adam* (1886), 34 Ch. D. 582. Cotton, L.J. at p. 589 says:

> . . . In my opinion it is not giving damages in consequence of the deceit, it is working out the proper result of setting aside a contract in consequence of misrepresentation. This is a very different thing, because although the damages which would have been obtained in an action of deceit if the misstatement had been made fraudulently, or with such reckless negligence as to bring about the same consequences, might have been the same as what the plaintiff will get under the indemnity, they might have been much more. The plaintiff here does not recover damages as in an action of deceit, but gets what is the proper consequence in equity of setting aside the contract into which he has been induced to enter. In my opinion it cannot be said that he is put back into his old position unless he is relieved from the consequences and obligations which are the result of the contract which is set aside. That is a very different thing from damages.

The point here is—Can the plaintiffs recover the cost of the construction of the house erected by him? It seems to me they can. In *Stepney* v. *Biddulph* (1865), 13 W.R. 576, the headnote reads as follows:

> A purchaser who has laid out money in *bona fide* improvements on lands purchased by him upon a sale which was invalid but not actually fraudulent, is entitled to an allowance for sums so expended by him.

In the case of *Lewis and Lewis* v. *Howson,* [1928] 2 W.W.R. 197, a case of innocent misrepresentation as I read it, MARTIN, J.A. at p. 204, says:

> Where rescission is ordered, the Court has full power to make a just allowance, and to do what is practically just, although it may not be able to restore the parties precisely to the state in which they were before they entered into the contract. The general rule appears to be that the party who misleads must put the party misled into the position in which he was before the contract, and that this includes the right to be indemnified from the consequences and obligations which are the result of the contract set aside.

He quotes in support of this statement a number of authorities including *Newbigging* v. *Adam, supra.* The defendants maintain that the parties cannot be reinstated in their original positions since the plaintiff has dealt with this property by erecting

a house thereon, and that the Court will not decree rescission of a contract except on the condition of their being *restitutio in integrum*. But as stated in Kerr on Fraud and Mistake, 6th Ed., 469:

> . . . The phrase [*restitutio in integrum*] is somewhat vague and must be applied with care. It must be considered with regard to the facts of each case. . . . The Court has full power to make all just allowances, and in practice it always grants such relief when it can do what is practically just, although it may not be able to restore the parties precisely to the state in which they were before they entered into the contract (*Hulton* v. *Hulton*, [1917] 1 K.B. 813).

The plaintiffs are therefore in my opinion entitled to rescission and the return of moneys paid, and in addition the cost of construction of the house amounting to the sum of $1,514.11 and costs of the action, as against the defendants McMillan, Fortin, and Parsons Brown Realty Ltd. They are not entitled, however, to anything beyond this, since innocent misrepresentation gives no right of action sounding in damages. With respect to the claim against Yen Ho, the plaintiffs' action must fail. When the contract was made the plaintiffs state that they were led to believe that Yen Ho was the owner of the property in question and that Parsons Brown Realty Ltd. were acting as his agents for sale. The plaintiffs' conclusion in that regard is not supported by the evidence, in my opinion. The fact was that while Yen Ho was the registered owner the defendant Parsons Brown Realty Ltd. held an option for the purchase of the property from him, and while the option was not exercised until after the sale was made to the defendants, I cannot find that there was any misrepresentation in regard to this. In any event the plaintiffs learned about the transaction between Yen Ho and Parsons Brown Realty Ltd. on the 12th of April, 1945, and saw all the documents in connection therewith. Thereafter the plaintiffs knew that they were dealing with Parsons, Brown Realty Ltd. as principals and not as agents, and since this action was commenced with full knowledge of this, it was unnecessary to add Yen Ho as a party. The action against him must therefore be dismissed with costs.

Judgment accordingly.

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Feb. 1, 14.

IN RE ADMINISTRATION ACT AND *IN RE* ESTATE OF WILLIAM BELL, DECEASED.

Administration—Application for next of kin—Alleged will—Citation to person named therein as executor and sole legatee—No appearance entered—Power of Court to grant order for administration.

Upon an application by The London and Western Trusts Company Limited as attorney for the next of kin of William Bell, deceased, for letters of administration of his estate, the material filed disclosed the existence of an alleged will of the deceased of the 9th of April, 1944, in possession of Samuel Hall, who was named therein as executor and sole legatee. The validity of the will is denied by the applicant and the next of kin, and Samuel Hall was cited to appear and propound the alleged will. He was advised in the citation that in default of so doing, administration would be granted the applicant. To the citation no appearance was entered.

Held, that under the circumstances an order for administration should be made.

Re Robinson Estate, [1918] 2 W.W.R. 391, followed.

APPLICATION by The London and Western Trusts Company Limited as attorney for the next of kin of William Bell, deceased, for letters of administration of his estate. Heard by COADY, J. in Chambers at New Westminster on the 1st of February, 1946.

Prenter, for the application. *Cur. adv. vult.*

14th February, 1946.

COADY, J.: This is an application by The London and Western Trusts Company Limited as attorney for the next of kin of William Bell, deceased, for letters of administration of the estate of the said deceased. The material filed disclosed the existence of an alleged will of the deceased dated the 9th day of April, 1944, and that this will was in the possession of Samuel Hall who was named therein as executor and sole legatee. The validity of this alleged will is denied by the applicant and next of kin, and the said Samuel Hall was cited to appear and propound the said alleged will, and was further advised in the citation issued that in default of his so doing administration would be granted to the applicant. To this citation no appearance has been entered.

On the authority of *Re Robinson Estate*, [1918] 2 W.W.R. 391 and the cases therein referred to, it seems clear that under the circumstances an order for administration will be made. There will be an order accordingly.

Application granted.

REX v. COWPERSMITH.

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Jan. 30; March 5.

Criminal law—Indecent assault—Evidence—Corroboration—Unsworn evidence of child—Criminal Code, Secs. 1002 and 1003.

The accused was convicted of indecently assaulting D. a child of tender years. D. was examined by the judge for the purpose of ascertaining whether she had the capacity to be sworn and was directing his mind to the ascertainment of whether the child understood the nature and obligations of an oath. He concluded she possessed such understanding. At the time D. was accompanied by another child of tender years, J. whom the judge also examined. He was not satisfied that J. knew the nature of an oath, but he was satisfied that she had the requisite intelligence to justify reception of her evidence under section 1003 of the Criminal Code, and her unsworn testimony was thereupon received.

Held, that even if the complainant little girl had given her testimony unsworn, corroboration of what she said is found in the subject-matter of the conversation between her mother and the appellant, once the jury disbelieved the appellant as they did.

APPEAL by accused from his conviction before COADY, J. and the verdict of a jury at the Fall Assize at Victoria on the 8th of November, 1945, on a charge that he did indecently assault Dorothy Geib, a young girl. The accused took an active interest in a Sunday school with his daughter and daughter-in-law. He took the children for drives and the evidence of Dorothy Geib, the principal witness, was that on a certain day when driving with the accused and sitting in the front seat beside him he took up her dress and felt her private parts. Dorothy was eight years old. There were other children in the car and one of them Jacqueline Browning, who was nine and a half years old, gave evidence without being sworn and said she saw the accused doing this to Dorothy. Dorothy told the circumstances to her mother who then decided not to allow Dorothy to attend the Sunday school. Mrs. Geib gave evidence and told the Court that accused came to see her and in the conversation that took place the accused said to her "I hope you will forgive me, it will not happen again." On the accused giving evidence he said this statement was with reference to his slapping a little boy in the car when he put the boy out of the car for misbehaviour. The accused was found guilty by the jury.

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The appeal was argued at Victoria on the 30th of January, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

McAlpine, K.C., for appellant: The complainant was eight years old. She did not understand the nature of an oath and the questions put to her as to the nature of an oath were improper. She must know the nature of an oath and on the questions asked she did not know the nature of an oath: see *Rex* v. *Southern* (1930), 22 Cr. App. R. 6, at p. 12; *Sankey* v. *Regem*, [1927] 4 D.L.R. 245, at pp. 267-9. There were not enough answers to questions here to judge that the child was of sufficient intelligence to give evidence: see *Rex* v. *Fitzpatrick* (1929), 40 B.C. 478; *Hughes* v. *Detroit, G.H. & M. Ry. Co.* (1887), 31 N.W. 603. There is error and there must be a new trial: see *Rex* v. *Lyons* (1921), 15 Cr. App. R. 144; *Rex* v. *Harris* (1919), 12 Sask. L.R. 473; *Rex* v. *McInulty* (1914), 19 B.C. 109. As to corroboration, Jacqueline Browning's evidence must be corroborated: see *Rex* v. *Manser* (1934), 25 Cr. App. R. 18. Jacqueline's evidence cannot be corroboration of Dorothy's evidence. The learned judge said Jacqueline's evidence was corroboration of Dorothy's evidence. This is error: see *Rex* v. *Iman Din* (1910), 15 B.C. 476, at pp. 483, 486 and 491.

Harvey, K.C., for the Crown: As to the nature of an oath see *Sankey* v. *Regem*, [1927] S.C.R. 436. The examination of the child Dorothy was sufficient: see *Rex* v. *Southern* (1930), 22 Cr. App. R. 6 and *Hughes* v. *Detroit, G.H. & M. Ry. Co.* (1887), 31 N.W. 603. The learned judge in exercising his discretion judicially satisfied himself as to the girl's intelligence, her desire to tell the truth and that she understood the nature of an oath: see *Rex* v. *Lyons* (1921), 15 Cr. App. R. 144. Corroboration is not necessary, but there was corroboration in the accused's own evidence: see *Rex* v. *Richmond* (1945), 61 B.C. 420, at p. 422; *Rex* v. *Baskerville*, [1916] 2 K.B. 658. Jacqueline's evidence is part of the incriminating transaction and shows a common purpose relevant to the issue: see *Brunet* v. *Regem* (1918), 57 S.C.R. 83; *Paradis* v. *Regem*, [1934] S.C.R. 165; *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65, *Rex* v. *Lyons* (1944), 60 B.C. 250; *Rex* v. *Penney* (1944),

ib. 348. That there may be corroboration by an unsworn witness see *Rex* v. *Hamlin* (1929), 52 Can. C.C. 149.

McAlpine, replied.

Cur. adv. vult.

5th March, 1946.

O'HALLORAN, J.A.: After due consideration of the objections advanced by counsel for the appellant, I am unable to find misdirection or non-direction amounting to misdirection. It was, of course, for the jury to believe or not to believe the testimony brought out by the prosecution and to believe or not to believe the testimony of the appellant. But if the jury believed the testimony of the prosecution and disbelieved that of the defence, as they did, there was sufficient evidence to warrant the conviction.

With regard to the learned judge's enquiry into the capability of the little girl complainant to understand the nature of an oath, it must be said with respect, that there is force in the submission that the questions put by the learned judge suggested the proper answers to her. But even if she had not been sworn, corroboration of what she said may be found in the subject-matter of the conversation between her mother and the appellant, once the jury disbelieved the appellant as they did. Viewing the testimony and the charge to the jury as a whole, it is my conclusion that no miscarriage of justice actually occurred.

I would dismiss the appeal.

SIDNEY SMITH, J.A.: We are concerned in this appeal with two short points, *viz.*: (1) Whether the learned judge was right in permitting a child of tender years to be sworn, and (2) (assuming that to be so) whether he was right in his instruction to the jury that they could look for corroboration of her testimony in the unsworn evidence of another child of tender years. I have come to the conclusion that both questions must be answered in the affirmative.

The circumstances are these: The appellant was convicted at the Victoria Assize in November, 1945, before Mr. Justice COADY and a jury, of indecently assaulting one, Dorothy, a child of tender years. Dorothy was examined by the learned trial

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judge for the purpose of ascertaining whether she had the capacity to be sworn. It was contended before us that this examination was insufficient in that the learned judge asked leading questions, and that the answers failed to disclose whether the child clearly understood the nature of an oath. I was not impressed by these submissions and can see no objection to the form of the questions put by the learned judge. He framed them in a manner suitable to the age of the child whom he saw and heard. He was directing his mind to the ascertainment of whether the child understood the nature and obligation of an oath. I can see no reason for doubting the correctness of his conclusion that she possessed such understanding.

At the time in question Dorothy was accompanied by another child of tender years, one, Jacqueline, whom the learned judge also examined. In her case he was not satisfied that she knew the nature of an oath, but he was satisfied that she had the requisite intelligence to justify reception of her evidence under section 1003 of the Criminal Code. Her unsworn testimony was thereupon received.

In a charge of admirable clarity, if I may be permitted to say so, the learned judge pointed out to the jury that in a crime of this nature while

> corroboration of the evidence of . . . Dorothy is not required by statute, nevertheless under a rule of practice so well established that it has become practically a rule of law, it is necessary for me to point out to you that while you may convict . . . , it is unsafe to do so.

After further enlargement of this topic he proceeded to indicate the portions of evidence capable of being corroborative if the jury were satisfied to accept them as such. These were, firstly, certain statements made by the accused to Dorothy's mother, and, secondly,

> the evidence of Jacqueline although that evidence was not given under oath.

Did this last direction correctly express the law? If it did not, there must be a new trial (subject to the provisions of section 1014, subsection 2 of the Code, for one cannot tell what particular evidence influenced the minds of the jury. They may have decided to place no corroborative weight upon the evidence of the accused's statements mentioned above, and it may have been the unsworn corroborative testimony of Jacqueline that ulti-

mately drove home to their minds the conviction of the guilt of the accused. This question then is all-important in the decision of the appeal.

It was contended before us that the unsworn testimony of Jacqueline could not be used in corroboration, unless such testimony was itself corroborated. But that is not the language of section 1003, subsection 2. It says that no person shall be convicted unless the unsworn testimony, admitted by virtue of the section, is corroborated by some other material evidence. It does not say that the evidence in corroboration, if itself unsworn, must be corroborated. In other words, unsworn testimony standing alone is not sufficient to convict, but there is no prohibition in the use of unsworn testimony for corroborative purposes. In the present case, for instance, the jury might reject the evidence of the statements of the accused and the evidence of Dorothy, and accept only the evidence of Jacqueline. In this event they could not convict on her evidence alone. But if they accepted the evidence of Dorothy then, as I see it, they could properly seek for corroboration in the testimony of Jacqueline, although unsworn.

The point has already been the subject of judicial consideration in Canada in the case of *Rex* v. *Hamlin,* [1929] 3 W.W.R. 258. There the Appellate Division of the Supreme Court of Alberta unanimously came to the like conclusion. I may add that I am not overlooking the case of *Rex* v. *Manser* (1934), 25 Cr. App. R. 18. But, with respect, I think the Court there treated the evidence of the complainant in all respects as if it had been unsworn evidence, and would appear to have drawn no distinction between the evidentiary value of sworn evidence corroborated by unsworn evidence, and that of unsworn evidence corroborated by unsworn evidence.

BIRD, J.A.: I would dismiss the appeal. There is little that I can usefully add to the reasons about to be filed by my brother O'HALLORAN, which I have had the advantage of perusing, and with which I agree.

The statement which the accused acknowledged to have made to the child's mother subsequent to the date of commission of the

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offence charged, particularly his request that she "forgive him because of what happened in the car," in my opinion could only relate to an incident which involved her own child. I think the jury must have so interpreted the statement and must have rejected the explanation of that conversation made by the accused at the trial. That being so, there is found in the evidence of the accused corroboration of the testimony of the two children as to his actions in the car.

There was evidence, in my opinion, amply sufficient to support the verdict, even if the complainant had not been sworn.

Appeal dismissed.

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March 12.

WATSON v. GIRARDI, GIRARDI AND CALABRIGO.

Practice—Non-suit—Non-suit without hearing evidence—New trial.

Upon the trial of an action a judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon his counsel's opening statement of the facts and without hearing the evidence tendered by him.

APPEAL by plaintiff from the order of MACFARLANE, J. of the 5th of November, 1945, upon motion made by the defendant for judgment on the pleadings, to recover the sum of $4,000 upon the ground of fraudulent misrepresentation.

The appeal was argued at Vancouver on the 12th of March, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, J.J.A.

Fleishman, for appellant: The action was dismissed without hearing evidence: see *Fletcher* v. *London and North Western Rail. Co.* (1891), 61 L.J.Q.B. 24; *Isaacs* v. *Evans* (1900), 16 T.L.R. 480. The evidence must be heard before decision can be given: see *Cross* v. *Rix* (1912), 29 T.L.R. 85; *McIntosh* v. *Homewood Sanitarium et al.,* [1940] 2 D.L.R. 782; *Rex* v. *Boyko* (1945), 83 Can. C.C. 295, at p. 297; *Edwards* v. *Mouncey,* [1920] 1 W.W.R. 298; *Ex parte Jacobson. In re*

Pincoffs (1882), 22 Ch. D. 312; *Jones* v. *Jones* (1895), 64 L.J. P. 84; *"Singer" Machine Manufacturers* v. *Wilson* (1877), 3 App. Cas. 376.

F. A. Jackson, for respondent: The agreement signed by the plaintiff was a settlement of the action: see Annual Practice, 1945, p. 484; *Hipgrave* v. *Case* (1885), 28 Ch. D. 356; *Moss* v. *Malings* (1886), 33 Ch. D. 603, at p. 604.

Fleishman, replied.

Per curiam (SIDNEY SMITH, J.A.): This is an appeal by the plaintiff from the dismissal of his action by MACFARLANE, J. during the opening address of plaintiff's counsel.

The plaintiff purchased from the defendants a grocery business and paid therefor the sum of $4,000. In the action the plaintiff sought the recovery of this sum upon the ground of fraudulent misrepresentation on the part of the defendants. About ten days after the writ had been issued the plaintiff and the defendants appear to have met and entered into a written agreement, expressed as being between Girardi Brothers and Company and the plaintiff, whereby the defendants agreed to give to the plaintiff grocery stock up to the value of $500 and the plaintiff agreed to "revoke and cancel" the present action. When counsel reached this point in his address and produced the agreement in question the learned judge observed that the terms of the document appeared to represent a settlement of the action between the parties. Counsel admitted that the plaintiff had signed the document, but submitted that the transaction was nothing more than a trick on the part of the defendants to deprive the plaintiff of his cause of action, that he was alleging conspiracy and would submit that this was merely further evidence in the conspiracy, that he wished to show the circumstances surrounding the making and signing of the document, and that he now asks leave to file a reply setting up these various matters.

After further discussion with plaintiff's counsel and an adjournment for half an hour for consideration, the learned judge dismissed the action with costs, upon the ground that the document in question was a valid settlement of the present action, and that any relief to which the plaintiff might be entitled must

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be sought in another action founded on the aforesaid agreement.

We are of opinion that these various issues should proceed to trial in the usual way. It is, of course, elementary that everyone is entitled to his day in Court, and that the parties to an action should be allowed to present their evidence and their submissions in accordance with the established rules and practice of the Courts. We think, on the whole, that it would have been better had this wholesome procedure been followed in the present case.

If authority is needed for this view, reference may be had to *Fletcher* v. *London and North Western Railway Co.*, [1892] 1 Q.B. 122, where Lord Esher, M.R. pointed out that in that case the learned judge "struck too soon," and went on to state the principle as follows:

> . . . In my opinion a judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon his counsel's opening statement of the facts.

The appeal is allowed with costs. We grant an extension of time to file the reply indicated above, and direct a new trial. Costs of the abortive trial will abide the result of the new trial.

Appeal allowed.

Solicitor for appellant: *Arthur H. Fleishman.*
Solicitor for respondents: *Frank A. Jackson.*

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1946
Mar. 1, 18.

REX v. ARTHUR.

Criminal law—Summary conviction—Case stated—Form and contents—Intoxicating liquor—Unauthorized prescription for—Proper form of case stated.

The appellant, being a physician, was convicted of unlawfully giving a prescription for liquor to other than a *bona-fide* patient in a case of actual need. On appeal by way of case stated the information and complaint and the conviction were filed in the registry with the recognizance and the case stated to which latter was attached the transcript of evidence.

Held, that the information and complaint and the conviction should not have been sent up and a case stated, being a statutory appeal and one limited to points of law, it follows that the evidence should not be sent

up. Where the proceeding is questioned on the ground that there was not any evidence to support the adjudication the magistrate may quote or send up the relevant portions of the evidence and those portions unnecessary to the making of the test "Was there any evidence" should not be sent up. The case stated ought not to have been entituled "In the Supreme Court of British Columbia" and the practice which has prevailed should be discontinued. The application may be amended by the applicant within seven clear days from the date of the proceeding to be questioned and must be in writing. The magistrate may not amend the application. Where the respondent intends to attack an application for a case stated, he should bring it into Court as an exhibit to an affidavit after verification by the magistrate and as it stood upon the expiry of the seven clear days within which it was open to him to make his application.

Section 89 (4) of the Summary Convictions Act states that the case shall be transmitted to the Supreme Court. It is therefore unnecessary in a case arising under our Act that the applicant should specify the Court to which it is desired that the case be stated.

Held, that the case be remitted to the learned magistrate for amendment as indicated.

Proper form of case stated.

APPEAL by way of case stated from a conviction by W. W. B. McInnes, Esquire, deputy police magistrate, Vancouver, pursuant to section 89 of the Summary Convictions Act on January 30th, 1946, on a charge that the accused between the 1st of November, 1945, and the 5th of January, 1946, being a physician, unlawfully did give a prescription for liquor to other than a *bona-fide* patient in a case of actual need contrary to the provisions of section 22 of the Government Liquor Act. Heard by MANSON, J. at Vancouver on the 1st of March, 1946.

D. McK. Brown, for appellant.
Jestley, for the Crown.

Cur. adv. vult.

18th March, 1946.

MANSON, J.: Appeal by way of case stated pursuant to section 89 *et seq.* of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271.

The appellant was convicted by W. W. B. McInnes, Esquire, a deputy police magistrate in and for the city of Vancouver, on the 30th of January, 1946, for that he, between the 1st of November, 1945, and the 5th of January, 1946, being a physician,

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unlawfully did give a prescription for liquor to other than a *bona-fide* patient in a case of actual need, contrary to the provisions of section 22 of the Government Liquor Act, R.S.B.C. 1936, Cap. 160 and amending Acts.

Counsel for the Crown takes the undermentioned preliminary objections:

A. The application to the magistrate "to state and sign a case setting forth the facts of the case and the ground on which the proceeding is questioned" is a nullity in that: 1: It purports to be "pursuant to section 761 of the Criminal Code," and no mention is made therein directly or by inference to the Summary Convictions Act: 2. The amendment of the application by the magistrate on 13/2/46 was (a) a nullity in that the magistrate had no power to amend; (b) a nullity in any event in that the seven clear days within which the application must be made (*vide* section 89 (2) [*supra*]) had expired prior to the amendment.

B. The case stated is in excess of jurisdiction and a nullity in that: 1. It is entituled "In the Supreme Court of British Columbia." 2. There is no paragraph therein directing it to the Supreme Court of British Columbia. 3. There is a fatal omission of a relevant fact in the case stated, *viz.*, the omission to state that the appellant did not testify at the trial. 4. The magistrate, contrary to the explicit requirement of the statute, omitted to set forth the facts of the case. 5. The magistrate attached a transcript of the evidence at the trial.

C. The magistrate having attached a copy of the transcript of the proceedings at the trial, if the transcript is read as requested by the appellant, the appeal will have taken the form of a trial *de novo*, and in that event the appeal must be dismissed for want of an affidavit of merits, as required by section 104 of the Government Liquor Act [*supra*].

In considering the cases cited by counsel it is noted that a number of them are appeals from convictions under the Criminal Code or from convictions under the statutes of Provinces other than British Columbia. That fact is of some importance in that the relevant statutory law in those cases differs from that of British Columbia. Appeals by way of case stated from convictions under Part XV. of the Code are governed by section 761 thereof and the immediately following sections. Section 576 (*b*) of the Code empowers superior courts of criminal jurisdiction in the several Provinces to make rules

> for regulating in criminal matters the pleading, practice and procedure in the court, . . . and the proceedings on application to a justice to state and sign a case.

Rules have been made by the Courts of some of the Provinces. Some of the Provinces have made the provisions of section 761

of the Code to apply *mutatis mutandis* to their Summary Convictions Acts (or corresponding Acts) as if enacted therein, and some have in a like manner imported section 576 (*b*) and the rules made thereunder. British Columbia has not made Part XV. of the Code applicable to Provincial offences. It has rules made under the authority of section 576 (*b*) to govern appeals by way of case stated under section 761 of the Code—*vide* Supreme Court Rules, 1943, 341 at p. 342. The practice and procedure on an appeal by way of case stated from a conviction, order, determination or other proceeding of a justice under the Summary Convictions Act of British Columbia is governed by the provisions of that statute, and, where the statute is silent, by the practice as laid down by our Courts by virtue of their inherent power to lay down rules of practice. On the latter point *vide Bell* v. *Wood and Anderson,* 38 B.C. 310, at p. 317; [1927] 1 W.W.R. 580.

Reference will be made more than once hereunder to *Rex* v. *Moroz,* [1945] 1 W.W.R. 433, a decision of the Court of Appeal of Manitoba upon an appeal by way of case stated under section 761 of the Code from a conviction for a violation of The Excise Act, 1934, Can. Stats. 1934, Cap. 52. Bergman, J.A. wrote a long, and, with respect, a helpful judgment which was assented to *in toto* by Dennistoun and Richards, JJ.A. and not dissented from by McPherson, C.J.M. and Trueman, J.A. who agreed in the result. While the relevant statute there was not the one in the case at Bar the reasoning and the conclusions are apposite because section 89 *et seq.* of our Summary Convictions Act are in *verbis ipsissimis* of section 716 of the Code except for slight variation in some minor respects.

As was said in *Rex* v. *Chin Hong* (1936), 50 B.C. 423, at p. 424:

> The appeal by way of a case stated is a purely statutory appeal. The authorities are abundantly clear that the provisions of the statute must be strictly complied with in taking the appeal.

And at p. 426:

> It has been said there must be strict compliance in the matter of the notice [application] to give the Court jurisdiction. I take this to mean at least a very substantial compliance though not a compliance to the letter.

Perhaps the matter might have been better stated by saying—

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there must be a substantially strict compliance with the provisions of the statute in the matter of the application to the magistrate to give the Court jurisdiction. It ought not to be that a condition precedent to a statutory appeal should be an uncertain thing depending upon the liberality in interpretation of this Court or that. The citation in the *Chin Hong* case at p. 426 from "The Table Talk of John Seldon" is apt, and *vide* Bergman, J.A. in the *Moroz* case at p. 448, and the cases cited. At p. 449 he observes:

> . . . These requirements are jurisdictional; and, unless they are complied with, there is no jurisdiction to entertain the appeal, even though the magistrate may have acted on the application and stated a case which is sufficient both in form and substance.

The application is attacked on several grounds (*supra*): A document entituled *"Rex* v. *James Ross Arthur"* and purporting to be signed by one J. R. Arthur as applicant and bearing the stamp of the Vancouver Registry, Feb. 28, 1946, is before me. It has not been brought up by being exhibited to an affidavit—nor is it sent up by the magistrate under his verification as an attachment to the case. It is blue-pencilled in the first clause and in the three paragraphs setting forth the grounds upon which the conviction is questioned. It bears an endorsement, "Recd Fbry 2nd 1946, W. W. B. McInnes, D.P.M."

Where the respondent intends to attack an application he should bring it into Court as an exhibit to an affidavit after verification by the magistrate (the application is not served upon the other side) and as it stood upon the expiry of the seven clear days within which it was open to him to make his application. It is no part of the duty of the magistrate to send up the application. He should, however, advise the respondent of the exact time of its receipt and deliver the original to the respondent or permit him to make a true copy thereof.

Counsel agree that the document above referred to is the original application delivered to the magistrate on the 2nd of February, 1946, as blue-pencilled by him at a later date. Counsel for the appellant states that the blue-pencilling was done after expiry of the time prescribed for delivery of the application. In my view it is immaterial when the blue-pencilling was done. The

application must be looked at as it was delivered or amended by the appellant within the prescribed time for delivery.

While the application may be amended by the applicant within seven clear days from the date of the proceeding to be questioned, the amendment must be in writing. The magistrate may not amend the application. He may state a case upon the grounds set forth in the application or may refuse to do so on all or on any of the grounds set forth in the application. If he refuses the applicant has his remedy under section 89 or under section 93 of the Act.

Hereunder are set out portions of the application which it is essential to consider:

Pursuant to section 761 of the Criminal Code, I, James Ross Arthur, the person named in the conviction . . . desire to question the said conviction . . . on the ground that the said conviction is erroneous in point of law for the reasons herein stated, and I hereby apply to you to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned by me, namely:

1. That you were wrong in holding that there was any evidence that I am a physician within the meaning of the Government Liquor Act.

2. That you were wrong in holding that there was any evidence that a prescription within the meaning of the Government Liquor Act was given.

3. That you were wrong in holding that the evidence shifted the burden of proof to me under section 97, subsection (2), of the Government Liquor Act.

Dealing, now, with the objections of the respondent to the application:

A. 1. I do not think the opening clause of the application is fatal. The magistrate is presumed to know the law, and the reference to the Criminal Code is a mere slip. If from the remainder of the application the magistrate could clearly understand the purport of the same, the clause in question would not mislead him. The objection is not sustained.

A. 2 (a) and (b). The blue pencilling by the magistrate was probably for his own convenience, and in any event did not alter the application in so far as this Court is concerned. The objections are not sustained.

The application did not state to what Court it was desired that the case be stated. In the *Moroz* case Bergman, J.A. at pp. 450-51, comments upon such an omission. He observes that a mere request to state a case without specifying to whom it was

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to be stated is "utterly meaningless." He concludes by stating,

> I have great doubts as to the sufficiency of this application

but refrains from deciding the point. The phrase "the court" used in section 761 of the Code, which was the relevant statute in that case, by virtue of Code section 705 (*c*) means and includes any superior court of criminal jurisdiction for the Province in which the proceedings in respect of which the case is sought to be stated are carried on, and in Manitoba by virtue of Code section 2 (38) means the Court of Appeal or the Court of King's Bench. Rules made by the Court of Appeal for Manitoba (51 Man. L.R. XVI) direct that the case stated shall be delivered to the registrar of the Court of Appeal—*vide* rule 4. Despite the rule it would seem to me that the statutory jurisdiction of the Court of King's Bench remains. If that be true, the necessity for specifying in Manitoba in an application under the Code section 761 the Court to which it is desired that the case be stated is quite understandable. The same point arose in Alberta. The rule in that Province requires that the applicant shall state in his application whether the case is to be stated to the appellate division or to a judge and it was held that the omission of such a statement could not be considered as a "slight" deviation (*Rex* v. *Dean,* [1917] 2 W.W.R. 943). In our Summary Convictions Act, Sec. 89 (4), it is explicitly stated that the case shall be transmitted to the Supreme Court. It therefore seems unnecessary in a case arising under our Act that the applicant should specify the Court to which it is desired that the case be stated.

The applicant seeks to question the conviction only on the ground that it is erroneous in point of law, and not on the ground that it is in excess of jurisdiction. The question as to whether there was "any" evidence is a question of law. If there was none the magistrate exercised his jurisdiction wrongly, but it cannot be said that he acted in excess of jurisdiction (*Rex* v. *Nat Bell Liquors Ltd.,* [1922] 2 W.W.R. 30).

The case stated is given in skeleton form hereunder—certain portions thereof *verbatim.*

> In the Supreme Court of British Columbia
>
> (style of cause)
>
> Case stated by.....under the provisions of Sec. 89 of the Summary Convictions Act . . .
>
> (Recital of the information)
>
> On the 30th day of January, 1946, the said charge was duly heard before

me in the presence of the said parties or their counsel, and after hearing the evidence adduced and after hearing the said Gilmour Fleming and the said James Ross Arthur by his counsel, I found the said James Ross Arthur guilty on the said evidence and convicted him thereof; but at the request of the said James Ross Arthur I state the following case for the opinion of this Honourable Court.

The facts of the case are set out in the stenographic report of the proceedings attached hereto which I find it necessary to attach in order to properly state the facts inasmuch as the proceedings are questioned on the ground that there was no evidence to support the conviction, and as all the evidence is pertinent to this question, the facts cannot be better stated than by attaching the afore-mentioned stenographic report and transmitting the exhibits.

The counsel for the said James Ross Arthur desires to question the validity of the said conviction on the ground that it is erroneous in point of law, on the following grounds:

(1) That I was wrong in holding there was any evidence that the said James Ross Arthur is a physician within the meaning of the "Government Liquor Act"; (2) That I was wrong in holding there was any evidence that a prescription within the meaning of the "Government Liquor Act" was given.

All of the above questions were raised before me by counsel for the appellant at the said hearing before me.

The questions submitted for the judgment of this Honourable Court are: (1) Whether there was any evidence that the said James Ross Arthur is a physician within the meaning of the "Government Liquor Act"; (2) Whether there was any evidence that a prescription within the meaning of the "Government Liquor Act" was given.

Dealing now with the objections of the respondent to the case:

The appellant makes no objection to the fact that the magistrate made no reference in the case stated to the third ground of objection taken by him in his application. He had his remedy under section 93 of the Act but did not choose to exercise it.

B. 1 and 2. Clearly the case stated ought not to have been entituled "In the Supreme Court of British Columbia." I have enquired from the deputy registrar as to the practice which has prevailed in this connection. An examination of the papers in a number of cases discloses that in each of them the magistrate entituled the case stated "In the Supreme Court of British Columbia." I have conferred with three of my colleagues and we are agreed that the practice which has prevailed should be discontinued.

As to the forms to be used in proceedings by way of case stated,

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vide Bergman, J.A. in the *Moroz* case at pp. 449 to 452. At p. 450 he says:

> . . . all the forms in common use in this province in connection with appeals by way of stated case are entirely unofficial and unauthorized.

The position in this Province is the same. The impropriety of entituling the case stated in the Court to which the appeal is taken is emphasized by Bergman, J.A. at pp. 452-53, and with his reasoning on the point I am in accord. At p. 453 he concludes:

> In the case at bar the stated case is entitled in the Court of Appeal. In my opinion this is incorrect and improper.

A case stated should be directed to the Supreme Court of British Columbia and the Chief Justice and the judges thereof. I am nevertheless of the opinion that the objections on these two points, B. 1 and B. 2 are not fatal, and I do not sustain them—*vide Rex* v. *Klig* (1929), 65 O.L.R. 8, at p. 10.

B. 3, 4 and 5. These objections may all be overcome by remitting the case for amendment pursuant to section 95 (1) of the Act, and I therefore do not give effect to them. My view, however, as to each of them will appear from my later observations.

C. The character of the appeal cannot be changed by the sending up of a transcript of the evidence before the magistrate. This is a case stated, and in this Province no affidavit of merits as provided for in section 104 of the Government Liquor Act is required in such a case—*vide Rex* v. *Carmichael* (1940), 55 B.C. 117—*aliter* in Saskatchewan by reason of the specific words of section 144 of the Saskatchewan Liquor Act, R.S.S. 1940, Cap. 279. The objection is not sustained.

A case stated being what it is—a statutory appeal and one limited to points of law—it follows that the evidence should not be sent up. The sufficiency of the evidence is not a matter for the appellate tribunal. Where the proceeding is questioned on the ground that there was not any evidence to support the adjudication the magistrate may quote or send up the relevant portions of the evidence. Those portions unnecessary to the making of the test "Was there any evidence" should not be sent up. In *Rex* v. *Fong Soon* (1919), 26 B.C. 450, at p. 455 the Court of Appeal of British Columbia deprecates, as it had done before, the practice of

needlessly and expensively sending up a transcript of all the evidence taken, . . . , where it . . . could not properly have been referred to.

MARTIN, J.A., as he then was, says:

So even in special cases where it is necessary to send up a transcript of some of the evidence, it should be confined to that portion of it which is relevant to the point in question, *e.g.*, Was there any evidence on which the conviction could be founded? or upon which a confession should be admitted, as in *De Mesquito's* case, [(1915), 21 B.C. 524] *supra?*

In *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431, at p. 437, MACDONALD, C.J.A., as he then was, "condemned" the practice of sending up a transcript of the whole of the evidence, but he too noted the exceptional case referred to by MARTIN, J.A. in the *Fong Soon* case. In *Rex* v. *McDonnell,* [1935] 1 W.W.R. 175, Harvey, C.J.A., at p. 176 observes:

Our Rule No. 2 of the "Rules as to Cases Stated" provides that a copy of the evidence is to be submitted with the stated case but it is to be observed that, by the section of the Code, the Court of Appeal has nothing to do with the deciding of the facts which, as found, are to be set forth in the stated case. It may happen, however, that the ground of objection is that there is no legal evidence to support a finding of fact, which is a legal question, and in such case it is necessary to have the evidence before the Court of Appeal.

With these views Bergman, J.A. does not agree. Speaking particularly of the decision of the Alberta Court of Appeal he says at p. 458:

I think that these observations are not applicable in a jurisdiction where there is no Court Rule requiring a copy of the evidence to be submitted with the stated case, at any rate where, as here, the evidence has not been made part of the stated case. In this jurisdiction the question, "Was there any evidence to sustain the said conviction?" must, in my opinion, be answered by reference to the facts as found by the magistrate and stated in the stated case, and not by going behind those findings and examining the evidence on which they are based.

Even if the above expressions of opinion in our own Court are no more than *obiter* I regard them as sound, as I do the opinion of the Chief Justice of Alberta.

The information and complaint and the conviction were filed in the registry with the recognizance and the case stated to which latter was attached the transcript of evidence. The information and complaint, and the conviction, should not have been sent up. A document said to have been an exhibit is also before me. It is not marked as an exhibit. There is a slip pinned to it, "Vancouver Police Court v. J. R. Arthur." The slip is not initialled

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by the magistrate or by the clerk of Court. No point was made by counsel as to the impropriety of this method of sending along a portion of the evidence, if such it was. There is a proper way of doing things, and it ought to be followed.

As to the contents of the case, a profitable discussion will be found in the *Moroz* case at p. 453 *et seq.*, but it may assist if I indicate substantially how, in my opinion, the magistrate should have stated the case At p. 2273 of Stone's Justices' Manual, 74th Ed., will be found a form which is useful as a guide. Not only should the case not be entitled "In the Supreme Court of British Columbia" but the words "respondent" and "appellant" should be deleted. A style of cause is unnecessary. The caption might well read—

CASE STATED BY.....PURSUANT TO THE PROVISIONS OF THE SUMMARY CONVICTIONS ACT, R.S.B.C. 1936, CAP. 271 FOR THE CONSIDERATION OF THE SUPREME COURT OF BRITISH COLUMBIA, THE CHIEF JUSTICE AND THE JUDGES THEREOF.

And then should follow:

(a) The substance of the information or complaint (*vide* Manitoba, Saskatchewan and Alberta Rules); (b) the name of the prosecutor (or complainant) and the defendant (*vide* Manitoba and Alberta Statutes).

(a) and (b) may be combined—*vide* Stone Form 210, p. 2273.

(c) The substance of the conviction, order, determination or other proceeding questioned (*vide* Manitoba, Saskatchewan and Alberta); (d) the date of the proceeding questioned (*vide* Manitoba, Saskatchewan and Alberta); (e) the facts as found (*vide* Saskatchewan); (f) any rulings upon points of law relevant to questions raised.

And then should follow:

The said Arthur, being dissatisfied with my determination as being erroneous in point of law (or in excess of jurisdiction), pursuant to the provisions of the Summary Convictions Act, R.S.B.C. 1936, Cap. 271, duly applied to me in writing to state and sign a case setting forth the facts of the case and the grounds upon which the proceeding is questioned for the consideration of this Court and duly entered into a recognizance as prescribed by the statute in that behalf.

Now therefore in compliance with such application I do hereby state and sign the following case:

Case.

1. The proceeding was questioned on two grounds, namely: Set forth the grounds.

Upon the first ground upon which the proceeding is questioned, having found that the said Arthur was the person who issued the document, Exhibit 1, upon the evidence quoted hereunder I found that the said Arthur was a physician within the meaning of the Government Liquor Act (*supra*).

Evidence (upon which finding made).

Witness Gilmour Fleming—the informant and the vendor at the Davie Street Liquor Store.

Questions and answers so far as relevant to the finding questioned.

Witness Hamilton Tate—the person in favour of whom the document, Exhibit 1, was issued.

Questions and answers so far as relevant to the finding questioned. (Exhibit 1) (if relevant to the findings questioned).

Upon the second ground upon which the conviction is questioned, upon the evidence quoted hereunder, I found that a prescription within the meaning of the Government Liquor Act (*supra*) was given.

Evidence (upon which finding made).

Repeating so far as necessary by reference only, and quoting additional relevant evidence.

No evidence was adduced to negative the evidence quoted.

Upon the above findings of fact and other findings not questioned I found the said Arthur guilty as charged.

The question upon which the opinion of the Court is desired is whether, upon the above statement of facts, I came to a correct determination and decision in point of law, and if not, the Court is respectfully requested to reverse or amend my determination, or remit the matter to me with the opinion of the Court thereon.

DATED the day of 1946, at the City of Vancouver, B.C.

.....

Deputy Police Magistrate in and for the city of Vancouver.

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The magistrate or the clerk of the police court transmitted the case stated to the registrar of this Court. The responsibility in that connection is clearly that of the applicant—*vide* section 89 (4). The applicant has a further responsibility which, until the case has been handed to him, cannot be discharged. It is important that the statute be complied with. Here the point was not raised—*sed vide Rex* v. *Evans* (1916), 23 B.C. 128, at p. 135.

The case is remitted to the learned magistrate for amendment as above indicated.

Case stated remitted for amendment.

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Sept. 18, 19, 20, 21, 24; *Nov.* 6.

REX v. HARRISON. (No. 2).

Criminal law—Murder—Provocation—Accident—Direction to jury—Reasonable doubt as between murder and manslaughter—Criminal Code, Secs. 252, Subsec. 2, 259 (c) and 1016, Subsec. 2.

The accused and one Helen Lee lived together from August to December, 1943, when they quarrelled and she left him, but he persisted in trying to find her as she went from one boarding-house to another attempting to avoid him. In April, 1944, she, with a friend Doris Olson obtained rooms 501 and 502 in the Mayli Rooms on Hastings Street in Vancouver with a communicating door between them. Helen 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 reading, with a six-months' old child of her sister whom she was looking after, when there was a knock on the door leading from the hall into room 501 and the accused forced his way into the room. He had a rifle partly under his overcoat and strapped to his shoulder. He took the gun out and while swinging it about said "everybody stand back" several times. Then the gun suddenly went off and the bullet hit Lennox in the stomach. Helen then grabbed the rifle and while struggling for it, they went through the adjoining door into room 502 where Lennox followed them and seized the accused from behind and the two men fell on Doris' bed where accused, who also had a three-pronged file with a sharp end, stabbed Lennox in the stomach with it. When Doris first saw accused come into room 501 she slammed the door shut between the two rooms and ran downstairs to telephone the police. The accused gave evidence and said the gun did not go off until after Helen had seized it and it was not until after they had struggled into room 502. Lennox died two hours after the shooting. Accused was convicted of murder.

Held, on appeal, that on the whole of the facts and with a proper direction, the only reasonable and proper verdict, if not of murder, would be one of manslaughter. The jury must have been satisfied of facts which proved Harrison guilty of manslaughter. Section 1016, subsection 2 of the Code should be applied and for the verdict found should be substituted a verdict of manslaughter and in substitution for the sentence passed by the trial judge should be imposed a sentence of imprisonment for life.

APPEAL by accused from his conviction before MACFARLANE, J. and the verdict of a jury at the Spring Assize at Vancouver on the 8th of June, 1945, on a charge of murder. The principal witness was one Helen Lee. She was married in Texas when 14 years old and came to Vancouver in 1943 when she was 20 years old. She was employed as a waitress in restaurants. She met the accused in June, 1943. They became friends and lived together from August to December in 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 him at her sister's room where he threatened her and said he would get her some time later. He saw her once 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. This girl, with one Doris Olson, had two adjoining rooms with door between on the fifth floor numbers 501 and 502 of the Mayli Rooms. On the night of the 7th of May, 1944, Mrs. Lee was sitting on the bed in room 501 playing cards with Clifford Lennox and Doris Olson was on the bed in room 502 with the six months' old child of her sister that she was looking after. At about 12.30 a.m. there was a knock on the door of 501. Helen Lee opened the door and the accused shoved his way in. He had a rifle, the butt being under his overcoat and it was strapped to his shoulder. He took the gun out, waved it about and said "everybody stand back" two or three times, when the gun went off, the bullet striking Clifford Lennox in the stomach. Helen then grabbed the gun and in struggling for possession they went through the door into room 502. Lennox followed them in and he seized accused from behind and they both fell on the bed in room 502. The accused also had in his hand when he came into the room a three-pronged file with a

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sharp point and Lennox was badly wounded with the file when they were struggling on the bed. When accused first came into room 501 Doris Olson, on seeing him, slammed shut the door between the two rooms and ran downstairs to telephone for the police. In the struggle in room 502 Helen got possession of the gun and struck the accused with it. The gun was broken in two. The police then arrived.

The appeal was argued at Victoria on the 18th to the 20th and the 21st and 24th of September, 1945, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Schultz, for appellant: Harrison was discharged from the army on December 31st, 1942. There was error in allowing in Muir's evidence of what Helen Lee said in room 502 when Harrison was sitting close by her. She said "He [Harrison] stabbed me" and "He [Harrison] shot him" (indicating Lennox): see *Rex v. Emele* (1940), 74 Can. C.C. 76; *Chapdelaine* v. *Regem*, [1935] S.C.R. 53; *Rex* v. *Norton*, [1910] 2 K.B. 496, at pp. 499-501; *Rex* v. *Christie*, [1914] A.C. 545, at pp. 554-5; *Stein* v. *Regem*, [1928] S.C.R. 553. The statements made to Muir are prejudicial and the question is whether accused was convicted according to law: see *Stirland* v. *Director of Public Prosecutions* (1944), 30 Cr. App. R. 40, at pp. 55-6; *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229, at p. 240; *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537; *Rex* v. *Scory*, [1945] 1 W.W.R. 15, at p. 33; *Reg.* v. *Sonyer* (1898), 2 Can. C.C. 501. Failure of counsel to object at the trial does not preclude accused doing so on appeal: see *Rex* v. *Powell* (1919), 27 B.C. 252, at pp. 253-4; *Rex* v. *Morelle* (1927), 39 B.C. 140, at p. 144; *Rex* v. *Sankey* (1927), 38 B.C. 361, at p. 377; *Rex* v. *Jennings* (1916), 28 Can. C.C. 164, at p. 165; *Schwartzenhauer* v. *Regem* (1935), 64 Can. C.C. 1, at p. 9; *Rex* v. *Hurd* (1913), 21 Can. C.C. 98; *Rex* v. *Palmer* (1935), 25 Cr. App. R. 97, at pp. 99-100. Cases to distinguish are *Rex* v. *Stonehouse and Pasquale* (1927), 39 B.C. 279; *Paradis* v. *Regem* (1933), 61 Can. C.C. 184, at p. 190 and *Rex* v. *McKevitt* (1936), 66 Can. C.C. 70. No objection was taken in *Rex* v. *Norton* (1910), 5 Cr. App. R. 65 and *Chapdelaine* v. *Regem*, [1935] S.C.R. 53,

at p. 61. Reception of inadmissible evidence entitles accused to new trial: see *Rex* v. *MacDonald* (1939), 72 Can. C.C. 182, at p. 183; *Allen* v. *Regem* (1911), 18 Can. C.C. 1; *Levesque & Graveline* v. *Regem* (1934), 62 Can. C.C. 241, at p. 245; *Gouin* v. *Regem* (1926), 46 Can. C.C. 1, at pp. 6-7; *Rex* v. *Leckey* (1943), 29 Cr. App. R. 128, at pp. 136-7; *Schmidt* v. *Regem,* [1945] S.C.R. 438, at p. 440; *Brooks* v. *Regem,* [1927] S.C.R. 633, at pp. 636-7. That the jury be discharged see *Rex* v. *Firth* (1938), 26 Cr. App. R. 148; *Rex* v. *Peckham* (1935), 25 Cr. App. R. 125, at p. 128; *Rex* v. *Featherstone* (1942), 28 Cr. App. R. 176, at p. 178; *Rex* v. *Wattam* (1941), 28 Cr. App. R. 80. On a trial for murder the jury should be directed that if, upon a review of the evidence, they are left in reasonable doubt as to whether the act was unintentional or provoked the prisoner should have the benefit of the doubt: see *Woolmington* v. *Director of Public Prosecutions,* [1935] A.C. 462, at p. 481; *Rex* v. *Jackson,* [1941] 1 W.W.R. 418, at p. 428; *Rex* v. *Manchuk,* [1938] S.C.R. 341, at p. 349; *Rex* v. *Primak* (1930), 53 Can. C.C. 203, at pp. 206-8; *Rex* v. *Philbrook* (1941), 77 Can. C.C. 26; *Rex* v. *Illerbrun* (1939), 73 Can. C.C. 77, at p. 79; *Rex* v. *Harms* (1936), 66 Can. C.C. 134; *Picariello et al.* v. *Regem,* [1923] 2 D.L.R. 706, at pp. 713-4. On the question of reasonable doubt as between murder and manslaughter see *Rex* v. *Beard* (1920), 14 Cr. App. R. 159, at p. 162; *Rex* v. *Kovach* (1930), 55 Can. C.C. 40, at p. 42; *Rex* v. *Studdard* (1915), 25 Can. C.C. 81, at p. 82. On sections 252, subection 2 and 259 (*d*) of the Code see *Rex* v. *Robichaud* (1938), 70 Can. C.C. 365, at p. 368; *Rex* v. *Dell'Ospedale* (1929), 51 Can. C.C. 117; *Rex* v. *Hughes, Petryk, Billamy, Berrigan,* [1942] S.C.R. 517; *Rex* v. *Harrison* (1945), 61 B.C. 181; *Graves* v. *Regem* (1913), 47 S.C.R. 568, at pp. 581-2. The evidence of what took place in both rooms 501 and in 502 constitutes provocation: see *Rex* v. *Harms* (1936), 66 Can. C.C. 134, at p. 137; *Rex* v. *Krawchuk* (1940), 75 Can. C.C. 219, at p. 223; *Rex* v. *Hopper,* [1915] 2 K.B. 431, at pp. 432 and 435; *Rex* v. *Jagat Singh* (1915), 21 B.C. 545, at p. 553. The judge should have told the jury that Helen Lee should have asked Harrison to leave the room before assaulting him: see *Reg.* v. *Brennan* (1896), 4 Can. C.C.

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41; *Rex* v. *Kirk* (1934), 62 Can. C.C. 19, at p. 23; *Wild's Case* (1837), 2 Lewin, C.C. 214; 168 E.R. 1132; *Regina* v. *Smith* (1866), 4 F. & F. 1066. The Crown must prove death was the result of a voluntary act of accused: see *Rex* v. *Martin* (1827), 3 Car. & P. 211; *Regina* v. *Smith* (1837), 8 Car. & P. 160. The defence, however weak, must be put: see *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77; *Rex* v. *Hewtson and Goddard* (1930), 55 Can. C.C. 13; *Rex* v. *West* (1925), 44 Can. C.C. 109; *Rex* v. *Boak* (1925), *ib.* 225; *Rex* v. *McKenzie* (1932), 58 Can. C.C. 106; *Rex* v. *Scott and Killick,* [1932] 2 W.W.R. 124, at p. 129; *Rex* v. *Turkington* (1930), 22 Cr. App. R. 91; *Rex* v. *Raney* (1942), 29 Cr. App. R. 14, at p. 17; *Rex* v. *Davis* (1917), 13 Cr. App. R. 22, at p. 25.

Bull, K.C., for the Crown: We rely on section 1014 of the Code. Any jury would find murder. He was hounding the girl Helen Lee, who is a working girl and the chief witness and what she told constable Muir in the presence of the accused should be accepted in this regard. What was said in *Rex* v. *Norton,* [1910] 2 K.B. 496, at p. 500 and in *Rex* v. *Christie,* [1914] A.C. 545, at p. 554 was adopted in *Chapdelaine* v. *Regem,* [1935] S.C.R. 53, at p. 55; see also *Rex* v. *Stonehouse and Pasquale* (1927), 39 B.C. 279. On the burden of proof and reasonable doubt as between murder and manslaughter see *Woolmington* v. *Director of Public Prosecutions,* [1935] A.C. 462, at p. 482. There was no misdirection on the question of reasonable doubt. On the evidence of accused as to accidental shooting and stabbing, this cannot in any way be accepted in light of the evidence: see *Rex* v. *Hughes, Petryk, Billamy, Berrigan,* [1942] S.C.R. 517. If they accept the evidence of Helen Lee, then section 259 (*a*) is conclusive. We fail to see what section 252, subsection 2 of the Code has to do with the case. Section 1014 of the Criminal Code applies to this case: see *Schmidt* v. *Regem,* [1945] S.C.R. 438; *Gouin* v. *Regem,* [1926] S.C.R. 539.

McPhillips, on the same side: There is no authority for reducing the case from murder to manslaughter on account of provocation. The cases of *Rex* v. *Krawchuk* (1940), 75 Can. C.C. 16; *Manchuk* v. *Regem,* [1938] S.C.R. 341 and *Rex* v. *Jackson,* [1941] 1 W.W.R. 418 are all husband and wife cases and do

not apply to the circumstances here: see Tremeear's Criminal Code, 5th Ed., 297; *Rex* v. *Simpson* (1915), 11 Cr. App. R. 218.

Schultz, in reply, referred to *Graves* v. *Regem* (1913), 47 S.C.R. 568, at pp. 581-2 and *Brooks* v. *Regem,* [1927] S.C.R. 633.

Cur. adv. vult.

6th November, 1945.

SLOAN, C.J.B.C.: I am in substantial agreement with the reasons for judgment of my brother ROBERTSON, and concur in the conclusions reached by him.

O'HALLORAN, J.A.: I am in substantial agreement with my brother ROBERTSON. I would emphasize the misdirection which occurred in respect to Code sections 252, subsection 2 and 259 arising out of a misapplication of what was said in *Rex* v. *Hughes, Petryk, Billamy, Berrigan,* [1942] S.C.R. 517.

In the first trial of this case, see *Rex* v. *Harrison* (1945), 61 B.C. 181, the learned judge restricted the jury to that part of the definition of culpable homicide in section 252, subsection 2 which relates only to "an unlawful act." I pointed out in *Rex* v. *Harrison, supra,* at pp. 192-6, that *Rex* v. *Hughes* and *Graves* v. *Regem* (1913), 47 S.C.R. 568 (upon which the *Hughes* decision was founded) were not based upon that restricted definition of culpable homicide, but depended for their application upon its wider definition also found in section 252, subsection 2 reading:

> . . . causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death, . . .

In the second trial, which gave rise to this appeal, the learned judge also confined the jury to that part of the definition of culpable homicide in section 252, subsection 2 relating to "unlawful act," and excluded from the jury's consideration the above-quoted portion of the section and definition upon which the *Hughes* and *Graves* decisions were founded. In my judgment a fatal misdirection then took place. I would apply Code section 1016, subsection 2 and substitute a verdict of manslaughter, as was done in *Manchuk* v. *Regem,* [1938] S.C.R. 341, at pp. 349-50 by the Supreme Court of Canada, and in *Rex* v. *Barilla*

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(1944), 60 B.C. 511, by this Court. As to sentence, I will not dissent from the majority view that imprisonment for life be imposed.

I would allow the appeal accordingly.

ROBERTSON, J.A.: Harrison appeals from his conviction on 7th May, 1945, for the murder of Clifford Lennox. The jury brought in a recommendation to mercy. The facts, shortly, are these: The accused, who is a married man, had been living with one, Helen Lee, two or three months prior to "last December, 1943, or the beginning of 1944," when they separated. The accused saw her many times between this date and the 6th of May, but only spoke to her "six or eight times." Latterly he thought that she was avoiding him. He wished to speak to her again.

For a period of about three weeks prior to the 7th of May, Helen Lee had been living in room 501, on the fifth floor of the Mayli Rooms with Lennox. The adjoining bedroom 502 was occupied by a Mrs. Olson. Lee's account of what took place is as follows: About 12 o'clock on the night of the 7th of May, Lee and Lennox were playing cards in room 501. Mrs. Olson was lying on her bed in the adjoining room and was reading. The door between the two rooms was open. A knock came at the door and Lee opened it and saw Harrison with a gun partially concealed under the overcoat which he was wearing. She tried to slam the door shut, but was unsuccessful as the accused interposed the gun barrel. After this she backed up and Harrison came in. Room 501 is a small room about 8 feet 10½ inches by 12 feet 3½ inches. She backed up towards a basin which was on the west wall. Lennox stood at the foot of the bed, which was along the east wall. The door into the hall was then shut; but there was no evidence to show who shut it. The gun had been strapped to Harrison's body. He took off the strap just after he first came into the room. At this time, also, he had a knife in one hand. The accused was waving the gun—that is, waving it around the room—and saying "stand back." Mrs. Olson slammed the communicating door between that room and 502. The accused said "stand back" quite a few times. At this

time Lee was still standing by the basin and Lennox at the foot of the bed. Then the gun went off. Lennox was struck in the stomach and sat down on the bed. Harrison said "I shot him." Lee rushed forward towards Harrison, grabbed the gun and started wrestling with him for possession of it. While wrestling they hit the door between room 502 and they went wrestling into the middle of room 502. Lennox came in from 501, grabbed Harrison by the shoulders from behind. They fell on the bed in 502 and were wrestling. Lee who got possession of the gun, was hitting Harrison wherever she could with it. Then Lennox fell on the floor and Harrison ran out of the door in the hallway. Then the police were called. Harrison's evidence is as follows: He had been looking for Lee on the morning of the 6th of May, saying he wanted to see her about some papers and that "everything would be alright." He continued to look for her in the afternoon. He says he went to the Mayli Rooms to try to locate Lee and after certain investigations in the building evidently thought she was in room 501. He had left a rifle in his car which was parked near the rooms, and after ascertaining where he thought she was, he got it with the idea that he would frighten Lee into talking to him. He knocked at the door of 501. Lee opened the door and when she saw who it was, attempted to slam it. He put his right shoulder to the door and threw it open, when immediately Lee rushed towards him screaming curses and using violent language. He told her to stand back but as she did not do so he produced the "scraper" (a knife with a triangular blade six inches long) from his pocket and told her to stand back. She retreated and stood by a wash basin in the room. At this time Lennox was standing at the foot of the bed, in this room. Harrison did not know, and had not seen him before. Lee rushed at him a second and a third time when Lennox as well came towards him, and it was then that he produced the rifle, which suspended by a strap around his shoulders, was held to his side under his sweater, from under his overcoat and told them "stand back everybody." He says that for about ten minutes he was in room 501, pleading with her to talk to him; that she would "say a few things sarcastically or curse him or something like that"; that he had asked Lennox what his

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relationship to Lee was; that Lee rushed towards him asking what business it was of his, and cursing him very violently. He says that no shot was fired in room 501 and there was no struggle there between him and Lee. He then entered room 502 and found it was empty and thought Olson had gone for the police. Suddenly Lee, who had come into 502, tried to jerk the rifle away from him; and that when she was doing this the rifle was struck against the bed in 502 and in consequence the shot was discharged which struck Lennox. That he had no intention of shooting the rifle; that Lee pulled the rifle out of his grasp and dropped it on the floor. Then Lee rushed at him and began to scratch him and he threw her back. She came at him a second time and again he threw her back. She came at him a third time. It was then he held out the scraper and "she ran herself a little bit on before I could jerk it away." Then Lennox came up beside him and grabbed him, binding his arms to the sides, and dragged him to the bed, telling Lee to shoot him. Lee attempted to do so, but the rifle was not loaded. Then she hit him with the rifle and it was broken. That he was trying to get away from Lennox and in the struggle he felt the scraper cutting his (Harrison's) leg. That he did not mean to cause any bodily injury to Lennox or to Lee. In the scuffle on the bed Lennox received a very severe wound from the knife in the abdomen which together with the rifle wound caused his death. Harrison said he did not know Lennox had been stabbed and that Lennox in his struggle with him, in trying to put the knife into him (Harrison) must have put it into himself.

The police met Harrison on the second floor and arrested him and brought him up to room 502. This was a few minutes after the affray. When the police arrested Harrison the knife was in his pocket. When the police brought Harrison back to room 502 they found Lennox lying on his back, directly under the overhead light and Lee was lying at his right side. Harrison was then handcuffed and taken over to the south-west corner of the room and put on a chair. Then Harrison got up from the chair and said something to Lee, who said "go away, you have caused me enough trouble." Then Harrison was returned to the chair, and Muir, one of the constables, asked Lee if she was injured, and

she said (indicating Harrison) "he shot him" (indicating Lennox), and again indicating Harrison with a nod of her head, said, "he stabbed me." At this time she was sitting up facing the west wall and was only four or five feet from Harrison.

The Crown rested its case on Lee's evidence and submitted that the accused was guilty of murder under section 259, subsections (*a*) and (*b*) of the Code, if the jury believed her. If they believed the accused's evidence then he was guilty of murder under section 252 (*d*). The substantial defence was that the accused was guilty of manslaughter because of provocation or accident within the law as laid down in *Rex* v. *Hughes, Petryk, Billamy, Berrigan, infra.* The defence submitted that if Harrison's evidence was accepted by the jury, the charge would fall under section 259 (*d*) of the Code and that the verdict should should have been manslaughter His counsel asked this Court to substitute a verdict of manslaughter pursuant to section 1016, subsection 2 of the Code, or, alternatively, to order a new trial.

At the trial counsel for Harrison objected to the evidence given by Muir on the grounds that it was inadmissible and he asked that the jury be discharged and a new jury empanelled. This was refused. This evidence was a surprise to both counsel for the Crown and the defence, as there had been a previous trial of the same charge against Harrison and from that trial they expected a different answer. There is no doubt upon the evidence that Harrison was so close to Lee, and the circumstances were such, there being no noise, that he could easily have heard what she said to Muir. Harrison did not say anything. No one observed his demeanour. The learned judge ruled the evidence was inadmissible and, at once, warned the jury not to consider it, and again in his charge he very carefully warned them to the same effect.

So far as I can gather, the law with regard to the admission of such evidence is laid down in *Chapdelaine* v. *Regem,* [1935] S.C.R. 53, at p. 55, as follows:

"As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the state-

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ment in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, actions, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part."

But there is a rule of practice that, for fear of prejudice to the accused, in case it is not shown that he has accepted the statement, that such evidence should not be allowed in until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge the jury might reasonably draw the inference that the accused had so accepted the statement as to make it in whole or in part his own. See *Chapdelaine* v. *Regem, supra,* at p. 56, and *Rex* v. *Emele* (1940), 74 Can. C.C. 76.

Counsel for the Crown contended that the evidence was admissible. In the view I take, it is not necessary to consider this.

Then, when inadmissible evidence has been given, is it sufficient for the trial judge to tell the jury to disregard it? Lord Atkinson thought it was. He said in *Rex* v. *Christie,* [1914] A.C. 545, at p. 556, as follows:

> . . . There is no sufficient reason, I think, to suppose that injustice to the accused could not be effectually guarded against by the judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own.

Lord Reading was doubtful. He said at p. 565:

> That there is danger that the accused may be indirectly prejudiced by the admission of such a statement as in this case is manifest, for however carefully the judge may direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement.

Pickford, L.J. said in that part of his judgment from *Rex* v. *Norton,* [1910] 2 K.B. 496, quoted at p. 500 in the *Chapdelaine* case:

> . . . To allow the contents of such statements to be given before it is ascertained that there is evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as, whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds.

In *Rex* v. *Firth* (1938), 26 Cr. App. R. 148 an application had been made by the prisoner's counsel for discharge of the jury on the ground that inadmissible evidence had been put before them. It was argued that the trial judge, having told

the jury not to consider this evidence, there was no miscarriage of justice. Lord Hewart, C.J., said at pp. 153-4:

> It is not very profitable or satifactory to enter on the sphere of inquiries with regard to the precise effect which may be produced on the mind of a juror—and still less on the minds of a collection of jurors—by a piece of evidence, but the principle laid down by this Court is that, where an irregularity manifestly takes place, then there ought to be an end of the trial in that form. It seems to us in a high degree dangerous to permit the trial to continue to its end and where such an irregularity has occurred as that which here was inadvertently permitted.

It was held by the majority of this Court in *Rex* v. *Stonehouse and Pasquale* (1927), 39 B.C. 279 that where inadmissible evidence had been placed before a jury and afterwards the trial judge in his charge carefully instructed the jury to pay no attention to it, it could not be said that any substantial miscarriage of justice had actually occurred, and accordingly a conviction of rape was upheld. MARTIN, J.A., as he then was, speaking with reference to the judge's charge to the jury "to treat the case without reference to the inadmissible evidence," said at p. 285:

> We find it impossible to believe that this strong exhortation and caution, entirely appropriate to the special occasion, failed to achieve its object in bringing the jury to the proper frame of mind in their consideration of the matter.

The matter was later considered by the Supreme Court of Canada in *Paradis* v. *Regem*, [1934] S.C.R. 165. In that case a witness made a reply which it was alleged was unexpected and irrelevant. Objection was taken and the trial judge ruled that this reference to the case should be struck from the deposition. It was contended that the reference was so prejudicial to the accused that the jury should have been discharged and the prisoner tried before a fresh jury. Rinfret, J. said at p. 172:

> There may be extreme cases where the suggested procedure might be adopted, although we apprehend the question whether such a course ought to be followed is primarily for the trial judge to decide upon the circumstances of the particular case; and a court of appeal will always approach with great caution a question as to the propriety of that decision. In this instance, at all events, there are clearly no adequate grounds for holding that the learned judge ought to have acted otherwise than he did.

No doubt the statement made to Muir was damaging against the accused and the evidence, given as it was, was a breach of the rule of practice which I have mentioned. In my opinion the evidence was of so vital a nature and so damaging to the accused

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that the Court could not be certain that the effect on the minds of the jury was neutralized by the judge's direction; and consequently it is necessary to enquire whether a miscarriage of justice has resulted. Had there been nothing else, I would have been inclined to think the accused was entitled to a new trial, as I think under the circumstances the learned trial judge should have discharged the jury and empanelled a fresh jury. In this case, however, Lee was called for the Crown and described the circumstances above mentioned, which were in effect the same as the statements she had made to Muir, to which objection was taken.

In my view, under these circumstances, what happened was an irregularity in the trial—see *Rex* v. *Featherstone* (1942), 168 L.T. 64—and accordingly I think, so far as this question is concerned, "no substantial miscarriage of justice has occurred" and I would apply section 1014, subsection 2 of the Code.

The second point is that the learned judge did not direct the jury that if they entertained a doubt as between murder and manslaughter, they should give Harrison the benefit of this doubt and return a verdict of manslaughter. See *Rex* v. *Illerbrun,* [1939] 3 W.W.R. 546. I am unable to discover anything in the charge covering this point.

Defence counsel submitted that a verdict of manslaughter was open (1) on the ground of provocation, or (2) "accident" in the sense discussed in *Rex* v. *Hughes,* [1942] S.C.R. 517. After carefully considering the charge, I am of the opinion that, assuming there was evidence to support provocation, the judge did explain to the jury the law with reference to this and drew their attention to the salient facts, which, it was alleged, supported provocation. Again counsel pointed out that the doctor who performed the *post mortem* on Lennox was unable to say that his death was caused by the rifle shot. He preferred to say it was caused by the combination of the shot and the stab which Lennox received when struggling on the bed with the accused. Counsel for Harrison submitted that if the stabbing were the cause of death, it happened because Lennox, through fear of violence at the hands of Harrison, seized him and they fell upon the bed and that while Lennox was trying to force the knife into Harri-

son he only succeeded in putting it into his own body and therefore what took place was not a voluntary act on the part of Harrison.

He submitted upon these facts that the learned judge should have charged the jury in accordance with the *Hughes* case; that he did not do so in that, while in the earlier part of his charge, he read the whole of section 252, subsection 2 of the Code to the jury and section 259, subsections (*a*) to (*d*) and told them it was culpable homicide and murder if it fell within any one of the heads of 259, but might be reduced to manslaughter in certain circumstances; he later limited culpable homicide to "an unlawful act," stating that it was not necessary to consider the balance of the definition of culpable homicide contained in section 252, subsection 2.

As Anglin, J. says at pp. 586-7 in *Graves* v. *Regem* (1913), 47 S.C.R. 568:

> The vital distinction—that, while, to sustain a charge of manslaughter, it would suffice that the acts of the accused, whatever their character, should in fact have aroused in the mind of the deceased a fear of violence which induced him to do that which resulted in his death (section 252 (2)), in order that that culpable homicide should amount to murder those acts of the accused must have been such that they knew or should have known that the death of some person would be likely to be caused by them (section 259 (*d*))—was not brought to the attention of the jury.

As the learned judge failed to draw to the attention of the jury the latter part of the definition of culpable homicide contained in section 252, subsection 2, I am of the opinion there was not a sufficient direction in accordance with the *Hughes* case.

Then it was submitted that the

> learned trial judge erred in his charge to the jury in misdirecting the jury on the law concerning the burden of proof, and the question of reasonable doubt, or, alternatively, in failing to direct the jury properly or adequately on the law concerning the burden of proof and the question of reasonable doubt.

As to this, the learned judge in his summing up pointed out as a first principle the presumption of innocence in favour of the accused. Then he said:

> The next of those principles, in the order in which I present them to juries is, that in all criminal trials, the burden of proof rests on the Crown, and it remains on the Crown throughout. What is required of the Crown is that it must prove every ingredient necessary to establish the commission of the crime charged, and the commission of the crime charged by the

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accused, both beyond a reasonable doubt. I shall shortly define that phrase to you, attempt to tell you what it means. Now, while, in a criminal case, it is always the duty of the Crown to assume the burden I have just stated, on its side of the case, there is no such burden laid on the accused to prove his innocence. He is not bound to satisfy the jury of his innocence. His obligation, if the Crown has made a case against him, is met if he raises a doubt as to his guilt, a reasonable doubt as to his guilt.

Then he dealt specially with the defence of insanity and said:

When the accused puts forward a defence of self-defence or provocation, he is still entitled, as he is, in all his defences, even if he fails to establish them, to the benefit of any reasonable doubt on the case as a whole.

Then he explained "reasonable doubt" and said:

While in civil cases, the mere preponderance of probabilities usually entitled a plaintiff in an action to succeed, in criminal cases, in respect to those things which the Crown has to establish, a much higher degree of assurance is required, and the evidence must have such a moral certainty as convinces the minds of you, as reasonable men, beyond all reasonable doubt.

Then he said, speaking of intention, as follows:

In other words, that presumption of intention may be rebutted by evidence. It is first to be proven by implication from the circumstances, and if that is done, if the circumstances, and are such that you find in them an irresistible conclusion, to your mind, then it is open to counsel for the accused, or the accused, himself, to rebut that presumption. In doing that, you will remember what I said to you, when I spoke to you of the burden of proof that rests on the accused being less than that which rests on the Crown; that it is sufficient if he shows that the probabilities are in favour of his contention, or, if he gives an explanation of the circumstances which is consistent with his innocence, and you think that reasonable. In any case, he is entitled, in all those things, if there is any doubt in your mind, to the benefit of the doubt.

Here he was referring to what he had said *supra,* just after he had dealt with the presumption of innocence.

It is submitted that while the jury were told that the burden of proof rested on the Crown throughout, immediately afterwards they were told that there was an "obligation" on the accused. Again, when the learned judge referred to having directed the jury that the burden of proof that rests on the accused being less than that which rests on the Crown, this must refer to the "obligation" previously mentioned, and would therefore create in the minds of the jury the impression that there was a burden of proof resting on the accused.

It is further objected that the statement

that it is sufficient if he shows that the probabilities are in favour of his contention

again intimated to the jury that a burden of proof lay upon the accused.

With deference, I am of the opinion that the jury might easily have thought that there was a burden of proof upon the accused, and if this is so, the summing-up on this point was clearly wrong. See *Woolmington* v. *Director of Public Prosecutions,* [1935] A.C. 462, at p. 481.

In my opinion the objections which I have mentioned are such that if there was any possibility of an acquittal there should be a new trial.

Counsel for the appellant did not even suggest that his client might be entitled to an acquittal. His plea was for substitution of a verdict of manslaughter, or alternatively, for a new trial.

In my opinion, upon the whole of the facts and with a proper direction, the only reasonable and proper verdict, if not of murder, would be one of manslaughter; and under these circumstances I feel, subject to the substitution of a verdict of manslaughter, there has been no substantial miscarriage of justice. It appears to me that the jury must have been satisfied of facts which proved Harrison guilty of manslaughter. I would therefore apply section 1016, subsection 2 of the Code, and substitute for the verdict found, a verdict of manslaughter and in substitution for the sentence passed by the learned trial judge, I would impose a sentence of imprisonment for life. Compare *Manchuk* v. *Regem,* [1938] S.C.R. 341, and *Rex* v. *Raney* (1942), 29 Cr. App. R. 14, and also *Rex* v. *Prince,* [1941] 3 All E.R. 37.

SIDNEY SMITH, J.A.: I have had the privilege of reading and considering the judgment of my brother ROBERTSON, and concur in the conclusions he has reached.

BIRD, J.A.: I concur in the conclusion reached by my brother ROBERTSON and for the reasons expressed by him that here there was misdirection under *Rex* v. *Hughes, Petryk, Billamy, Berrigan,* [1942] S.C.R. 517 in that the learned judge excluded from consideration by the jury the latter part of the definition of "culpable homicide" as set out in Code section 252, subsection 2, *i.e.,*

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causing a person, by threats or fear of violence, . . . , to do an act which causes that person's death.

Counsel for the Crown, while rebutting any misdirection, relied strongly upon Code section 1014 in relation to this and other objections taken by the appellant on grounds of misdirection.

Careful consideration of the evidence and of the argument of Crown counsel fails to convince me that a verdict of murder would necessarily have been returned by the jury if the charge in respect of the foregoing direction had been correct.

In those circumstances the Crown has failed to show that no substantial miscarriage of justice occurred in consequence. *Schmidt* v. *Regem,* [1945] S.C.R. 438.

Upon consideration of all the facts and assuming proper direction, I think that the jury must have been satisfied of facts which proved the accused guilty of manslaughter. I would therefore substitute a verdict of manslaughter for the verdict found. I concur in the imposition of a sentence of life imprisonment in substitution for the sentence passed by the learned trial judge.

Appeal allowed and sentence of life imprisonment imposed.

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Mar. 5, 11.

IN RE LANDLORD AND TENANT ACT AND *IN RE* BACHAND AND DUPUIS.

Constitutional law—Landlord and tenant—Courts—Process of—Interference by Government official—Order in council authority for—Emergency Shelter Regulations P.C. 9439—Sheriff ordered not to enforce writ of possession.

Authority given by order authorized by statute to order a Government official to do or refrain from doing any act does not, without express words, authorize that official to interfere with the execution of legal process.

Assuming that the Governor in Council properly bestowed on the Central Mortgage and Housing Corporation the authority given it by P.C. 9439 and the orders in question herein made by an emergency shelter administrator had the same validity as if made by said corporation.

Held, nevertheless, that the wording of P.C. 9439 did not authorize the mak-

ing by the administrator of such an order as that contained in his letter to the sheriff which purported to require the sheriff to refrain from enforcing a writ of possession which had been issued out of the county court. Since the interpretation sought to be put on said order to support the administrator's letter would result in "an injustice so enormous that the mind of any reasonable man would revolt from it," the order should not be held to have produced such a result unless they have manifested that intention by express words.

The whole value of the legal system—the integrity of the rule of law—is at once destroyed if it becomes possible for officials by arbitrary decisions made, not in the public court rooms, but in the private offices of officialdom without hearing the parties, without taking evidence, free of all obedience to settled legal principles and subject to no appeal, effectively to overrule the Courts and deprive a Canadian citizen of a right he has established by the immemorial method of a trial at law.

APPLICATION to the Supreme Court under section 130 of the County Courts Act for an order calling upon the sheriff to show cause why he should not execute the writ of possession herein. The facts are set out in the reasons for judgment. Heard by WILSON, J. at Vancouver on the 5th of March, 1946.

Schultz, for landlord.

Donaghy, K.C., for Emergency Shelter Administrator and Attorney-General of Canada.

Des Brisay, K.C., for Attorney-General of British Columbia.

Cur. adv. vult.

11th March, 1946.

WILSON, J.: On November 7th, 1945, following a hearing in open Court, attended by the parties and their counsel. His Honour Judge LENNOX of the County Court of Vancouver ordered that a writ of possession issue directing the sheriff of Vancouver to put Joseph Bachand, landlord, in possession of certain premises presently held by his tenant, Bertha Dupuis. The order was made under competent Provincial legislation, the Landlord and Tenant Act, R.S.B.C. 1936, Cap. 143, and was further expressly authorized by order 294 of the Wartime Prices and Trade Board. The time for appealing against the order has elapsed and neither its validity nor the jurisdiction of the Court which made it has been questioned.

Pursuant to the order a writ of possession issued out of the

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county court to the sheriff, directing him to put the landlord in possession of the premises and to levy the sum of $64.70, the landlord's costs of the proceedings.

On January 24th, 1946, J. G. Walker, Emergency Shelter Administrator for Vancouver, wrote the following letter to the sheriff:

Dear Sir:

The shortage of housing accommodation in the Vancouver area and the resulting distress is so acute that means must be adopted to afford relief to tenants wherever the circumstances indicate that it is reasonable to grant relief. I have examined into the circumstances relating to the undermentioned writ of possession and consider that a measure of relief should be given to the tenant.

Therefore, under the authority of the Wartime Prices and Trade Board, pursuant to powers conferred by the Emergency Shelter Regulations, Order in council P.C. 9439 of December 19th, 1944, as amended, the writ of possession issued to you out of the County Court of Vancouver instructing you to give possession of the housing accommodation known as 173 West 6th Ave., Vancouver, B.C. to Joseph Bachand is hereby suspended until March 31st, 1946, at which time, in the absence of any further notice from me to the contrary, you will be at liberty to execute the said writ.

The sheriff, by reason of this letter, refused to execute the writ of possession, and the landlord took proceedings to compel him to do so. These proceedings were taken under section 130 of the County Courts Act, R.S.B.C. 1936, Cap. 58 which reads as follows:

No writ of *mandamus* shall issue to a Judge or an officer of the County Court for refusing to do any act relating to the duties of his office, but any party requiring such act to be done may apply to the Supreme Court, upon an affidavit of the facts, for an order or summons calling upon such Judge or officer of the County Court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of the order or summons good cause is not shown, the Supreme Court may, by order, direct the act to be done, and the Judge or officer of the County Court, upon being served with such order, shall obey the same on pain of attachment; and in any event, the Supreme Court may make such order with respect to costs as to it seems fit.

As provided by this section the sheriff was called upon to show cause why he should not execute the writ of possession. Since the landlord proposed to question the constitutionality of Mr. Walker's act, notice of the hearing was given the Attorney-Generals of Canada and British Columbia, both of whom were represented by counsel on the hearing before me. Before the matter was heard, Mr. Walker had issued two further orders,

one to the landlord and one to the sheriff, dated February 18th, 1946. Mr. *Donaghy,* who represented the Central Mortgage and Housing Corporation, as well as the Attorney-General for Canada, stated that he would not attempt to support Mr. Walker's letter of January 24th as binding on the sheriff, but that he did contend that the sheriff must obey the direction contained in Mr. Walker's letter of February 18th, even although this involved disobedience by the sheriff of the orders of the Court of which he is an officer. The letters relied on are as follows:

Room 601 Royal Bank Bldg.
Vancouver, B.C.
February 18th, 1946.

Joseph Bachand, Esq.,
179 West 6th Avenue,
Vancouver, B.C.

Dear Sir:

Re Bachand vs. Dupuis

Pursuant to authority and direction given to me by Central Mortgage and Housing Corporation dated February 14th, 1946, copy of which is attached hereto, I hereby require you, the landlord, to continue to rent the premises situate at 173 West 6th Avenue, Vancouver, B.C., to the tenant, Mrs. Bertha Dupuis, until March 31st, 1946, on the conditions that the tenant must exert every effort to secure alternative accommodation and must vacate the premises when such alternative accommodation has been found.

Yours truly,
J. G. WALKER,
Emergency Shelter Officer.

Room 601, Royal Bank Bldg.,
Vancouver, B.C.
February 18th, 1946.

F. A. Keill, Esq.,
Sheriff,
Court House,
Vancouver, B.C.

Dear Sir: *Re Bachand vs. Dupuis*

I enclose copy of my letter of the above date to Joseph Bachand, landlord, and in order to more effectively enforce the order therein contained I do hereby pursuant to authority and direction given to me by Central Mortgage and Housing Corporation dated February 14th, 1946, copy of which is attached hereto, require you to refrain from taking action to evict the tenant, Mrs. Bertha Dupuis, from the premises situated at 173 West 6th Avenue, Vancouver, B.C. in accordance with the writ of possession which you have at present in your possession, until March 31, 1946, on the conditions that the tenant must pay to the landlord the rental and that the tenant must

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exert every effort to secure alternative accommodation and must vacate the premises when such alternative accommodation has been found.

Yours truly,

J. G. WALKER,
Emergency Shelter Officer.

Mr. Walker is Emergency Housing Administrator for Vancouver, having been appointed to this position by the Wartime Prices and Trade Board. The validity of his appointment was not disputed before me. His authority for making the orders above cited is a delegated one, claimed to be vested in him by subsection (2) of section 4 of P.C. 9439:

(2) The Board may from time to time delegate to such Administrators of Emergency Shelter as may be appointed and to other persons such of the powers and discretions of the Board on such terms as the Board deems proper.

The Board here referred to is the Wartime Prices and Trade Board, which is, or was, the recipient of all authority delegated by the Governor in Council under P.C. 9439.

Privy Council 9439, known as the "Emergency Shelter Regulations," sets out the powers under which Mr. Walker purports to act. This order in council, after a preamble describing a condition of housing congestion in certain areas of Canada, says this:

3. (1) These regulations and any order made thereunder shall prevail over any other law in force in any part of Canada to the extent that such other law is in conflict therewith.

(2) His Majesty in right of Canada or of any province thereof shall be bound by the provisions of these regulations or of any order.

4. (1) In addition to other powers conferred on the Board by the Governor in Council and without derogating therefrom, the Board shall have power, from time to time

(*h*) to require, on such terms and conditions as the Board may specify, any person to let or offer to let or continue to let any shelter and to give possession thereof to such person as the Board may specify.

(*k*) to require any person to perform or refrain from performing such act in respect of any shelter as the Board may specify in order more effectively to exercise its powers and enforce any order.

2. (*e*) "order" means and includes any general or specific order, requirement, direction, instruction, prescription, prohibition, restriction or limitation made or issued in pursuance of any power conferred by these regulations.

Privy Council 9439 was issued by the Governor in Council on December 19th, 1944, under the authority of the War Measures Act. Like all orders under that Act it would have perished on January 1st, 1946, since Parliament declared by section 5 of Cap. 25, Can. Stats. 1945—The National Emergency Transi-

tional Powers Act, 1945—that the war should on that date, for the purposes of The War Measures Act, 1914, be deemed no longer to exist.

But The National Emergency Transitional Powers Act, 1945, contained this further provision:

4. Without prejudice to any other power conferred by this Act, the Governor in Council may order that the orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act.

Exercising the power conferred by section 4, the Governor in Council, on January 7th, 1946, passed P.C. 7414 ordering this:

Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, and under the powers conferred by The National Emergency Transitional Powers Act, 1945, is pleased to order and doth hereby order that all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day The National Emergency Transitional Powers Act, 1945, comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act.

This, it is argued, had the effect of continuing the operation and validity of, *inter alia,* P.C. 9439, the Emergency Shelter Regulations.

To conclude this recital it should be added that by P.C. 7502 the Governor in Council transferred from the Wartime Prices and Trade Board to a body known as the Central Mortgage and Housing Corporation authority in respect of the Emergency Shelter Regulations. This latter corporation has fully authorized the action taken by Mr. Walker in this case, by a letter dated February 14th, 1946:

Dear Mr. Walker, *Re: Bachand and Dupuis*

You are hereby authorized and directed to require the landlord, Mr. Joseph Bachand, to continue to rent the premises situated at 173 West 6th Avenue, Vancouver, B.C., to the tenant, Mrs. Bertha Dupuis, until March 31st, 1946, on the conditions that the tenant must pay to the landlord the rental and that the tenant must exert every effort to secure alternative accommodation and must vacate the premises when such alternative accommodation has been found.

You are also further authorized and directed to require the sheriff to refrain from taking action to evict Mrs. Dupuis from the premises in accordance with a writ of possession which the sheriff has at present in his possession until March 31, 1946, on the conditions that the tenant must exert every

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effort to secure alternative accommodation and must vacate the premises when such alternative accommodation has been found. If this action has already been taken by you, it is hereby ratified and confirmed on behalf of the Corporation.

The authority and direction is given by the Central Mortgage and Housing Corporation, pursuant to the Emergency Shelter Regulations, Order-in-Council P.C. 9439 of December 19th, 1944, as amended, and Order-in-Council P.C. 7502 of December 28th, 1945.

D. B. MANSUR,
President.
ERIC R. SPEAR,
Secretary.

Counsel for the landlord and counsel for the Attorney-General posed certain constitutional questions for my consideration. I do not propose to deal with them, because I have reached the conclusion that P.C. 9439, assuming it to be *intra vires*, does not authorize the action of Mr. Walker. But, I should, I think, put them on record.

It is contended that P.C. 9439 in so far as it purports to invade Provincial control of property rights and the administration of justice, is *ultra vires*. The war being over, it is said the state of emergency has ceased to exist, and such decisions as the *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1, *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695; [1923] 3 D.L.R. 629, and *Re George Edwin Gray* (1918), 57 S.C.R. 150, are inapplicable. A condition of necessity in regard to housing it is argued is something the Provincial Legislature is competent to deal with. An emergency is not to be presumed where there is no war, it is said, and a condition of necessity is not necessarily an emergency. The law applicable is, it is said, to be found in such cases as *In re Price Bros. and Company and the Board of Commerce of Canada* (1920), 60 S.C.R. 265; *In re The Board of Commerce (1919), and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; *Reference re The Employment and Social Insurance Act*, [1936] S.C.R. 427; *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935, ib.* 398, etc.

The second proposition, baldly stated, is this: that even if there is an emergency still, neither the Parliament of Canada nor the Governor in Council must be allowed to interfere with

the Provincial control of the administration of justice, since no emergent condition could necessitate or justify such a revolutionary invasion of constitutional rights.

It has further been urged upon me that: (a) Different considerations must be brought to bear on a peacetime Act, such as The National Emergency Transitional Powers Act, 1945, than were weighed by the Supreme Court of Canada in the *Reference re Chemicals* case, *supra;* that therefore the power of redelegation conceded by that decision to the Governor in Council under the War Measures Act would not necessarily exist under The National Emergency Transitional Powers Act, 1945; (b) that such right of redelegation, if it existed, while it might enable the Governor in Council to confer certain powers on the Central Mortgage and Housing Corporation, would not enable the Governor in Council to empower the Central Mortgage and Housing Corporation to further sub-delegate those powers to Mr. Walker.

In view of the opinion I have formed in this matter, I do not consider it necessary to canvass these questions and am assuming, for the purposes of my decision, that the Governor in Council properly bestowed on the Central Mortgage and Housing Corporation the authority given it by P.C. 9439 and 7502, and that the orders made by Mr. Walker have the same validity as though made by the corporation.

The neat question which I have to decide, therefore, is whether P.C. 9439 authorized the making by the administrator of such an order as is contained in his letter to the sheriff of February 18th, 1946.

Counsel for the corporation argues thus:

(1) That subsection (*h*) of section 4 of P.C. 9439 empowers the corporation (or Mr. Walker) to let or to continue to let any shelter to such person as the corporation may specify; (2) that Mr. Walker has validly used the power by his letter of February 18th, 1946, to the landlord, requiring him to continue to rent the premises in question to Bertha Dupuis; (3) that subsection (*h*) of section 4 empowers the corporation, or Mr. Walker, to require any person to do or refrain from doing such act in respect of any shelter as the corporation, or Mr. Walker, may specify in order

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more effectually to exercise its powers and to enforce any order; (4) that Mr. Walker's letter to the sheriff of February 18th, 1946, is, within the meaning of subsection (*k*) an order requiring the sheriff, as a person, to refrain from doing an act (enforcement of the writ of possession) in order to enforce Mr. Walker's previous order to the landlord, Bachand.

The Attorney-General for British Columbia, and the landlord, say that Mr. Walker's order, which directs an officer of a competent Court to disobey the orders of that Court, is a direct interference with the administration of justice, a matter entrusted to the Provincial Legislature by section 92, subsection (14) of the British North America Act, 1867; that it is furthermore an attempt of the most direct and unabashed type to deny to a subject the enforcement of one of his most fundamental rights, the fruits of his judgment in a Court of law, and that, in the absence of some specific authority, general words, such as those in the sections quoted, must not be interpreted so as to permit any official to make such an order.

The Governor in Council has, on one occasion, seen fit to make, under the War Measures Act, an order which, if valid, will have the radical effect of doing, in a considerable class of cases, what Mr. Walker's order purports to do in this specific case. I quote section 3 of P.C. 537:

> 3. Subject to the provisions of Section 4 following, every notice to vacate given before July 25, 1945, under the provisions of Section 15A or Section 15B of said Order No. 294, by the landlord of any housing accommodation to the tenant thereof is hereby suspended and every pending proceeding taken and every order or writ of possession issued to enforce the vacating of the accommodation by the tenant is hereby stayed, if the tenant is still in occupation of the accommodation on July 25, 1945.

This order is cited as an example of the specific language His Excellency saw fit to use when making such an order, and lends weight to the argument that he would, if P.C. 9439 was intended to confer such a radical power, have used similar language.

If I am to hold that the order in council (P.C. 9439) empowered Mr. Walker to issue directions to officers of Courts to disregard their sworn duty, I will, in effect, hold:

(1) That the order in council authorized an interference with Provincial control of the administration of justice; (2) that it

authorized an administrative official or board, without any hearing, public or otherwise, to effectively set aside an order of a Court of competent jurisdiction by forbidding its enforcement, with the consequent refusal to a subject of the fruits of a judgment which the law had given him.

There are decisions defining the supremacy of the Provincial Legislatures in regulating the administration of justice. I quote from two of them:

In *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada,* [1894] A.C. 189, the Lord Chancellor said, at p. 198:

> . . . Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to legislation by that parliament.

The writ of possession here considered is a process of execution and as much within the jurisdiction of the Provincial Parliament as an execution for the payment of money.

Again in *Attorney-General for Dominion of Canada* v. *Attorney-General for Province of Ontario,* [1898] A.C. 247, Lord Watson, after reciting that the Parliament of Canada has the right to appoint judges, says (p. 254):

> . . . But in all other respects the courts of each province, including the judges and officials of the courts, . . . , are subject to the jurisdiction and control of the provincial legislature.

From these pronouncements it is apparent to me that a concession to the corporation of the powers claimed for it under P.C. 9439 would validate a new invasion of the Provincial field, an interference with the administration of justice.

Now as to the second submission, the argument that any interference with the process of a competent Court is contrary to British constitutional principles, I propose first to quote the simple words of a gentleman, who, if he is not a lawyer, is certainly a respectable constitutional authority. Mr. Winston Churchill has said this:

> The essential aspects of democracy are the freedom of the individual within the framework of laws passed by Parliament to order his life as he

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pleases, and the uniform enforcement of tribunals independent of the Executive:

cited in Allen's Law and Orders, 275.

I would also refer to the words of Scrutton, J., in *Chester* v. *Bateson,* [1920] 1 K.B. 829, at p. 834:

> . . . One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension.

While, in general, the attitude of the Courts toward the efforts of the Government to cope with an emergent housing situation should be a benevolent one, surely an enactment which is alleged to justify such an interference with fundamental constitutional and human rights must be scrutinized with the most jealous care.

Chief Justice Anglin in *Hirsch* v. *Protestant Board of School Commissioners,* [1926] S.C.R. 246, says this, at p. 266:

> In *Minet* v. *Leman* (1855), 20 Beav. 269, at p. 278, Romilly M.R., stated as a principle of construction which he said could not, as a general proposition, be disputed, that:
>
> "The general words of an Act are not to be construed as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched."
>
> This may be rather a broad expression, but it serves to show at least that an intention to change the law must be clearly expressed or necessarily implied.

There is no doubt that the effect sought here involves a radical alteration in "the previous policy of the law."

Maxwell on Statutes, 8th Ed., pp. 73-4, says this:

> Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words. There are certain objects which the Legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words contained in an enactment (especially general words), and sometimes to depart, not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the Legislature. It is regarded as more reasonable to hold that the Legislature expressed its

intention in a slovenly manner, than that a meaning should be given to them which could not have been intended.

One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act. The general words of the Act are not to be so construed as to alter the previous policy of the law.

The words of that very great judge, Lord Esher, M.R., in *In re Brockelbank. Ex parte Dunn & Raeburn* (1889), 23 Q.B.D. 461, at pp. 462-6, appear to me to be applicable here:

In this proviso the legislature have used language of the widest kind—"in all cases"—so wide that, if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the legislature construed literally involves such consequences, the Court has over and over again acted upon the view that the legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless they have manifested that intention by express words. The Court will not infer such an intention from the use of merely general words.

I cannot think that the interpretation asked for here would result in anything less than

an injustice so enormous that the mind of any reasonable man [would] revolt from it.

It is, I think, fair to consider the implications of conceding to an administrative official such as Mr. Walker the powers which he has sought to exercise here.

If he can validly restrain the sheriff from carrying out his duties, I see no reason to suppose that he cannot, as effectually, restrain any officer of any Court. He might direct a judge of the highest Canadian Court in his judicial capacity to perform or to refrain from performing an act in respect of shelter. I cannot conceive that Parliament or the Governor in Council will ever vest such authority in an administrative official, but, if such

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a thing is to be done, it must certainly be done in language that forbids any other interpretation.

Mr. Walker's order to the sheriff is, I think, unique in that it represents the first attempt in any British country by an administrative official to effectively revoke the order of a Court of competent jurisdiction. For that reason the order in council must, as I have said, be read with the utmost care in order to be sure that the governing authority intended to confer power on a subordinate board or official to perform so radical an act. But, if the intention is clearly expressed then, if it is *intra vires,* it must be given effect to. As was said by the Earl of Selborne in *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351, at p. 358:

> It is not, I conceive, for your Lordships or for any other Court to decide such a question as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the legislature in the statute or statutes upon which the question depends.

For a Court to assume to reject a clearly worded legislative provision, on the ground that it was against public policy, would be objectionable as an attempt on the part of the judiciary to encroach on the legislative field; and would be fully as wrong as any attempt by an administrative official to encroach, without legal authority to do so, on the judicial field. If the Legislature, acting within its *vires,* has clearly authorized the shelter administrator to prevent the execution of judicial process, it is my duty to implement the Legislature's intention, however novel a departure it may create in the field of British jurisprudence.

I have, therefore, these two considerations before me: First, that a power of the sort invoked here must be clearly expressed; secondly, that if it is clearly expressed, it is no part of my function to presume to invalidate it. I do not think such a power is expressed in subsection (*k*) of section 4 of P.C. 9439. I do not think that authority given an official to order a person to do or refrain from doing any act entitles that official, without express words, to interfere with the execution of legal process. I think that if the Governor in Council had intended to confer any such power, he would have bestowed it in words as clear as those used in P.C. 537, already cited.

If I have been unable to find an exact precedent for my deci-

sion in this matter, it is not, I hope, through lack of diligence but because the action attempted by the administrator is unprecedented. This is, so far as I know, the first instance in the annals of British jurisprudence in which an official has essayed to invalidate the order of a Court of justice. It is, I think, somewhat alarming to find an official of a minor administrative bureau attempting to assert a power which was, so long ago as the reign of James I., denied to the King himself. I refer, of course, to the glorious and courageous refusal of Coke and his brother judges of the Court of King's Bench to obey the King's writ *"de non procedendo rege inconsulto"* commanding them to stop or delay proceedings in their Court: Holdsworth's History of English Law, Vol. V., p. 439. Mr. Walker's order, while it was directed to the sheriff and not to the judges of the Court was nevertheless an attempt to "stop or delay proceedings in the Court." While, as the Earl of Selborne has said (*supra*) matters of policy are for legislatures and not for judges, nevertheless I would, I think, be doing less than my duty if I failed to emphasize the revolutionary effect of conceding to any official the power sought to be exercised here. The whole value of the legal system—the integrity of the rule of law—is at once destroyed if it becomes possible for officials by arbitrary decisions made, not in the public court rooms but in the private offices of officialdom, without hearing the parties, without taking evidence, free of all obedience to settled legal principles, and subject to no appeal, effectively to overrule the Courts and deprive a Canadian citizen of a right he has established by the immemorial method of a trial at law.

The deputy sheriff of Vancouver, now fulfilling the duties of the sheriff of Vancouver, is ordered, on pain of attachment, to enforce the writ of possession.

Application granted.

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Practice—Divorce—Costs against co-respondent—Discretion as to—Column 2 of Appendix N—Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, Sec. 35—Divorce Rules 87 and 88.

Upon a decree of divorce being granted, counsel for the petitioner applied for taxation of costs against the co-respondent on a scale higher than Column 2 of Appendix N, which is the column applicable to divorce proceedings. Appendix N provides that an order for taxation on a higher scale may be made in the following cases: (a) Where some difficult point of law or construction is involved; (b) where the question litigated is important to some class or body of persons; (c) where the question litigated is of general or public interest; (d) where the result of the action or counterclaim is in effect determinative of rights between the parties beyond the relief actually recovered or denied in the action or counterclaim; or in any other case for special reason.

The only applicable provision of Appendix N above quoted which would authorize taxation on a higher scale would be "in any other case for special reason." The question is, does such special reason exist here?

Held, that nothing was done by the co-respondent in the proceedings themselves which would constitute special reason. While the conduct of the co-respondent which resulted in these proceedings was reprehensible, it does not furnish a special reason within the meaning of the rule. It must have some relation to the subject-matter of the action or conduct of the party in reference to the litigation itself and not to the morality of the act of the party prior to the litigation. Jurisdiction for such an order must be found under the provisions of Appendix N and in this case one cannot find that any special reason exists. The costs against the co-respondent will be taxed on the usual scale.

APPLICATION by petitioner in a divorce action for taxation of costs against the co-respondent on a scale higher than Column 2 of Appendix N of the Supreme Court Rules. Heard at Vancouver by COADY, J. on the 16th of April, 1946.

C. S. Arnold, for petitioner.
McAlpine, K.C., for respondent.

Cur. adv. vult.

26th April, 1946.

COADY, J.: At the conclusion of the trial herein a decree of divorce was granted and counsel for the petitioner applied for taxation of costs against the co-respondent on a scale higher than Column 2 of Appendix N, which is the column applicable to

divorce proceedings. Counsel appearing for the co-respondent submitted, as I understood, that while the matter was discretionary there were no special circumstances to warrant taxation on a higher scale. I was of the opinion that under the special circumstances of this case taxation should be on Column 4 of Appendix N, and so stated. Later, however, the matter was again spoken to, when counsel for the co-respondent submitted that there was no jurisdiction to make such order for, while under section 35 of the Divorce and Matrimonial Causes Act, Cap. 76, R.S.B.C. 1936, the Court may make such order as to costs as may seem just, that did not authorize an order for payment on a higher scale, and he asked leave to submit authorities. This was granted. I have now had the advantage of the written submissions of both counsel.

Appendix N provides that an order for taxation on a higher scale may be made in the following cases: (a) Where some difficult point of law or construction is involved; (b) where the question litigated is important to some class or body of persons; (c) where the question litigated is of general or public interest; (d) where the result of the action or counterclaim is in effect determinative of rights between the parties beyond the relief actually recovered or denied in the action or counterclaim; or in any other case for special reason.

Appendix N applies to costs in divorce proceedings. The Divorce Rules provide as follows:

87. The same fees and costs as between solicitor and client, and party and party, and generally, shall be payable and allowable in Divorce and Matrimonial Causes and matters as are payable or allowable in similar analogous proceedings and things in causes or matters in the Supreme Court.

88. The tariff of costs, and the fees payable to the Crown, in force from time to time under the Supreme Court Rules shall be in force and given effect to under these Rules, so far as the same are applicable thereto.

The only applicable provision of Appendix N above quoted, which would authorize taxation on a higher scale, would be "in any other case for special reason." The question therefore is: Does such special reason exist here? The action was not defended by the co-respondent. Counsel appearing on his behalf did not cross-examine, nor did he call any evidence. No difficulty, therefore, was placed in the way of the petitioner in supplying the

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necessary proof of the allegations in the petition to justify the decree asked for. In a word, there was nothing done by the co-respondent in the proceedings themselves which would constitute special reason.

While the conduct of the co-respondent which resulted directly in these proceedings was reprehensible and resulted in irreparable wrong to the petitioner, it does not in my opinion furnish a special reason within the meaning of the rule above quoted. While it would be idle to attempt to define what would be a special reason, it seems to me, broadly speaking, it must have some relation to the subject-matter of the action or to the conduct of the party in reference to the litigation itself and not to the morality of the act of the party prior to the litigation, even though as here such act gives rise to the litigation. To direct taxation upon a higher scale would be in effect to award damages against the co-respondent where damage is not sought.

Costs on a solicitor and client basis against a co-respondent were awarded by HUNTER, C.J.B.C., in the case of *Clappier* v. *Clappier* (1923), 32 B.C. 204, by reason of the conduct of the co-respondent where the facts were somewhat similar to what we have in this case, and that case was followed by ROBERTSON, J., in *Trueb* v. *Trueb* (1933), 47 B.C. 443, but these orders were made under the special provisions of Divorce Rule 87 above referred to. There is no similar rule to authorize taxation on a higher scale. The jurisdiction for such an order must be found therefore, it seems to me, under the provisions of Appendix N above referred to, and in this case I cannot find that any special reason exists. Section 35 of the Divorce and Matrimonial Causes Act, which gives discretion as to costs, does not, it seems to me, justify such an order. Costs against the co-respondent will therefore be taxed on the usual scale.

Application dismissed.

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GUELPH v. WHITE AND CARRON FOR THEMSELVES AND FOR AND ON BEHALF AND FOR THE BENEFIT OF ALL OTHER MEMBERS OF THE BOILERMAKERS' & IRON SHIPBUILDERS' UNION LOCAL No. 1, SO INTERESTED.

Labour organization—Member injured in his employ—On compensation—Then application for and granted withdrawal card from union—Subsequent tender of withdrawal card and application for union card—Refusal—Action—Damages—Costs.

The plaintiff, a member of the defendant union and employed as a welder in the North Vancouver Shipyards, was injured in his employ in June, 1943, and was thereafter on compensation for injuries suffered. On September 30th, 1943, being satisfied that he would not be able to return to his employment as a welder where he had been, applied for and was granted a withdrawal card from the union. About February 2nd, 1945, plaintiff attended at the shipyards and arranged for his return as a welder. He then tendered his withdrawal card at the office of the union and applied for a union card. This was refused. Nothing further happened until March 20th, when the plaintiff's solicitor received a letter advising that if the plaintiff wished to apply for reinstatement as a member, he was free to do so and his application would be considered on its merits. On the evidence it was found that the plaintiff did apply, but it was refused as the union required payment of all dues covering the period since the withdrawal card was issued. The plaintiff refused to pay and the application was not proceeded with. The plaintiff brought action for a declaration that he was entitled to reinstatement as a member of the union and for directions that the secretary-treasurer of said union do accept the deposit of the withdrawal card held by the plaintiff and the payment of one month's dues and issue a union card to the plaintiff and for a declaration that the plaintiff is a member in good standing of the union and damages. On the argument at the conclusion of the trial the plaintiff asked for and was granted leave to amend his prayer for relief in the alternative for a declaration that the defendants wrongfully refused or neglected to submit the application for reinstatement of the plaintiff to the general membership or the executive committee and for directions that the application of the plaintiff be so submitted and damages.

Held, that the plaintiff is not entitled to a declaration for membership as that is a matter for the executive or the membership to decide, but he is entitled to a declaration that his application be submitted either to the executive or to the membership to be dealt with as they see fit. The only damage is for violation of the right to have his application for membership considered by the executive or membership, a right that was denied him. For this he is entitled to nominal damages only, fixed at $50, each party to pay his own costs.

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ACTION for a declaration that the plaintiff is entitled to reinstatement as a member of the defendant union and for directions that the secretary-treasurer of the said union accept the deposit of the withdrawal card held by the plaintiff and payment of one month's dues and do issue a union card to the plaintiff and for a declaration that the plaintiff is a member in good standing of the union and for damages suffered by reason of the refusal or failure of the defendants to admit the plaintiff to membership in said union. At the conclusion of argument the plaintiff asked for and was granted leave to amend his prayer for relief by asking in the alternative for a declaration that the defendants wrongfully refused or neglected to submit the application for reinstatement of the plaintiff to the general membership or the executive committee and for directions that the said application be so submitted and for damages. Tried by COADY, J. at Vancouver on the 17th of April, 1946.

Branca, for plaintiff.
Burton, for defendants.

Cur. adv. vult.

1st May, 1946.

COADY, J.: This action is brought by the plaintiff for a declaration that he is entitled to reinstatement as a member of the defendant union pursuant to the constitution and by-laws thereof, and for directions that the secretary-treasurer of the said union do accept the deposit of the withdrawal card held by the plaintiff and payment of one month's dues, and do issue a union card to the plaintiff, and for a declaration that the plaintiff is a member in good standing of the said defendant union, and for damages suffered by the plaintiff by reason of the refusal or failure of the defendants to admit the plaintiff to membership in the said defendant union. On the argument at the conclusion of the trial the plaintiff asked for and was granted leave to amend his prayer for relief by asking in the alternative for a declaration that the defendants wrongfully refused or neglected to submit the application for reinstatement of the plaintiff to the general membership or the executive committee, and for directions that the said application of the plaintiff be so submitted,

and for damages. A summary review of the facts is necessary. The plaintiff was formerly a member of the defendant union. He was injured in his employ on or about June, 1943, and was thereafter on compensation for the injuries suffered. On or about September 30th, 1943, when he was satisfied that he would not again be able to return to his employment as a welder in the North Vancouver Shipyards where he had been employed up to the time of his injury, he made application for and was granted a withdrawal card from the defendant union. On or about the 1st of February, 1945, the plaintiff had recovered sufficiently to be able to engage in some type of employment in the opinion of the medical referee of the Workmen's Compensation Board, and it was then suggested to him by the Compensation Board that he should seek employment since after that date he would be placed on partial compensation only. On or about the 2nd of February, 1945, the plaintiff attended at the office of the shipyards accompanied by an inspector from the Workmen's Compensation Board and there met a Mr. Clark, a foreman of the yard, and a Mr. Thompson, a representative of the defendant union, and arrangements were made for his return to the shipyards as a welder, although the plaintiff was uncertain as to whether or not he could at that time perform the duties that were expected of him in that capacity. He thereupon tendered his withdrawal card which had been previously issued to him by the defendant union at the office of the defendant union and applied for a union card. This was refused on instructions of the defendant union. It is perhaps well at this stage to refer to the provisions of the constitution and by-laws applicable to the matter. Section 9 of article 4 of the constitution of the Shipyard General Workers' Federation of British Columbia which is the constitution under which the defendant union operates provides as follows:

> Any former member possessing a withdrawal card and wishing to return to the industry shall deposit his withdrawal card with the local Union in any city in which he may wish to be employed, together with the payment of one month's dues. No reinstatement or initiation fee can be charged by the local union.

Clause 2 of article 24 of the by-laws of the defendant union provides as follows:

> A holder of a valid withdrawal card from any local Union affiliated with

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the Shipyard General Workers' Federation may on application be reinstated to full membership by decision of a general membership meeting or the Executive Committee, and on deposit of the withdrawal card and payment of two months' dues in advance.

It will be noticed that the latter part of that clause requiring payment of two months' dues in advance is in conflict with the clause of the constitution above referred to, and consequently is *ultra vires*. The defendants frankly admit this.

The defendants state that the refusal to accept surrender of the withdrawal card and to issue a union card to the plaintiff on the 2nd of February was pursuant to a resolution passed at a general meeting of the defendant union on the 22nd of January, 1945, as follows:

It is moved, seconded and carried that the books of the Union be closed in view of the contemplated lay-offs in some of the yards.

The defendants further say that this resolution applied not only to new applicants but to former members who held withdrawal cards. While this resolution may have justified the defendants' refusing a union card to the plaintiff on February 2nd, 1945, I am not satisfied that this was the true reason for such refusal. The defendants admit that it was not the only reason. On the plaintiff's application of February 2nd he was advised by the young lady to whom he spoke that she had instructions that a union card was not to be issued to him, and she further stated that there was a letter or memorandum filed with her to that effect. This letter or memorandum is significant. It reads:

If R. Guelph comes in to pick up his card, he has a withdrawal card. You are to tell him that our instructions are not to issue it as there are Union welders out of work.

The plaintiff asked to see the memorandum in question and it was handed to him, and he refused to return it since it referred specifically to him. Instead he took it to his lawyer. If the defendants were acting solely under the resolution of the general meeting of January 22nd above quoted, there would be no need of any specific instructions to be given with regard to this particular applicant. It is significant, too, that this memorandum was in the hands of this clerk in the afternoon of the very day that the plaintiff had made arrangements to return to work in the yard. The defendants frankly admit that they disapproved of the conduct of the plaintiff in going to the yard to make

arrangements for his re-employment since they had a "closed shop" agreement with the yard and any arrangements should have been made through their representative, and it was for this reason that this memorandum was issued, although an attempt to justify it is made on the basis of the resolution. At a meeting of the defendant union held on February 5th, 1945, some three days after this application had been made by the plaintiff for the union card the following resolution was passed at a meeting of the defendant union:

> Moved, seconded and carried that member in question (M. V. Welder) be denied membership.

This resolution the defendants admit refers to the plaintiff. It was passed to express the disapproval of the plaintiff's conduct in going to the yard and making arrangements for his re-employment as above stated, and in taking away from the office on February 2nd the memorandum above referred to. The resolution of January 22nd closing the books was quite sufficient, and one finds it hard to understand why it was thought necessary to pass this resolution except to express disapproval of what the plaintiff had done. Moreover, at this time no formal application was before the meeting. On February 7th, the plaintiff's solicitor wrote to the defendant union enclosing the plaintiff's withdrawal card and asking for a membership card and enclosing likewise a cheque for $1.50 representing one month's dues as required by the constitution. On February 23rd the withdrawal card and cheque were returned to the plaintiff's solicitor in a letter written by C. W. Carron, one of the defendants, and secretary-treasurer of the defendant union, wherein he pointed out that the plaintiff was no longer a member of the union and that the books of the union were closed to new members, because a number of union members were presently unemployed and they were therefore not in a position to accept the application. On the same date the letter was written by Mr. *John Stanton* acting as solicitor for the defendant union, further explaining the reason for the refusal at that time to accept the application which had been forwarded by the plaintiff's solicitor on February 7th. Nothing further was done until March 20th when the plaintiff's solicitor received a letter from Mr. *Stanton* advising that if the plaintiff wished to

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apply for reinstatement as a member he was free to do so and his application would be considered on its merits, and intimated that the condition which had prevailed when the previous applications were made, no longer prevailed. Further correspondence took place between the solicitors terminating in a letter from the plaintiff's solicitor to Mr. *Stanton* dated the 26th of March wherein he stated that he would ask his client to attend at the union office, tender his withdrawal card, pay up his dues and receive his union card. The evidence is not very clear as to whether the plaintiff applied after this date or not. Quite apart from the evidence of Mr. Carron, on examination for discovery to which I shall later refer I am rather inclined to think that the plaintiff did apply after this date and that he was refused on the ground that the defendant union required payment of dues covering the full period that had elapsed from the time that his withdrawal card was issued. This the plaintiff refused to pay, and consequently his application was not proceeded with. Mr. Carron denies any such refusal or any such request for the payment of dues. I find it difficult to accept his evidence on that point, for it seems obvious that unless some such request was made the withdrawal card would have been left and the application for reinstatement given consideration since the plaintiff was at that time anxious to go to work. On the point as to the time when this last application was made by the plaintiff, I refer to the evidence of Mr. Carron on examination for discovery. He was being asked about this application of the plaintiff and the refusal:

> Now what was the date of that? I cannot recall the exact date.
>
> What day of the week was it? But I could add it was after we had given instructions to Mr. *Stanton* who was our representative to inform Mr. Guelph that he could appear at the office.
>
> Well now, Guelph had come to your office before that, had he not? Not to my knowledge.

This evidence I think is conclusive as showing that application was made by the plaintiff following the letter from the plaintiff's solicitor dated March 26th that his client would reapply. The application made at that time by the plaintiff was not referred to the executive committee, nor was it referred to the membership such as the by-law provides. The secretary was, I think,

clearly wrong in his refusal to accept the plaintiff's withdrawal card at that time with the dues tendered and submit it to the executive or the membership. The plaintiff was entitled to this as of right.

It was quite apparent to me at the conclusion of the plaintiff's case that the plaintiff could not succeed in his first claim, and it was at this stage that the plaintiff applied for the amendment to which I have already referred. On the amended claim I think the plaintiff is entitled to succeed. That is, he is entitled to a declaration that his application be submitted either to the executive or to the membership to be dealt with as they may see fit. He is obviously not entitled to a declaration that he is entitled to membership. That is a matter for the executive or for the membership to decide.

The next question for consideration is the damage claimed by the plaintiff. The claim for damages is based largely on loss of earnings. Clearly the plaintiff was not entitled to membership as of right. No damages can therefore be given on the basis of loss of earnings in this particular employment since we can have no assurance that the application would have been accepted. But it is urged that if his application for membership had been accepted in March, 1945, as it should have been, and submitted to the executive or the membership, and if then his application had been refused, he would then have known where he stood and could have made some other arrangements for employment elsewhere, and consequently he is entitled to damages. But if he had accepted employment elsewhere it is speculative as to what amount the plaintiff could have earned, for as stated by the plaintiff himself, it is uncertain as to what work he can do by reason of his physical condition. But even if he could have secured and could have performed some remunerative employment, and assuming that he could have engaged in that employment more or less regularly, his condition of health permitting, I am still of the opinion that the plaintiff would have refused employment since at that time and up until the close of this trial the plaintiff was convinced that he was entitled to membership in this union as a matter of right, and he was insistent upon this right of his being recognized, and he was quite prepared to con-

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tinue unemployed in the expectation that his rights to membership being determined in this action he would be entitled to damages, relying on *Kuzych* v. *Stewart et al.* (1944), 61 B.C. 27, to which counsel for the plaintiff referred. It is quite clear that he is not entitled to membership as of right, and I am not convinced that he has therefore suffered any loss by reason of the refusal to accept and submit his application for consideration by the executive or membership late in March. The only damages therefore that the plaintiff is entitled to, it seems to me, is for damages for a violation of a legal right—the right to have his application for membership considered by the executive or the membership, a right that had been denied him. For this he is entitled to nominal damages only. I would fix the nominal damages at the sum of $50.

As to the question of costs, since the plaintiff succeeds only on his amended claim and since this amended claim was made only upon the conclusion of the case and upon the argument I do not think that he is entitled to the costs of the action. Had he brought his action in the first instance for relief that he now is afforded, it may be that settlement would have been made forthwith and these proceedings might have been unnecessary. He is not therefore entitled to costs. On the other hand the defendants are, it seems to me, under the special circumstances here, likewise not entitled to costs. Each party will therefore pay its own costs.

Judgment for plaintiff in part.

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Criminal law—Conviction—Warrant of commitment—Second warrant of commitment issued owing to error in first—Nothing in second warrant to show that it is issued in substitution of the original—Discharge of accused.

On the 12th of July, 1946, accused was committed to gaol for one year on a conviction of stealing a camera and other personal effects alleged to be of the total value of under $25. On the same date a warrant of commitment was issued and signed by the magistrate addressed to the keeper of the common gaol at Oakalla ordering him to keep accused in custody for one year from and including the 28th of June, 1946. Later it was brought to the attention of the magistrate that accused was charged with theft of certain articles of the total value of under $25. Accused was again brought before the magistrate on July 15th, 1946, when the magistrate explained that he was under the impression that the charge was of theft of property over the value of $25 and the sentence of one year was given in error. He then sentenced accused to six months' imprisonment with hard labour from June 19th, 1946, and then stated "the warrant of commitment I signed will be cancelled." On the same day a new warrant of commitment was signed by the magistrate committing the accused for six months, including the 19th of June, 1946. No further steps were taken to require the gaoler to substitute the second warrant of commitment for the one of July 12th. On the return before the Court there were two inconsistent commitments to gaol, one for six months and one for twelve months for the same offence.

Held, that the substituted warrant must show on its face that it is in place of the original warrant. If it is not shown that the second warrant is a substitution of the original, the second warrant will be disregarded. As there is nothing in the second warrant to show that it is a second warrant for the warrant of commitment of July 12th, the accused is entitled to his discharge and the conviction will be set aside.

APPLICATION by way of *habeas corpus* with *certiorari* in aid. The facts are set out in the reasons for judgment. Heard by HARPER, J. at Vancouver on the 2nd of August, 1946.

Howard, for the application.
A. W. Fisher, for the Crown.

HARPER, J.: This is an application by way of *habeas corpus* with *certiorari* in aid. The accused Henry Lyons was on the 12th day of July, 1946, committed to the common gaol for a period of one year on a conviction of stealing a camera and certain other

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personal effects alleged to be of the total value of under $25. On the same date a warrant of commitment was issued and signed by the magistrate, addressed to the keeper of the common gaol of the county of Vancouver at Oakalla, ordering him to keep the said Lyons in custody for the period of one year from and including the 28th day of June, 1946. Later it had been brought to the attention of the magistrate that the accused was charged with theft of certain articles of the total value of under $25. The accused was again brought before the magistrate on the 15th day of July, 1946, when the magistrate explained that he was under the impression that the charge against the accused was of theft of property of over the value of $25 and that the sentence of one year had been given in error. He then proceeded to sentence the accused to a period of six months' imprisonment with hard labour to date from the 19th of June, 1946. The magistrate then stated, as shown by the writ of *certiorari*: "The warrant of commitment I signed will be cancelled." On the same day a new warrant of commitment was signed by the magistrate, committing the accused Lyons to the common gaol for a period of six months from and including the 19th of June, 1946.

Although it is evident from the statement made by the magistrate in the police court that he intended the warrant of commitment issued on the 12th day of July, 1946, sentencing the accused for an imprisonment of one year to be cancelled, no further steps were taken to require the gaoler to substitute the second warrant of commitment for the one of July 12th. On the return before this Court there are therefore existing two inconsistent commitments to gaol: one for a period of six months and one for a period of 12 months for the same offence.

The rule seems to be clear that if there is an error in a warrant of commitment a new warrant of commitment may be substituted, but the gaoler should be advised by the endorsement on the new warrant of commitment that it is in substitution for the first warrant. That was not done in this case.

Tremeear's Criminal Code, 5th Ed., at p. 1537 says as follows:

> As to a commitment, the rule appears to be that if a warrant of commitment is defective it cannot be recalled, withdrawn or altered, but if there is error in it a fresh commitment, bearing an endorsement requiring the governor of the prison to substitute it for the first warrant, may be lodged,

and the prisoner may be detained upon this warrant, which can then be returned to a writ of *habeas corpus*.

It is clear then that the substituted warrant must show on its face that it is in place of the original warrant. If it is not shown that the second warrant is a substitution of the original, the second warrant will be disregarded (*Rex* v. *Venot* (1903), 6 Can. C.C. 209; *Rex* v. *Kolin*, [1932] O.W.N. 415).

In this case as there is nothing in the second warrant to show that it is a second warrant for the warrant of commitment of July 12th, the accused is entitled to his discharge, and the conviction will be set aside, protection being given to the magistrate and all officers under him.

Conviction set aside.

THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTORS OF THE LATE ALICE GRANT MACKAY, DECEASED v. THE CONGREGATION OF ST. ANDREW'S-WESLEY CHURCH AT VANCOUVER, A CONGREGATION OF THE UNITED CHURCH OF CANADA.

Will—Gift to church—"To be added to the endowment fund"—Charitable purposes—Cy pres doctrine invoked.

Alice G. MacKay by her will of April 25th, 1940, gave all her property to a named trustee upon trust to pay a large number of legacies and thereafter "To pay or transfer all the rest of my estate to the St. Andrew & Wesley Church, Vancouver, B.C., to be added to the endowment fund." There is not such an institution as "St. Andrew & Wesley Church, Vancouver, B.C.," but there is the St. Andrew's-Wesley Church at Vancouver, a congregation of the United Church of Canada, to which no doubt the testatrix intended to designate and to benefit. St. Andrew & Wesley Church at Vancouver had at the time of the death of the testatrix no endowment fund to which her residuary bequest could be added in the terms of the will. On originating summons it was held that *prima facie* since there was no endowment fund, the gift is void for uncertainty, unless it can be saved by the *cy pres* doctrine. The Court would be left to surmise the objects for which the endowment fund, if there had been one, might be used and would in effect have to create such a fund and define the purposes for which it might

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be used. The Court can only do this through the application of the *cy pres* doctrine and the doctrine cannot be applied unless the bequest is a charitable one. Is the gift charitable in purpose, so that the Court can, despite the uncertainty of the object, invoke the *cy pres* doctrine and see the money applied as nearly as possible according to the presumed intent of the testatrix? If the words "to be added to the endowment fund" were elided, there would, on the authority of *In re Schoales. Schoales* v. *Schoales*, [1930] 2 Ch. 75, be a good charitable bequest. The testatrix had a clear charitable intention and the words "to be added to the endowment fund" are only words of limitation, indicating her wish that the capital of the gift be kept intact while the interest was used for charitable purposes. This being the case, the *cy pres* doctrine can be invoked and a proper endowment fund set up. The working of the scheme can be left to the registrar and should be restricted to such objects as would come within the definition of Sir John Wickens, V.-C., in *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574.

ORIGINATING summons for the construction of the will of Alice Grant MacKay, deceased, dated the 25th of April, 1940. Heard by WILSON, J. at Vancouver on the 25th of September, 1945.

Cowan, for plaintiff.
Donaghy, K.C., for the Church.
Norris, K.C., for next of kin. *Cur. adv. vult.*

24th April, 1946.

WILSON, J.: Alice Grant MacKay, by her will dated April 25th, 1940, gave all her property, real and personal, to a named trustee upon trust to pay a large number of legacies and thereafter

To pay or transfer all the rest of my estate to the St. Andrew & Wesley Church, Vancouver, B.C., to be added to the endowment fund.

There is not such an institution as "St. Andrew & Wesley Church, Vancouver, B.C.," but there is the St. Andrew's-Wesley Church at Vancouver, a congregation of the United Church of Canada and I have no doubt that it was this church which the testatrix intended to designate and to benefit.

St. Andrew & Wesley Church at Vancouver, which I shall hereafter call the church, had at the time of the death of the testatrix no endowment fund to which her residuary bequest could be added in the terms of the will.

On the return before me of the originating summons by which

these proceedings were commenced I was attended by counsel for the executor, who quite properly adopted a neutral attitude, by counsel for the church and by counsel for the next of kin of the deceased. Counsel for the church sought to support the bequest; counsel for the next of kin attacked it as void for uncertainty, and said that there is an intestacy which must benefit the next of kin.

Counsel for the next of kin, in a commendably studious and thorough argument, made these points: 1. That *prima facie,* since there was no endowment fund, the gift is void for uncertainty. 2. That the gift can only be saved from death through uncertainty, if indeed it can be saved, by the application of the *cy pres* doctrine. 3. That, since the gift cannot clearly be demonstrated to be one for an unmixed charitable purpose, the *cy pres* doctrine cannot apply, and the gift must fail.

I can see no escape from the correctness of the first contention. If, for instance, the gift had been directed to be added to the non-existent endowment fund of a non-charitable institution, say a sports club, then I think it must fail. There would be created no trust which the Court could oversee, direct or enforce. The Court would be left to surmise the objects for which the endowment fund, if there had been one, might be used, and would, in effect, have to create such a fund and define the purposes for which it might be used. The Court may only do such a thing by the application of the *cy pres* doctrine. The *cy pres* doctrine cannot be applied unless the bequest is for charitable purposes. Is the gift charitable in purpose, so that the Court can, despite the uncertainty of the object, invoke the *cy pres* doctrine and see the money applied as nearly as possible according to the presumed intent of the testatrix? If the gift were an outright one to the church no difficulty could arise. This is established by the decision of Romer, J. in *In re Barnes. Simpson* v. *Barnes* (1922), [1930] 2 Ch. 80 n. In that case a testator gave all his property to the Church of England absolutely. It was held that such a bequest was not intended to benefit all the members of the Church of England, but was meant to go to "the operative institution which ministers religion and gives spiritual edification to its members," and was intended to be used by that

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institution for those purposes. That therefore it was a good charitable bequest and not void for uncertainty.

In re Schoales. Schoales v. *Schoales,* [1930] 2 Ch. 75, follows the *Barnes* case, and holds that a gift by a testator of all his property to "the Roman Catholic Church for the use thereof" is a good charitable bequest. While no reference is made in either of these decisions to the judgment in *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574, it would appear that the purposes of the gifts upheld in both the *Barnes* case and the *Schoales* case would come within the definition given by Sir John Wickens, V.-C., at p. 585:

> . . . It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public.

The effect of these cases would seem to be this: An outright gift to a church with no words of limitation is a good charitable gift. The object of the bequest is taken to be the ordinary work of the church, the dissemination of religion which is a charitable object.

St. Andrew's-Wesley Church at Vancouver is a member church of the United Church of Canada. I have read the statutes and constitutional documents relating to this church submitted to me by counsel. While its organization and services differ widely from those of the Church of England and the Roman Catholic Church, it is just as competent as either of those bodies to take a gift for purposes that are charitable in the sense of being religious. The fact that the present gift is to an individual member church, rather than to the whole church organization seems to me to strengthen rather than to weaken the case of the beneficiary.

The words used by the present testatrix were these:

> To pay or transfer all the rest, residue and remainder of my estate to the St. Andrew & Wesley Church, Vancouver, B.C., to be added to the endowment fund.

If the words "to be added to the endowment fund" were elided I think this would on the authority of the *Schoales* and *Barnes* cases, *supra,* be a good charitable bequest. If the church had an endowment fund, properly constituted for charitable objects, the bequest, as it stands, would be good. There was no such

fund, and I am left to consider what the testatrix had in mind; whether she had an intention to devote her money to a charitable purpose. The word endowment is defined by Wharton thus:

> Endowment, wealth ensured in perpetuity to any person or use . . . ; the creation of a perpetual provision out of lands or money for any institution or person.

It would appear to me that, since there was no endowment fund with objects known to the testatrix, her intention was to benefit the church, but to do so by creation of an income for it, rather than by making an outright gift. It is quite true that if there had been an endowment fund, previously created by the church or some benefactor, it might have embraced objects other than those immediately pertaining to ministering religion and giving spiritual edification to its members. But I am not trying to divine what the persons who might have established such a fund might have had in mind. I am only concerned with what the testatrix had in mind. I am constrained to think that she had a simple object: she wanted to give her money to the church; to "the operative institution which ministers religion and gives spiritual edification to its members" but she did not want the church to be able to use the capital, but only the usufruct of her gift. She had, I think, a clear charitable intention, and the words "to be added to the endowment fund" are only words of limitation indicating her wish that the capital of the gift be kept intact, while the interest was used for charitable purposes. This being the case I think the *cy pres* doctrine can be invoked and a proper endowment fund set up.

This rather summary disposition of the matter might seem to indicate that I have not paid due heed to the very numerous and interesting authorities cited to me by counsel for the next of kin, most of them dealing with the definition of what bequests are charitable. This is not the case. I have read these decisions with care, from *Morice* v. *The Bishop of Durham* (1805), 10 Ves. 521, down to the recent decision in *Farley* v. *Westminster Bank, Ltd.*, [1939] 3 All E.R. 491. They indicate that the field in which trusts are considered as charitable in the sense of being religious, is much narrower than an uninstructed person might assume it to be, but I am satisfied for reasons I

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have already stated, that the present bequest comes within that narrow field. The working out of the scheme can, I think, be left to the registrar. The trust should be clearly restricted to such objects as would come within the definition of Sir John Wickens in *Cocks* v. *Manners*, already cited. The trustees of the church can act as trustees of the endowment fund. The document dated December 2nd, 1945, purporting to set up an endowment fund would appear to indicate a rather hazy idea on the part of the governing body of the church regarding endowment funds, since it does not clearly limit expenditures to income. It will not serve, and the registrar, with counsel for the church and the executor must see that a proper trust is created.

The costs of all parties will come out of the estate. Liberty to apply.

Order accordingly.

6th May, 1946.

WILSON, J.: I intended and omitted to state in my reasons for judgment that I found this case one of considerable difficulty, and that I would be very glad to see the matter taken to the Court of Appeal.

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May 7; June 6.

PORTER *ET AL.* v. THE TORONTO GENERAL TRUSTS CORPORATION.

Contract—Promise to devise by will in consideration for services—Death of promisors—No provision in wills—Evidence of promisees—Pleading—Amendment.

E. G. Houghton owned all but one share of Chelsea Shop Limited, interior decorators. His wife owned the remaining share and she managed the operative part of the business. The three plaintiffs were employees of Chelsea Shop Limited. Houghton died in November, 1944, and his wife died a month later. The plaintiffs claim that in February, 1937, the Houghtons agreed that if the plaintiffs would continue to work in the employ of Chelsea Shop Limited until the death of the Houghtons at their then respective salaries or such other salaries as should, during the lifetime of the parties, be agreed upon, and that in consideration of the plaintiffs so doing, the Houghtons would, by will leave the whole of the

shares in said Chelsea Shop Limited to the plaintiffs or would do whatever was necessary to place the title and ownership of said shares in the plaintiffs effective on the death of the Houghtons. The plaintiffs continued to work at the salaries so arranged in the employ of the Chelsea Shop Limited until the death of the Houghtons and carried out their part of the agreement. Neither of the Houghtons by their wills or by any other act did anything to place the ownership of the stock of the company in the names of the plaintiffs. On the evidence of the plaintiffs Howlett alleges acceptance in 1937 but gives no facts from which one may conclude what the offer was that was accepted. Mrs. Porter alleges an offer in 1937 and an acceptance by her, but not by the other plaintiffs. Smith alleges an offer in different terms in 1936 and acceptance, but gives no evidence of a contract in 1937. In an action for specific performance of a contract between the plaintiffs and the Houghtons:—

Held, that the Court cannot find that the evidence as received establishes a contract with the clearness and definiteness required by law. The claim for a *quantum meruit* must also fail as a *quantum meruit* necessarily implies the existence of a binding contract. The action is dismissed.

ACTION for specific performance of a contract between the plaintiffs and E. G. Houghton and Madeline Houghton whereby it was agreed between the Houghtons and the plaintiffs that if the plaintiffs would continue to work in the employ of Chelsea Shop Limited until the death of the Houghtons at their then respective salaries that in consideration of the plaintiffs so doing the Houghtons would by will leave the whole of the shares in said Chelsea Shop Limited to the plaintiffs. The facts are set out in the reasons for judgment. Tried by WILSON, J. at Vancouver on the 7th of May, 1946.

Crux, and *G. F. McMaster*, for plaintiffs.
Locke, K.C., and *Hill*, for defendants.

Cur. adv. vult.

6th June, 1946.

WILSON, J.: The three plaintiffs are employees of Chelsea Shop Limited, interior decorators. The defendant is administrator of the estates of E. G. and Madeline Houghton, who were man and wife. Mr. Houghton, who died in November, 1944, predeceasing his wife, owned all except one of the shares of Chelsea Shop Limited and apparently acted as its financial

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manager. Mrs. Houghton died about a month later. She managed the operative part of the business and owned one share of the stock of Chelsea Shop Limited. There were no other shareholders. On the death of Mr. Houghton Mrs. Houghton, as sole beneficiary under his will, became entitled to his shares in Chelsea Shop Limited.

The action is, in substance, one for the specific performance of a contract between the plaintiffs and the Houghtons, alleged in paragraph 8 of the statement of claim, which I quote.

> When the same was conclusively arranged and further made and confirmed in the month of February, 1937, both the said Houghtons agreed with the plaintiffs, who agreed with the said Houghtons that the plaintiffs would continue to work in the employ of Chelsea Shop Limited until the death of the said Houghtons at their then respective salaries or such other salaries as should during the lifetime of the parties be mutually agreed upon, and that in consideration of the plaintiffs so doing the said Houghtons would by will leave the whole of the shares in the said Chelsea Shop Limited to the plaintiffs or that the said Houghtons would do whatever was necessary to place the title and ownership of said shares in the plaintiffs effective on the death of the said Houghtons. The plaintiffs in accordance with the said agreement continued to work at the salaries so arranged in the employ of Chelsea Shop Limited until the death of the said Houghtons and did carry out all their part of the said agreement.

The plaintiffs then allege that they carried out their part of the contract by working for Chelsea Shop Limited until both the Houghtons were dead. They did so and in fact, still work for the company.

Neither of the Houghtons, by their wills or by any other act did anything to place the ownership of the capital stock of Chelsea Shop Limited in the names of the plaintiffs.

The plaintiffs were paid weekly salaries or wages during all the term of their employment but suggest these salaries or wage were inadequate and only accepted by them because of the existence of the contract alleged in paragraph 8 of the statement of claim.

The original statement of claim did not contain paragraph 8 in its present form but was amended on the opening of the trial. The previous pleading, while it set out an offer by the Houghtons, and performance by the plaintiffs, did not allege an agreement by the plaintiffs to carry out their part of the contract, that is, to continue to work for the Houghtons until the Hough-

tons died. The amendment was made, presumably, to bring the present case within what is argued to be the rule in *Maddison* v. *Alderson* (1883), 7 App. Cas. 467.

In that case a servant had been induced by her employer to serve him as his housekeeper without wages for many years and to give up other prospects in life (I quote from the head-note) by a verbal promise to make a will leaving her a life estate in a farm. She did serve him until his death. He died intestate and she sued for specific performance of the alleged contract. Since the alleged contract pertained to realty the judgment really turns on the question of part performance, and it is only in the judgment of the Earl of Selborne, L.C. that I find enunciated otherwise than as *obiter dicta* the doctrine relied on by the defendant in this case. I quote from him at p. 472:

> The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

MACDONALD, C.J.B.C. has in *Bligh* v. *Gallagher* (1921), 29 B.C. 241, at p. 245 stated that this finding in *Maddison* v. *Alderson* is *obiter* and that *Maddison* v. *Alderson* really turned on the Statute of Frauds. Be that is it may, I think the present case must be distinguished. In this case there was no withholding of wages. All the plaintiffs were paid and accepted weekly salaries from the Houghtons for the services they rendered. These salaries were not lessened after the date of the alleged contract, they were in fact substantially increased, so that a perfectly good and valid consideration existed for the continued services rendered by the plaintiffs to the Houghtons. But the plaintiffs allege a further contract than their contract of employment, a contract whereby, in return for a covenant by the

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Houghtons to leave or give them the business they engaged themselves to serve the Houghtons during the lifetime of the Houghtons. The mere fact that they did continue to serve the Houghtons would not establish this contract, since such service was attributable to the existing contract of employment, and not unequivocally referable to the agreement alleged for service until the death of the Houghtons. Therefore something more must be established to convince me that this special contract, additional to the ordinary contract of employment, existed. If there was such a contract here then, in case of summary dismissal of any one of the plaintiffs after the date it was made, an action might lie for that plaintiff against the Houghtons. Similarly, if it was a contract to serve the Houghtons during their lives, any plaintiff leaving their employment without cause would be liable to be sued.

A contract consists of an offer and an acceptance. The acceptance may be by words or, in some cases, by conduct. Here it could not be by conduct since the conduct of the plaintiffs in continuing to work for the Houghtons was not exclusively referable to the contract sued on, but was equally consistent with the non-existence of such a contract; since it could be attributed to the ordinary contract of employment under which they worked. Unless there was on their part an acceptance of the alleged offer by the Houghtons, which acceptance took the form of a binding engagement by the plaintiffs to serve the Houghtons while the Houghtons lived, there is no contract. The offer alleged to have been made here cannot be placed in the special category covered by the *Carlill* v. *Carbolic Smoke Ball Company* case, [1893] 1 Q.B. 256, but comes rather within the scope of the decision in *Kennedy* v. *Thomassen*, [1929] 1 Ch. 426. What we have here is an offer of a promise for a promise, rather than an offer of a promise for an act.

So I must decide whether there was an offer; if so, what it was, and whether it was accepted, and if so, how.

Plaintiff's counsel, abandoning in part his plea in paragraph 8 of the statement of claim, says that the contract was made not in 1936 but in 1937. Taking it that I must, as conceded by plaintiffs' counsel, look to the 1937 interview for the establish-

ment of a contract I have carefully scanned Mr. Howlett's account of this interview for the two necessary elements of offer and acceptance. I can only say that, even supposing I take as acceptances the rather vague remarks of agreement attributed by Mr. Howlett to himself and his co-plaintiffs, I cannot find what they were accepting; that is, I cannot find an offer, but only an expression of an intention on behalf of the Houghtons "to give the business to the plaintiffs when they were through with the business or at their death." What the plaintiffs were to do in return for this is nowhere stated. Therefore the acceptance is meaningless.

In 1942 Mr. Howlett says, he wanted to resign and Mrs. Houghton said, "You can't do that, you must remember your bargain." This remark would be exceedingly significant and helpful if there was a bargain, and I knew what the bargain was. As it is, I do not know.

In 1944, after the death of Mr. Houghton, Mrs. Houghton told Howlett with the other two plaintiffs:

> Children, I have been down to Mr. *Clyne*, my solicitor, and I have made arrangements to have this business turned over to you. I want you to all keep on together and I am glad I have carried out my promise, and I feel it right. Now keep on together and God bless you all.

Again, if there was any evidence of an existing contract, this statement would be helpful to the plaintiffs. As it is, the statement cannot be related to an existing contract, and certainly does not of itself establish one.

In re-examination Mr. Howlett was asked why he accepted his salary without question, and answered:

> Well, because I had made a bargain or had a contract not to do that. I was to work there until their death.

These words may state the witness's impression or conclusion, but, since in his accounts under examination and cross-examination of all his dealings with the Houghtons he never alleged any bargain or contract, his impression is valueless.

I must therefore find that Mr. Howlett's evidence, by itself, would not establish a contract.

Dealing next with Mrs. Porter, the first thing of any substance that she says is that Mrs. Houghton prior to 1936, used to say,

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If you will stay with me and take an interest in the business later on you will have an interest in it yourself.

Even if this could be construed as an offer, there is no acceptance.

Next she talks of the 1936 interview attended by both the other plaintiff and Mr. Houghton. I can only say that I can see no clear offer and acceptance here, the main defect being that Mr. Houghton did not offer or promise the plaintiffs anything beyond vague benefits.

Going next to the 1937 interview I find the first evidence that might be interpreted as establishing a contract. I quote it.

How did that conference come about? That conference came about—it was more or less a meeting of Mr. Howlett, myself, Mr. Houghton and Mrs. Houghton; Mr. Houghton came in very early in the morning, called Mr. Howlett, Mr. Smith and myself together in the very front of the shop and Mr. Houghton said that Mrs. Houghton definitely had to stay out of the business, and he said definitely stay out of the business, that she had to have a rest, and he said at that time, he said, well now, to use the exact words he said, "If you people continue," he said, "I want you three people to continue," myself, Mr. Smith and Mr. Howlett, to carry on this business in the same way that Mrs. Houghton has been carrying it on." "Mrs. Houghton has been carrying it on," he said, more or less the way she was carrying it on; "we are prepared to give you the same standard wage" if we continue to do that and put our interest into the business and work for the business and whenever they were through, Mr. and Mrs. Houghton were through, or until they died, that we in consideration of that would have the Chelsea Shop, the business of Chelsea Shop, the three of us together. And furthermore he said that Mrs. Houghton was ailing and that he himself as far as that goes was not very good, and that all he really thought to get out of it was more or less a fair return for what they had invested in it, he would be perfectly satisfied from then on. And Mrs. Houghton turned around and said to me, "Now," she said, "you can make as good a job of it as I can, and get on with it."

And what did you say to their proposition? To their proposition, well I said that I certainly would. I said, "As long as I am able to look"—provided I was given the strength, something like that. As a matter of fact she kissed me and that was the end of it. We went on generally talking.

It will be noted that there is here what might be argued to be an acceptance by Mrs. Porter but no evidence of acceptance by the other plaintiffs.

I must, of course, read this in connection with Mrs. Porter's cross-examination on the same subject. That cross-examination makes it abundantly clear that when Mrs. Porter was examined for discovery before trial, and before the statement of claim was amended so as to set up a contract rather than a bare promise by

the Houghtons, she did not give any evidence of an acceptance, or counter-promise by herself. While her attention was not expressly directed to that point she was, at the end of her account of the 1937 interview, asked these questions and gave these answers:

Is there anything else that happened in February, 1937, between you and Howlett and Smith and Mr. Houghton except what you have told me? I don't think anything very important.

Yes, anything at all. I don't think so.

. . . .

Now is there any other agreement which you say that you made with either Mr. or Mrs. Houghton upon which you base your claim in this action except what you have told me? No.

None whatever? No.

Mr. Smith, the other plaintiff, speaks first of a talk with Mrs. Houghton in 1933 when he said,

Mr. and Mrs. Houghton appreciated the work I was doing and if I carried on in the same capacity that eventually at one time a certain percentage of the business would be mine.

If this was an offer, there was no acceptance of it.

In regard to the 1936 interview Mr. Smith says this:

In 1936—yes, that was in the fall of the year—I think around the latter part of the year or early November—we were called into the shop after the rest of the staff was gone and Mr. Houghton mentioned at that time that Mrs. Houghton's health was failing and wished us folks to carry on as we had done in the past; that the burden was too much for Mrs. Houghton to carry on at that time and if we did that, the three of us would have a percentage of the business after they were through with it.

What did you say to that? Well, I agreed with Mr. Houghton and thanked him. It was very nice to have that offer.

And the others the same? Yes.

The offer here is that if the plaintiffs would carry on they would have a percentage of the business after Houghtons were through with it. There are words which can be construed as an acceptance of this offer. The offer was made by Mr. Houghton only, Mrs. Houghton not being present.

In dealing with the 1937 interview it is noticeable that Mr. Smith alleges no acceptance by either himself, Mr. Howlett or Mrs. Porter of any offer made by the Houghtons at that time. In cross-examination Mr. Smith is more specific as to the offer made in 1937 but alleges no acceptance.

To epitomize the evidence of these three very decent and worthy people, I have this:

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Mr. Howlett does not give any evidence of a contract in 1936. He does allege an acceptance in 1937, but gives me no facts from which I can conclude what the offer was that was accepted.

Mrs. Porter alleges an offer in 1937 and an acceptance by her but not by the other plaintiffs. This offer and acceptance might be construed as coming within the terms of the contract pleaded, but must be considered with the other evidence.

Mr. Smith differs in alleging an offer, on different terms, in 1936 and an acceptance but gives no evidence of a contract in 1937.

Certain evidence was adduced as to the insufficiency of the wages paid the plaintiffs. While these wages were not generous, I cannot say that they were so grossly inadequate as to buttress the plaintiffs' contention.

The evidence of several reputable and credible persons was offered in corroboration of the plaintiffs. As to that testimony I need only say this—that if the evidence of the plaintiffs proves a contract which would, in the ordinary case where corroboration is not required, be enforceable at law, then the evidence of these other persons is sufficient, under section 11 of the Evidence Act, to corroborate it. I therefore return to consideration of the plaintiffs' evidence.

I may say that I formed an exceedingly favourable impression of all three plaintiffs and that the circumstances have impelled me to a consideration of their evidence which has, perhaps, been almost unjudicially sympathetic. But I cannot, with all good will, find that the evidence as I have reviewed it, establishes a contract with the clearness and definiteness required by the law.

The plaintiffs' claim for a *quantum meruit* must also fail since, as stated by MURPHY, J. in *Bligh* v. *Gallagher, supra,* at p. 242,

> a *quantum meruit*, . . . necessarily implies the existence of a binding contract, the only term of which not definitely fixed is remuneration.

I must dismiss the action. I do so with regret. I am sure that the Houghtons had benevolent intentions toward the plaintiffs and that these intentions would have been carried out if Mrs. Houghton had lived a little longer. While I must award costs

to the defendant I suggest to the eminent counsel who acted for the defendant that this is a case in which he might well advise the heirs to the estate to instruct the executor to forego those costs.

Judgment for defendant.

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TISMAN v. RAE.

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Practice—Discovery—Examination for—Sale of land—Action for fraudulent misrepresentation—Limited to issues raised by the pleadings—Scope of—Rule 370c.

In an action for damages for fraudulent misrepresentation on the sale of a farm, four specific factors are alleged in the statement of claim to constitute misrepresentation by the defendant which are denied by the defendant. Upon examination for discovery of the defendant he refused to answer the following question: "53. Just tell me the conversation. I do not care where you start, but give me the conversation, and I would suggest the logical place to start would be at the beginning. Now, you met Mr. Tisman. What did you do and what did you say?"

Upon motion to compel the defendant to answer the question the learned Chamber judge refused the motion upon the ground that the question "had the appearance of being in the nature of a fishing-question and one which does not fall within the category of questions limited to the issues raised by the pleadings."

Held, on appeal, reversing the decision of HARPER, J., that as the question may raise matters which are relevant to the issues raised on the pleadings, it must be answered. Where an action is brought in respect of verbal misrepresentations alleged to have been made to the plaintiff, defendant is entitled to enquire on plaintiff's examination for discovery as to the substance of the whole conversation and is not bound to confine his examination wholly to the alleged misrepresentation.

APPEAL by plaintiff from the order of HARPER, J. of the 9th of April, 1946, whereby it was ordered that the defendant be not required to answer question 53 of his examination for discovery.

The appeal was argued at Vancouver on the 3rd of June, 1946, before O'HALLORAN, SIDNEY SMITH and BIRD, JJ.A.

John L. Farris, for appellant: The action is for damages for fraudulent misrepresentation on the sale of a farm. This was a 64-acre farm and sold for $64,000. One statement was that the

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annual net income was from $10,000 to $12,000 a year. There must be some latitude and at times it is impossible to say that answers may be relevant to the issue: see *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, at pp. 28-9; *Playfair* v. *Cormack* (1913), 9 D.L.R. 455; *McKergow* v. *Comstock* (1906), 11 O.L.R. 637; *Carney* v. *Carney* (1913), 15 D.L.R. 267; *Wilson* v. *Suburban Estate Company* (1913), 23 O.W.R. 968; *Walkinshaw* v. *Drew*, [1935] O.W.N. 233, at p. 236.

Guild, for respondent: The statement of claim included four specific allegations. On examination for discovery under rule 370c it must be confined to issues raised by the pleadings: see *Jones* v. *Pemberton* (1897), 6 B.C. 67 and the judgment of HUNTER, C.J. in *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23, at p. 27. Fraud cannot be pleaded in general, it must be pleaded in particular. The examination must be limited to particulars, especially in a case of fraud: see *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354; *Whieldon* v. *Morrison* (1934), 48 B.C. 492, at pp. 497-8; *Nolan* v. *McCulloch* (1941), 56 B.C. 420; *Harris* v. *Toronto Electric Light Co.* (1899), 18 Pr. 285; *Carney* v. *Carney* (1913), 15 D.L.R. 267, at p. 268.

Farris, in reply: If the question may include matters that may be relevant, it should be answered.

Cur. adv. vult.

11th June, 1946.

O'HALLORAN, J.A.: I concur in the judgment of my brother BIRD and would allow the appeal accordingly.

SIDNEY SMITH, J.A.: I have had considerable doubt about this matter, but on the whole I have reached the conclusion that the question was not one to which legitimate objection could be taken. Running through all the authorities which were quoted to us is the principle that questions on discovery may be in the nature of cross-examination but must be limited to the issues raised by the pleadings. Side by side with this principle, however, is another one, that in framing the questions a fair amount of latitude is to be allowed. These two principles are mentioned in a compact sentence by MARTIN, J., as he then was, in *Whieldon* v. *Morrison* (1934), 48 B.C. 492, at p. 500 as follows:

No decision in Ontario or elsewhere has been cited that throws any doubt upon the leading Ontario judgment of Street, J. in *Mack* v. *Dobie* (1892), 14 Pr. 465, which was adopted by our Full Court in *Trapp's* case, *supra*, p. 358 as holding that:

"Questions must be confined to matters raised by the pleadings, but a fair amount of latitude was to be allowed."

In the case before us I think that while strictly speaking the question asked went beyond the issues set up in the pleadings, nevertheless in view of the fact that it was in the nature of a general opening question for the topic upon which the examination was to proceed, namely, the representations, and applying the principle of a fair amount of latitude, it cannot be regarded as objectionable.

I would therefore allow the appeal.

BIRD, J.A.: In this action the plaintiff seeks to recover damages for fraudulent misrepresentation on the sale of a farm. Four specific factors are alleged in the statement of claim to constitute misrepresentation by the defendant, which induced the plaintiff to buy the farm, each of which is alleged to be untrue.

The defendant denies the several allegations referred to and alleges that the plaintiff bought the farm, relying upon his own independent investigations and that he did not do so by reason of any inducement held out by the defendant.

Upon examination for discovery of the defendant, he refused, on the advice of counsel, to answer the following question, which counsel after having put the question then said was related to the negotiations between the parties which preceded the sale; the question being as follows:

53. Just tell me the conversation. I do not care where you start, but give me the conversation, and I would suggest the logical place to start would be at the beginning. Now, you met Mr. Tisman. What did you do and what did you say?

Upon motion subsequently made to compel the defendant to answer the question, the learned Chamber judge, having referred to the specific allegations and the fraudulent misrepresentations set out in the statement of claim, refused the motion upon the ground that the question "has the appearance of being in the nature of a fishing-question"; one which does not fall within

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the category of questions "limited to the issues raised by the pleadings." The plaintiff now appeals from that part of the order which sustained the defendants' refusal to answer question 53. Counsel for the appellant does not question the reasoning in the several judgments referred to in the reasons for judgment of the learned trial judge, including *Carney* v. *Carney* (1913), 15 D.L.R. 267; *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23; *Playfair* v. *Cormack* (1913), 9 D.L.R. 455; *McKergow* v. *Comstock* (1906), 11 O.L.R. 637; but urges that the question put does raise matters which are relevant to the issues between the parties set up on the pleadings and therefore is a question proper to be answered.

I understood counsel for the respondent to concede that the question may raise matters that are relevant but it will also raise matters that are irrelevant. He contends that this being so, the learned judge was right in directing that the question be not answered, since it was in the nature of a fishing-question.

I would adopt the language of HUNTER, C.J. in *Hopper* v. *Dunsmuir,* at pp. 28-9, and say that even if the question may provoke an answer that is

> remote from the matter in hand, but I think it is impossible to say that the [answer thereto] may not be relevant to the issues, [raised upon the pleading] and such being the case [is] within the right given the cross-examining party by the rule.

Since in my opinion the question may raise matters which are relevant to the issues raised on the pleadings I think, with deference, it must be answered, and *cf. Wilson* v. *Suburban Estate Company* (1913), 23 O.W.R. 968, wherein Cartwright, K.C., Master in Chambers, with whose reasoning I agree, held

> that where an action was brought in respect of verbal misrepresentations alleged to have been made to plaintiff, defendant was entitled to enquire on plaintiff's examination for discovery as to the substance of the whole conversation, and was not bound to confine his examination wholly to the alleged misrepresentations.

I would allow the appeal and direct that the defendant do attend for further cross-examination.

Appeal allowed.

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondent: *C. K. Guild.*

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Injunction, interim—Application to continue until trial—Constitutional law—Validity of statute attacked—The National Emergency Transitional Powers Act, 1945—Orders of Administrator of Motor Vehicles and Parts—R.S.C. 1927, Cap. 206—Can. Stats. 1945, Cap. 25.

The plaintiff company carried on a business in second-hand cars and in conjunction therewith operated a general automobile garage business in the course of which it repaired and reconditioned used cars bought for resale. Between 23rd November, 1944, and the 20th of March, 1946, the company had been convicted four times for contravention of the Wartime Prices and Trade Board Regulations respecting purchase and sale of used motor-vehicles. On one occasion it was fined $350, on two other occasions $500 and on a fourth occasion $1,000. Owing to these infractions, the Wartime Prices and Trade Board cancelled its licence in respect of the operation of its business as a dealer in used cars, entered upon its premises, seized three motor-vehicles and certain books and records and prohibited the plaintiffs from selling any motor-vehicles, except with the concurrence of the representative of the Board at Vancouver. The claim endorsed on the writ was for a declaration that The National Emergency Powers Act, 1945, is *ultra vires* and order in council P.C. 8528 and all orders issued by the Administrator of Motor Vehicles and parts under the provisions of the administrator's orders are *ultra vires* and for an injunction and other consequential relief. This is an application to continue until the time of the action an *interim* injunction made *ex parte* by COADY, J., and the Court is asked in substance not to preserve the subject-matter as it now is or even as it was when the action was taken, but to restore it to the condition in which it was before this action was taken. It was held that this cannot be dealt with without deciding first whether there was a probability that the plaintiff could succeed on its claim and as that involves a constitutional point of the highest importance as to the conditions upon which the Federal Government is entitled to invade the field of the Provinces, this should not be attempted even if it were proper on a motion of this kind, without notice to the Attorney-Generals of the Dominion and the Province.

Held, on appeal, affirming the order of MACFARLANE, J. (O'HALLORAN, J.A. dissenting), that if an interlocutory injunction (whether mandatory or restrictive) is not granted below, it is very seldom that a Court of Appeal will grant one and with the exception of *Home Oil Distributors Ltd. v. Attorney-General of British Columbia* (1938), 53 B.C. 355, there has been no reference to any decision in which an *interim* injunction has been granted where the matter in debate involved the question of the validity of a statute. This application was substantially one to restore and not merely to preserve and as the plaintiff had not established or could establish the kind of case warranting the continuance of the injunction, it should be dismissed.

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APPEAL by plaintiff from the decision of MACFARLANE, J. refusing the application of the plaintiff to continue the injunction granted by COADY, J. on the 4th of May, 1946, until the trial of the action, heard by him at Vancouver on the 8th and 10th of May, 1946.

McAlpine, K.C., and *John L. Farris*, for plaintiff.
Locke, K.C., and *C. C. Locke*, for defendants.

Cur. adv. vult.

22nd May, 1946.

MACFARLANE, J.: This is an application to continue until the time of the action an *interim* injunction made *ex parte* by my brother COADY. The plaintiff also asks that a mandatory order be made now that the defendants return to the plaintiff three motor-cars and the registration slips and transfer licences affecting them, taken under an order of the defendant Gordon, dated the 16th day of April, 1946. The defendant *Brazier* has entered an appearance. The other defendants have not yet appeared. The claim endorsed on the writ is for a declaration that The National Emergency Transitional Powers Act, 1945, Can. Stats. 1945, Cap. 25, is *ultra vires*, and that order in council P.C. 8528 and all orders issued by the Administrator of Motor Vehicles and Parts under the provisions of the administrator's orders are *ultra vires*, and for an injunction and other consequential or ancillary relief. The plaintiff submits that all he has to establish on this application is that "there is a fair question to raise as to the existence of the right which he alleges" (*Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55). I pause, only to add that that case adds to the language quoted (p. 58)

and can satisfy the Court that the property should be preserved in its present actual condition until the question can be disposed of.

I will comment on this second requirement later. He also submits that

Upon a motion for an *interim* injunction the Court ought not to enter upon a discussion of the merits of the litigation:

vide Middleton, J. in *M. J. O'Brien Ltd.* v. *British American Nickel Corporation Ltd.* (1921), 20 O.W.N. 184, at p. 185.

That was a case where the injuction was to restrain the defendant company and a trust company from carrying into effect a proposed scheme of reorganization involving the discharge of an existing issue of debentures and the creation of others. In that case the continuation of the injunction was refused for the reasons therein stated. These include the observation that the pendency of the action is just as effective as any injunction could be to prevent the scheme being carried out.

On the argument before me, as I understood, it was not contended that my brother COADY intended to grant a mandatory injunction, so counsel then asked that the mandatory provisions to which I have referred be included in the order he now asks me to make.

It is essential, in my opinion, *in limine,* to decide just what the nature of the injunction under consideration is. The reason is that, as I read the authorities, different considerations apply —different standards of proof are required—according to the nature of the injunction requested.

The case cited, *Wheatley* v. *Ellis and Hendrickson, supra,* is an example of one type of injunction, the purpose of which is to retain the property *in statu quo, viz.,* as it existed at the time of the order. In such a case the plaintiff is required only to establish (to adopt the language of that case) that there is a fair question to raise as to the existence of the right which he alleges, and to satisfy the Court that the property should be preserved in its present actual condition, that is, its condition at the time of the granting of the injunction, or at least at the issue of the writ.

A mandatory injunction is defined by Lord Westbury in *Isenberg* v. *East India House Estate Company* (1863), 3 De Gex J. & S. 263, at p. 272, as

> an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made.

In the case of a mandatory injunction, the principle guiding the Court is laid down by Cotton, L.J., in *Preston* v. *Luck* (1884), 27 Ch. D. 497, at p. 506, as follows:

> . . . It is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief.

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That principle is referred to in a case which is perhaps nearer in principle to this than any of the cases cited to me. The case is *Blue Funnel Motor Line* v. *City of Vancouver* (1918), 26 B.C. 142.

As I see this case, the notice was given, the licence cancelled, and possession of the books and documents taken before the injunction was granted or the writ issued. I am asked in substance not to preserve the subject-matter as it now is or even as it was when the action was taken, but to restore it to the condition in which it was before this action was taken. I do not see how I could deal with that without deciding first whether there was a probability that the plaintiff could succeed on his claim, and as that involves a constitutional point of the highest importance, as to the conditions upon which the Federal Government is entitled to invade, if you like, the field of the Provinces, I could not attempt that in my opinion, even if it were proper on a motion of this kind without notice to the Attorney-Generals of the Dominion and of the Province.

Before, however, leaving the point I have been discussing, I might say that I do not think my learned brother, COADY, when he granted the injunction, had any intention of doing any more than preserving the subject-matter *in statu quo* at the time of the application before him. I mention that now, because it was urged before me that I should dissolve the injunction because on the application the facts were not, as it was alleged, fully or properly put before the learned judge. While I am neither concerned to act on that suggestion in respect of the particulars referred to by counsel, nor on the other hand to question the principles of law applicable, I think it is obvious from what I have already stated that my learned brother, for whom everyone knows, I think, I have the highest possible respect and I should add admiration, did not have fully placed before him the position of affairs, as I see them, that actually existed. I have no doubt that was due rather to what to me appears misapprehension than from any lack of good faith. As I do not intend to continue the injunction, I need not discuss this matter further, nor need I, nor should I, I think, discuss the constitutional question which was argued to some extent before me. I do not think

it is open to me to do so here, except on the basis that the injunction be treated as a trial of the action, and that is not and cannot be so, as all the parties are not before the Court.

All I think I might say is that if I were to continue the injunction on the basis of any argument that the Act referred to above is unconstitutional, I should have a clear decision of a Court superior to me to that effect. Viscount Simon, in *Attorney-General for Ontario* v. *Canada Temperance Federation,* [[1946] A.C. 193, at p. 206]; [1946] 2 W.W.R. 1, at p. 7 said that *Russell* v. *The Queen* (1882), 7 App. Cas. 829

> must be regarded as firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it.

And that

> Their Lordships have no intention, in deciding [that] appeal, of embarking on a fresh disquisition as to relations between ss. 91 and 92 of the British North America Act, 1867.

What he said of *Russell's* case is simply a paraphrase of what Sir Montague Smith said in that case. He does say that in *Toronto Electric Commissioners* v. *Snider,* [1925] A.C. 396, the explanation of what the Board in that case considered the ground of decision in *Russell's* case is too narrowly expressed. But that does not reflect on the soundness of other considerations involved in that decision or the principles enunciated in *Fort Frances Pulp and Paper Co.* v. *Manitoba Free Press Co.,* [1923] A.C. 695, with reference to cases referred to in *Snider's* case arising out of some extraordinary peril to the national life of Canada as a whole, such as the cases arising out of a war and, in the *Fort Frances* case, to provision for circumstances which require steps to be taken to avoid the effect of economic and other disturbance occasioned originally by the war which may continue for some time after it is terminated. Here Parliament has declared that the emergency that existed during the war requiring legislation of this character still continues and, while I am not in any way deciding the issue, I cannot see that in these circumstances there is such a clear case as I should have upon which I could act in continuing this injunction.

In further explanation of the conclusion to which I have come, I need only add that I adopt the argument that what was done fell within the provisions of the powers contained in P.C. 8528

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and affirmed by P.C. 7414. The substantial attack is on the validity of these orders and of the Act, being Cap. 25, Can. Stats. 1945. As I do not intend to consider whether that statute is *intra vires* or *ultra vires* on this application, I think the maxim *omnia præsumuntur rite esse acta* is applicable. The case is not one where there is a clear decision that the statute or a relevant portion of it is *ultra vires*.

I may also add that I have searched and have been unable to find any case where on an application for an interlocutory injunction a Court of first instance has attempted to adjudicate on the validity of a statute, and by so doing purported to set aside something already done under that statute, when the question as to whether the statute is valid or not will depend on varying expressions as to grounds of interpretations as stated by a Court of last resort, and I think it would be highly improper to do so, as I have said, without representation of a notice to the Attorney-Generals whose relevant jurisdictions might be so affected. In my opinion, the Court is here faced with a *fait accompli* and the application is therefore substantially for a mandatory injunction to restore and not an injunction to preserve conditions as they were before the action was taken, and I do not think I can find that the plaintiff has established or can establish before me that kind of case which would warrant me in continuing the injunction. I would therefore dissolve the injunction. Counsel has called my attention to that portion of the injunction which he says prevents the defendant from maintaining a representative on the premises. The material discloses that this representative was withdrawn on the 4th instant so that, if the injunction did cover such activity, there is now nothing upon which it could operate.

Application refused.

From this decision the plaintiff appealed. The appeal was argued at Vancouver on the 17th, 18th and 19th of June, 1946, before O'HALLORAN, ROBERTSON and SIDNEY SMITH, JJ.A.

McAlpine, K.C., for appellant: The company was served with notice cancelling their motor-vehicle permit on the 3rd of May, 1946. Pursuant thereto an employee of the Board took and

removed therefrom three motor-cars and certain books and records of the company. The action is for a declaration that The National Emergency Transitional Powers Act, 1945, is *ultra vires* and that order in council P.C. 8528 and all orders issued by the Administrator of Motor Vehicles and Parts under the provisions of the administrator's orders are *ultra vires* and for an injunction restraining the defendants from interfering in any way with the plaintiff. We are asking for a mandatory injunction that the material be given back to the plaintiff, that the cars be delivered up and the company be allowed to continue their business without interference from the Board: see *Rex* v. *Bush* (1938), 53 B.C. 252, at p. 255. Here it is a continuing wrong in preventing us from operating: see *Von Joel* v. *Hornsey,* [1895] 2 Ch. 774. The plaintiff is ruined if he does not get an injunction: see *Hornsey Urban District Council* v. *Smith* (1897), 66 L.J. Ch. 476, at p. 478.

John L. Farris, on the same side: That The National Emergency Powers Act, 1945, is *ultra vires* as it invades "property and civil rights" see *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919,* [1922] 1 A.C. 191, at p. 197. There is sufficient case to warrant preservation and granting injunction to preserve the rights of the plaintiff. The ground of emergency does not exist after termination of the war: see *Reference re The Natural Products Marketing Act, 1934, and Its Amending Act, 1935,* [1936] S.C.R. 398, at p. 423; *Attorney-General for Canada* v. *Attorney-General for Ontario,* [1937] A.C. 326; *Attorney-General for Ontario* v. *Canada Temperance Federation,* [[1946] A.C. 193]; [1946] 2 D.L.R. 1; *Fort Frances Pulp Co.* v. *Manitoba Free Press Co.* (1923), 93 L.J.P.C. 101. There is a fair case to be tried.

Locke, K.C. (*E. A. Boyle,* with him), for respondents: It is wrong for the Court to be asked for an injunction ordering the Board not to take steps against those breaking the law. By section 15 (2) of P.C. order 8528, no proceedings by way of injunction shall be taken against members of the Board. This man is a persistent law-breaker and no Court will grant an injunction preventing one to be prosecuted for breaking the law until the case is heard for a declaration that the Act is *ultra vires.* The

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company is not out of business, they still carry on a garage business and filling-station. On an application for an injunction all the facts should be disclosed: see *Rex* v. *Kensington Income Tax Commissioners* (1916), 86 L.J.K.B. 257, at p. 261; *Dalglish* v. *Jarvie* (1850), 20 L.J. Ch. 475; *Boyce* v. *Gill* (1891), 64 L.T. 824. The order made by MACFARLANE, J. is discretionary and should be upheld unless wrong in principle: see *Solloway, Mills & Co.* v. *Frawley* (1930), 42 B.C. 513 and 524. The learned judge was asked to make an order to let Campbell continue to break the law: see *Electric Telegraph Company* v. *Nott* (1847), 47 E.R. 1040, at p. 1042; *Bain* v. *Bank of Canada and Woodward* (1935), 50 B.C. 138, at p. 142; *Gaskell* v. *Somersetshire County Council* (1920), 84 J.P. 93; *Toronto Brewing and Malting Co.* v. *Blake* (1882), 2 Ont. 175, at p. 183; *Jones* v. *Victoria* (1890), 2 B.C. 8, at p. 11; *Blue Funnel Motor Line* v. *City of Vancouver* (1918), 26 B.C. 142; *Fort Frances Pulp Co.* v. *Manitoba Free Press Co.* (1923), 93 L.J.P.C. 101. As to the Acts, the war is still on. The National Emergency Powers Act, 1945, expires in December of this year. That the regulations were held *intra vires* see *Woywedka* v. *Mokrey,* [1945] 4 D.L.R. 362, at p. 367; *Reference as to the Validity of the Regulations in relation to Chemicals,* [1943] S.C.R. 1, at p. 12; *In re Silver Brothers, Ltd.* (1932), 101 L.J.P.C. 107. See also *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia* (1938), 53 B.C. 355 and *The King* v. *British Columbia Electric Railway Co. Ltd.,* [1946] S.C.R. 235.

Farris, in reply: There was full disclosure to COADY, J. Section 15 (2) of order 8528 was not a factor in the refusal by MACFARLANE, J.

Cur. adv. vult.

26th June, 1946.

O'HALLORAN, J.A.: In further punishment for infractions of the "ceiling" regulations relating to the purchase and sale of used motor-cars by the appellant company, and for which it had been convicted and fined by a competent Court, the Administrator of Motor Vehicles and Parts cancelled the permit issued

by it to the appellant "to carry on business as a dealer in used motor-vehicles at 398 Kingsway, Vancouver, B.C." This order of cancellation with incidental provisions, dated at Ottawa on 16th April, 1946, was executed without previous notice on 3rd May, 1946, by service thereof on the appellant and by seizure of the motor-cars, books, and records on the appellant's premises.

The appellant issued a writ the next day against the respondents for a declaration that The National Emergency Transitional Powers Act, 1945, is *ultra vires* the Parliament of Canada and that order in council P.C. 8528 and all other orders issued by the Administrator of Motor Vehicles and Parts under the provisions of the administrator's orders are *ultra vires*, and for an injunction restraining the respondents, their servants and agents from interfering in any way with the appellant and also for an order compelling the respondents to return the motor-cars and other property of the appellant which the respondents had seized and retained. On the same day the appellants obtained an *interim* injunction *ex parte* from COADY, J.

The motion to continue the injunction until trial came before MACFARLANE, J. who dissolved the injunction on 16th May for reasons dated 22nd May. Because the administrator's order had been executed the learned judge considered that any injunction he could grant would be so mandatory in its character that he ought not to do so, unless the applicant could satisfy him that the statute is *ultra vires*. The learned judge added:

> All I think I might say is that if I were to continue the injunction on the basis of any argument that the Act referred to above is unconstitutional, I should have a clear decision of a Court superior to me to that effect.

But, in my judgment, it is by no means true that the Court will not under any circumstances grant a mandatory injunction upon interlocutory motion. It may do so if there is a "possibility of there being legal and equitable rights to be determined," and *cf. Hervey* v. *Smith* (1855), 1 K. & J. 389. Every injunction must be mandatory to some degree.

I agree that an interlocutory mandatory injunction pending trial ought not to be granted in certain cases. Thus if A, in assertion of a right to do so, builds a house on B's property, it would be inequitable to prejudge the case by granting a man-

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datory injunction for demolition of the house pending trial. For if A should succeed in upholding that asserted right at the trial, the house, the subject-matter of that asserted right would no longer be in existence. In the course of successfully asserting his right, A would have lost not only the money he expended in building the house but also the money required to demolish it under the mandatory order. The right to build the house was the real issue between the parties and that could not be determined until the trial was held. It seems manifest that the equitable order in such a case would be to restrain A from adding to or using the house pending trial. That would preserve the subject-matter of the asserted right until trial. If A succeeded at trial his success would not then be accompanied by what well might be the irreparable damage resulting from the mandatory order for the demolition of the house.

But that is not the type of case now under review. The appellant's case is that he has been illegally deprived of the right to carry on business in used motor-cars, and has been put out of business by an arbitrary board order of which he had no notice until its execution. Because of the irreparable injury thereby manifestly caused him, he asks that the Court restrain the respondents from interfering or interrupting that right, until it is determined at an early trial, whether they have the power to do so. He does not deny that his right to carry on business may be regulated by statute, but he says the power to do so is vested in the Province and is excluded from the Dominion under the British North America Act, 1867. He says the Board's orders and their parent statute The National Emergency Transitional Powers Act, 1945, are *ultra vires* the Dominion because they usurp powers reserved to the Province.

The appellant had no notice of the administrator's order putting him out of business until the order was executed on 3rd May. If he had notice of that order and had been able to apply before its execution for an injunction suspending its operation pending early trial, there is little doubt it would have been granted. Again if the managing director of the appellant company had been imprisoned (see section 3 (1) of the statute and paragraph 9 (1) of P.C. 8528) by a court of inferior jurisdic-

tion, there is little doubt I think he would have been released on *habeas corpus* pending determination of the Board's power. The occasion for the interlocutory injunction pending trial is to preserve the subject-matter (*viz.*, the business) and to protect an asserted legal right (to carry on business) until the trial. I fail to apprehend how that is affected in principle by the circumstance that the Board has summarily cancelled his permit to carry on business. The Board has cancelled his permit because he has broken its regulations. But he says these regulations are made and enforced without proper authority and he is seeking the opportunity to prove it in Court.

It is plain, I think, from the affidavits filed, that the appellant will be caused irreparable damage if the injunction is not granted. If it is not granted and he should succeed at the trial, customers new and old will have been lost. The reputation of the business will be adversely affected, and its goodwill will have suffered incalculable injury from these and attendant conditions one of which appears to be danger of loss of its present business location. Granting the order can cause no damage or inconvenience to the respondents, for the operation of the cancellation order would be interrupted for a few weeks until trial. If the applicant is unsuccessful at the trial its operation resumes automatically. If he is successful it is set aside completely as null and void *ab initio*. The public interest cannot suffer. In fact it may be said to be safeguarded by the protection of individual rights.

When the case is regarded in this manner I have no hesitation in concluding that the principle this Court applied in *Wheatley* v. *Ellis and Hendrickson* (1944), 61 B.C. 55 is equally in point here, *viz.*, that the interlocutory injunction ought to be granted if it appears there is a fair question to raise as to the existence of the right asserted, and the Court is satisfied the subject-matter ought to be preserved in the condition it was before the controversy arose—and *cf. Eastern Trust Company* v. *Mackenzie, Mann & Co., Limited*, [1915] A.C. 750, at p. 760. I think enough has been said to make it apparent that the subject-matter (*viz.*, the business) may be impaired to a degree that it will be

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destroyed for all practical purposes, and that in the circumstances irreparable damage must inevitably result.

It is equally clear, I think, the appellant raises a fair question regarding the right he asserts to carry on business. He says the order putting him out of business is incompetent because the authorizing statute The National Emergency Transitional Powers Act, 1945, is *ultra vires* the Dominion Parliament. Counsel for appellant conceded for the purposes of argument, that if a state of war still existed, and if the respondents had acted under powers conferred by the War Measures Act, Cap. 206, R.S.C. 1927, then the force of binding decisions would be against him. But he says that is not this case. He submits that by section 5 of The National Emergency Transitional Powers Act, 1945, the war came to an end for the purposes of the War Measures Act on 1st January, 1946, and hence the only reason which could justify the present invasion of provincial jurisdiction has disappeared. That being so, he submits that The National Emergency Transitional Powers Act, 1945, is *ultra vires,* and that the powers the Board has exercised in this case are a usurpation of Provincial powers.

It is not for a Court of Appeal on the hearing of an appeal involving the issuance of an interlocutory injunction to decide whether the important constitutional point advanced by counsel for the appellant is well founded or not. We may have to decide that point eventually if an appeal is taken from the decision at the trial. Any expressions of opinion now given upon the merits of the constitutional point may easily embarrass the trial judge as well as this Court upon a subsequent appeal upon the merits of the case. For these reasons I do not discuss the constitutional decisions referred to in the argument. I do not need to go further than to say that, in my judgment, counsel for the appellant has raised a fair question for judicial determination. I think it is an important constitutional point well worthy of more exhaustive examination than was necessary to devote to it on this interlocutory appeal. When the time comes to decide it, the Court will no doubt have the benefit of submissions from counsel representing both the Dominion and the Province.

A point was taken by counsel for the respondents that it was

not the practice of the Courts pending trial to restrain operation of legislation or orders in council having the statutory force of legislation. Counsel did not argue the Courts lacked jurisdiction to restrain the enforcement or operation of legislation pending trial. He said it was not the practice. That form of argument is necessarily premised on the existence of the Court's jurisdiction. It may not be the practice in the English Courts. But England is a unitary and not a Federal State like Canada. It has not the problems arising from divided sovereignty such as constantly occur in a Federal State. Its Courts are not concerned with recurring conflicts between Dominion and Provincial sovereignties. One of the highest responsibilities of Canadian Courts frequently invoked, is to determine if specific legislation is within the power of the Province or within the power of the Dominion.

In such cases it is a convenient, logical and equitable course to restrain or interrupt the operation of the statute until its constitutionality is determined at the trial. If authority were needed for that proposition it is found in *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia* (1938), 53 B.C. 355. In that case the injunction obtained by the plaintiff oil companies restraining the operation of the order of a Provincial board reducing or fixing the price of gasoline in this Province was continued until the trial. This Court upheld that order. It is very much in point to note that the legislation which the oil companies attacked and the operation whereof they were successful in restraining by injunction, was held *intra vires* by this Court—see (1939), 54 B.C. 48 and later by the Supreme Court of Canada—see [1940] S.C.R. 444.

Under this branch of the case it was submitted also that different considerations ought to govern the Court in restraining a Government board than in restraining a corporation or individual. With respect this may lead to unforeseen and perhaps dangerous consequences if it affects individual rights in an issue involving conflict between Dominion and Provincial sovereignty. But it is for the Courts alone to interpret the law.

Except where the civil power has been justifiably displaced by martial law, or in the case of subversive activities by persons in

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Canada supporting the policies or designs of a foreign power, in my opinion at least, it is hard to find a place in our system of jurisprudence for an "ideology" of "state necessity," such as in totalitarian countries would soon make fundamental individual rights subservient to the alleged material advancement of the "mass." The argument of "state necessity" received a powerful set-back when Lord Camden said in *Entick* v. *Carrington* (1765), 19 St. Tri. 1029, at p. 1073:

> . . . And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

There seemed to be a suggestion that because the respondents put the appellant out of business as part of a Government policy of anti-inflation, the Courts ought not to interfere. But it is fundamental that the curbs upon inflation must be legal curbs. If any individual citizen in Canada desires to attack the validity of The National Emergency Transitional Powers Act, 1945, he has the right to do so in the Courts. It is no answer for those for the time being in control of the machinery of the State to say that it is expedient in the public interest as they regard it at the moment that he shall be deprived of that constitutional right or of any of the safeguards which accompany it.

In *Rex* v. *Brixton Prison (Governor)* (1916), 86 L.J.K.B. 62, a case involving the deportation of an alien during the first war, Low, J. said at p. 66:

> . . . I do not agree that it is for the Executive to come here and simply say, "The man is in custody, and therefore the right of the High Court to interfere does not apply, because the custody is at the moment technically legal." I say that that answer of the Crown will not do if this Court is satisfied that what is really in contemplation is the exercise of an abuse of power. The arm of the law would have grown very short, and the power of the Court very feeble, if that were the case.

Those observations were approved and added to by the Judicial Committee in *Eshugbayi* v. *Nigeria Government (Officer Administering)* (1931), 100 L.J.P.C. 153, at p. 157, where it is also of some importance to note the Governor of Nigeria had acted solely under executive powers and in no sense as a Court. Paragraph 15 (2) of P.C. 8528 is not overlooked. It reads:

> (2) No proceedings by way of injunction, mandatory order, *mandamus*, prohibition, *certiorari* or otherwise shall be instituted against any member

of the Board, Administrator or other person for or in respect of any act or omission of himself or any other person in the exercise or purported exercise of any power, discretion or authority or in the performance or purported performance of any duty conferred or imposed by or under these regulations or any regulations for which these regulations are substituted or otherwise conferred or imposed by the Governor in Council.

That provision necessarily relates at most to acts or omissions which the Board is competent to perform, and hence, in my opinion, it cannot relate to the present proceedings which attack the validity of the statute under which paragraph 15 (2) must depend for its authority. *Samejima* v. *Regem,* [1932] S.C.R. 640 may be usually referred to. It concerned a somewhat analogous prohibition contained in the Immigration Act itself. Moreover while P.C. 8528 has the force of law by virtue of section 2 (2) of The National Emergency Transitional Powers Act, 1945, that statute does not confer jurisdiction upon the Governor in Council to enact substantive law. It confers power to make procedural regulations limited to the powers the statute has given. But that statute does not attempt to give power in any form to deny access to the Courts or to restrict any of the safeguards with which the Courts may find it just and equitable to surround such access to the Court, and *cf. The King ex rel. Lee* v. *Workmen's Compensation Board* (1942), 57 B.C. 412, at p. 428.

Considerable stress was laid upon the danger of inflation as a reason for refusing the injunction until an early trial. The theory was present although not bluntly stated that once Parliament had decided the danger of inflation amounted to an economic emergency, then administrative boards could act in their sole discretion to combat inflation without being called to answer in the Courts. Examination of the language of paragraph 15 (2) of P.C. 8528 above referred to points strongly in that direction. I cannot understand that theory unless it is founded upon a denial of the "rule of law" which in turn means a denial of constitutional government. Without being exhaustive, several considerations may be mentioned.

Where sovereignty in a Federal State is divided between a central body and Provinces, it must follow, that the central body cannot, in the furtherance of some political or economic philos-

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ophy or expedient adopted by the party controlling the majority in Parliament for the time being, arrogate to itself sovereignty vested in the Provinces. If that were so there could be no divided sovereignty. Instead there would be one central body with unlimited sovereignty, while the Provinces would relapse into the *status* of municipalities possessing only such powers as the central body saw fit to leave untouched. Hence a decision of the central body that an emergency to justify invasion of Provincial sovereignty has arisen cannot be either final or supreme. Another sovereign body must be heard from, *viz.*, the Provinces. And if a controversy arises regarding sovereignty in particular circumstances it is for the Courts to decide. It has long been the practice in Canada to allow these conflicting points of sovereignty to be raised and fought out to the Judicial Committee in actions commenced by corporations or private citizens.

Moreover the "rule of law" which remains as the chief rampart of our legal system and of course our system of Government, excludes the idea of any immunity of state officials or others from obedience to the law as interpreted by the Courts, *cf.* Dicey's Law of the Constitution, 8th Ed., 198. Professor Dicey said further, pp. 198-9:

> The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequences of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; . . .

Parliament's legislation is interpreted by the Courts according to common-law principles. And see observations of Viscount Simon in 86 Sol. Jo. 127, regarding the difference between the British and the Nazi conceptions of law; *cf.* also Lord Goddard's remarks as reported in Vol. 28 of the 1945 Canadian Bar Association proceedings at pp. 136-7.

The "rule of law" preserves to us, in my judgment, the same basic constitutional rights found in written form in the Declaration of Independence and the Constitution of the United States (and cf. 86 Sol. Jo. 183). The Declaration of Independence proclaims:

> We hold these truths to be self evident that all men . . . are endowed by their creator with certain inalienable rights. . . . That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed. . . .

Self-evident truths require no proof. One of these truths is that each individual is endowed with certain inalienable rights. They are described as inalienable, that is to say they are integrated in man's very nature so that they are humanly indestructible and non-transferable *per se*. That refers to rights which the State cannot give and cannot take away. Hence Parliament may only legislate constitutionally subject to acknowledgment of those rights. As Lord Greene, M.R. put it (see 86 Sol. Jo. 183):

> The State and the ministers of the State [are] ruled by the law of the State.

These rights may be aptly described as "imprescriptible," the word used by Darling, J. speaking for the Court (Darling, Avory and Salter, JJ.) in *Tyrrell* v. *Cole* (1918), 120 L.T. 156, at p. 158.

Other inalienable rights to which the Declaration of Independence refers is that Governments derive their powers from the consent of the governed, that Governments are instituted to secure these inalienable rights and may be altered or abolished when they become destructive of those ends. It follows that the State is the creature of its citizens and its Government can only have those faculties which its citizens (not its Government or Parliament) confer upon it. That is what I think the Earl of Reading, C.J. meant when he used the phrase in *Rex* v. *Income Tax Commissioners* (1919), 89 L.J.K.B. 194, at p. 201, that "the Crown represents the public." The main reason for the existence of the State is to secure and preserve these inalienable rights. That objective is emphasized in the Declaration of Independence by conceding the right of revolution against a Government which proves to be "destructive of these ends."

So that the foregoing may not be misunderstood it may be wise to add that such rights impose reciprocal obligations which arise from each individual's social responsibilities. There is, however, a vital difference between acknowledging the existence of these imprescriptible or inalienable rights and the voluntary restriction of their use in the common good on the one hand, and the absolute denial of those rights on the other hand. Therein

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lies a sharp difference between constitutional democracy and totalitarianism. These inalienable rights so set forth in the Declaration of Independence repeat in written form the rights of life, liberty and property which stemming from Magna Charta have become part of our unwritten constitution.

It may well be, in order that Canada's true constitutional *status* may be preserved that a constitutional charter similar to the Declaration of Independence and the Constitution of the United States will be essential. No doubt it will be if the doctrine of the "Supremacy of Parliament" is pushed to the extreme mirrored in a declaration that "Parliament has power to order the destruction of all blue-eyed babies." For the law must be taken to intend what is reasonable *(Lex semper intendit quod convenit rationi)*. In the present case if the danger of inflation has created an economic emergency which is national in character, one would think, it would be so self-evident that no major obstacle would prevent co-operation between the Dominion and the Provincial sovereignties for its control.

I would continue the injunction until trial upon terms that the trial be held at the earliest available date, and that in the meantime the appellant in carrying on business as a dealer in used motor-vehicles do comply with all price-ceiling regulations of the Board.

I would allow the appeal accordingly.

ROBERTSON, J.A.: I agree with the judgment of my brother SIDNEY SMITH. I think there is another reason why the injunction should be refused: Section 2 (1) of The National Emergency Transitional Powers Act, 1945 (later referred to as the Act), provides that:

> The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of
>
> (c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace.

Subsection (2) of section 2 provides that all orders and regulations made under the Act or pursuant to authority created

under the Act shall have the force of law while the Act is in force. Under section 4 of the Act the Governor in Council without prejudice to any other power conferred by the Act, was empowered to order that the regulations made under the War Measures Act, in force immediately before the day the Act came into force, should continue in full force and effect. An order in council was passed accordingly. So that the Wartime Prices and Trade Board Regulations as established by order in council 8528 and amendments apply.

In *Re George Edwin Gray* (1918), 57 S.C.R. 150 the Court had to consider the effect of an order in council passed under section 6 of The War Measures Act, 1914, which provided that:

> The Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, . . . deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

Subsection 2 of section 6 of The War Measures Act, 1914, provided that

> All orders and regulations made under this section shall have the force of law, ...

Speaking of this decision, Sir Lyman Duff, then Chief Justice of Canada, said at p. 9 of the *Chemicals* case [1943] S.C.R. 1:

> The War Measures Act came before this Court for consideration in 1918 in *re Gray* (1918), 57 Can. S.C.R. 150, and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the authority vested in the Governor General in Council is legislative in its character and an order in council which had the effect of radically amending the Military Service Act, 1917, was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the War Measures Act may have the effect of an Act of Parliament.

Chief Justice Rinfret, with whom Mr. Justice Kerwin and Mr. Justice Taschereau agreed, referred with approval to this passage in *Reference as to the Validity of Orders in Council in Relation to Persons of the Japanese Race,* [1946] S.C.R. 248, at pp. 264-5.

The position then is that these regulations contained in P.C. order 8528 have "the effect of an Act of Parliament." Subsection (2) of section 15 of these regulations provides: [already set out in the judgment of O'HALLORAN, J.A.].

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While of course it is true that if the Act is *ultra vires* the regulations also are, yet in view of the statement in the recital to the Act that a national emergency arising out of the war continues and the wish of Parliament as expressed by the regulation, *supra,* that there should be no interlocutory interference with persons acting under the regulations and the vast importance involved in the question at issue, to the economic stability of Canada and the danger of inflation, I am of the opinion that the discretion of the Court below was properly exercised in refusing the injunction.

Subsection (*c*) of section 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

In *Barnard* v. *Walkem* (1880), 1 B.C. (Pt. 1) 120 Chief Justice Begbie said at p. 131, in refusing an injunction:

> . . . But I think we are bound to consider that at present the order prayed for probably would interfere, at a very critical moment, with the public business.

Gray, J. said at p. 140:

> Recognizing to its full extent the doctrine of public convenience as influencing the discretion of the Court in granting or refusing injunctions. . . .

I am of opinion the appeal should be dismissed.

SIDNEY SMITH, J.A.: Mr. Justice MACFARLANE in his judgment in this matter summarizes his conclusions in one sentence as follows:

> . . . In my opinion, the Court is here faced with a *fait accompli* and the application is therefore substantially for a mandatory injunction to restore and not an injunction to preserve conditions as they were before the action was taken, and I do not think I can find that the plaintiff has established or can establish before me that kind of case which would warrant me in continuing the injunction.

I agree with every word of this statement, and shall now give my reasons for my own conclusions in this regard.

At the outset there are, I think, two observations which may usefully be made. The first is that if an interlocutory injunction

(whether mandatory or restrictive) is not granted below, it is very seldom that a Court of Appeal will grant one (*Thompson* v. *Park*, [1944] K.B. 408; *Hollywood Theatres Ltd.* v. *Tenney* (1938), 53 B.C. 385). And in this case an injunction was refused below. It is true that an injunction was granted in the first place by COADY, J., but that was upon an *ex parte* application and for four days only, and therefore his order had all the inherent weakness of orders so obtained. The real argument, with both sides represented and with full material, took place before MACFARLANE, J. on the fourth day thereafter. He refused to continue the injunction and it is from his order that this appeal is taken. The second observation is that, with the exception of *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia* (1938), 53 B.C. 355, we have not been referred to any decision in which an *interim* injunction has been granted where the matter in debate involved the question of the validity of a statute. The present case affords singularly unattractive ground for a second exception of this kind, for here the impugned statute is one of the Dominion Parliament, admittedly enacted to stand off inflation and other potential evils arising directly from the late war. If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

But these considerations apart: I prefer to found my opinion upon the main issue argued before us, *viz.*, whether or not there is a clear case for a decision at the trial holding that the statute in question, namely, The National Emergency Transitional Powers Act, 1945, Can. Stats. 1945, Cap. 25, and all orders issued thereunder are *ultra vires* in the sense that they involve an invasion of "property and civil rights in the Province," as that heading is set out in section 92 (13) of the British North America Act, 1867, and so go beyond the legislative competence of the Parliament of Canada. For this purpose it will be necessary to say something about the material facts.

The plaintiff company carried on a business in second-hand cars and in conjunction therewith operated a general automobile garage business, in the course of which it repaired and reconditioned used cars bought for resale. Between the 23rd of

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November, 1944, and the 20th of March, 1946, it had been four times convicted for contravention of the Wartime Prices and Trade Board Regulations respecting purchase and sale of used motor-vehicles, and fined, on one occasion $350; on two other occasions $500; and on the remaining occasion $1,000. In view of these infractions the Wartime Prices and Trade Board cancelled the licence issued to the plaintiff in respect of the operation of its business as a dealer in used cars, entered upon the premises of the plaintiff, effected seizure of three motor-vehicles and certain books and records and prohibited the plaintiff from selling any motor-vehicles except with the concurrence of the representative of the Board at Vancouver. These steps were all properly taken under orders in council which are valid, provided that the statute itself is valid. If, however, the statute is in law *ultra vires,* it falls, and the orders in council fall with it. The single issue therefore that requires determination in the action brought by the plaintiff company against the defendants (who are members of the Wartime Prices and Trade Board, except as to one defendant, who is the representative of the Board at Vancouver) is whether the company is entitled to a declaration that The National Emergency Transitional Powers Act, 1945, and all orders in council made thereunder are constitutionally invalid.

It should be noted that the said Emergency Act is a temporary measure, coming into force on 1st January, 1946, enacted for one year only (with a proviso for a later expiration in certain events) and designed to carry on the machinery set up by The War Measures Act, 1914 (now R.S.C. 1927, Cap. 206), during the transitional period from war to peace. In section 5 it states that the war shall be deemed to be at an end on and after 1st January, 1946, for the purposes of the War Measures Act, and I take this to mean for the purposes of transferring such machinery and not otherwise.

There was much argument before us as to whether the injunction sought to be continued was of a mandatory nature. Prior to the action taken by the Board the company had been doing business as a used-car dealer under the authority of a permit duly issued by the Administrator of Motor Vehicles and Parts and

which was expressed to be "not transferable and subject to cancellation without prior notice." At the time when the injunction was granted, and indeed at the date of issue of the writ, the entry seizure and the cancellation of this permit had been effected. It thereby became illegal for the company to do business as a dealer in used cars, for it must be presumed that these acts were done properly and under lawful authority. The company could then only resume doing such business by obtaining a new permit, and that end could only be achieved by the Court ordering the defendants to give such new permit; in other words, by the issue of a mandatory injunction directed to the defendant. It cannot avail the company to colour this legal position by saying that all that is sought is an order restraining the defendants from prosecuting the company for doing business without a licence. The Court will not make an order which will have the effect of countenancing illegality; nor will it enter into bargains with wrong-doers.

In a case of this kind he who seeks, as here, an *interim* mandatory injunction must satisfy the Court that there is a serious question to be tried at the hearing, and that he is clearly in the right (*Bain* v. *Bank of Canada and Woodward* (1935), 50 B.C. 138; *Toronto Brewing and Malting Co.* v. *Blake* (1882), 2 Ont. 175, at p. 183; Halsbury's Laws of England, 2nd Ed., Vol. 18, par. 51, p. 35). It was pressed upon us that the plaintiff had discharged this *onus,* and reliance was placed upon certain pronouncements of the Judicial Committee in the recent case of *Attorney-General for Ontario* v. *Canada Temperance Federation,* [1946] 2 W.W.R. 1, which it was claimed in effect overruled certain contrary passages in the judgment of the Judicial Committee in *Fort Frances Pulp and Paper Co.* v. *Manitoba Free Press Co.,* [1923] A.C. 695. The latter case followed the first Great War and declared *intra vires* The War Measures Act, 1914 aforesaid and orders in council made thereunder for controlling throughout Canada the supply of newsprint paper and its price, and also declared *intra vires* a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace. There is therefore striking similarity between the legislative measures adopted then and

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now, to cover the respective transitional periods from war to peace. Such variance as there may be, for instance, that involved in contrasting section 3 of the War Measures Act with section 2 of the Emergency Act, seems to me to be one of degree and not of principle; for the emergency contemplated in the latter section may be of such a nature that it would require to be dealt with by measures looking to the security, defence, peace, order and welfare of Canada in the sense in which these words are used in section 3 of the War Measures Act.

In delivering the judgment of the Judicial Committee Viscount Haldane used this language (p. 706):

> When war has broken out it may be requisite to make special provision to ensure the maintenance of law and order in a country, even when it is in no immediate danger of invasion. Public opinion may become excitable, and one of the causes of this may conceivably be want of uninterrupted information in newspapers. Steps may have to be taken to ensure supplies of these and to avoid shortage, and the effect of the economic and other disturbance occasioned originally by the war may thus continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be entertained is one on which a Court of law is loath to enter. No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton* v. *Kentucky Distilleries Co.*, [(1919)] 251 U.S. 146.

In my view it is quite impossible to believe that their Lordships of the Judicial Committee, when delivering judgment in the *Temperance* case, overlooked this passage in the *Fort Frances* case, still less that they intended to overrule it. Had such been their intention, one would expect that they would at least have mentioned the case and would have said so. But no reference whatever was made to the former authority; I think for the good reason that it never occurred to their Lordships that it

might be thought that they were enunciating principles inconsistent with the pronouncements therein contained. It is no doubt correct that there are passages in the *Temperance* case which, standing by themselves, would seem to point to such an inconsistency. These were properly referred to by counsel for the company in his forceful argument. In particular, he directed our attention to these remarks made by Viscount Simon at p. 6, [[1946] A.C. at p. 205]:

> The first observation which their Lordships would make . . . . . is that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the provincial legislatures merely because of the existence of an emergency.

And a little further on at p. 7, [[1946] A.C. at p. 206]:

> True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

But it is a commonplace that a judgment, like every other document in writing, must be read as a whole, and every part of it read in the light of the whole. These passages must therefore be considered with the following paragraph from p. 6, [[1946] A.C. at pp. 205-6]:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in *In re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 and *In re The Regulation and Control of Radio Communication in Canada*, [*ib.*] 304, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen*, [(1882)] 7 App. Cas. 829, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

Can it be said, in the light of this last passage which is in consonance with the principles enunciated in the *Fort Frances* case, and in view of the fact that the necessity for this present legislation was occasioned by the recent war and the gravity of

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the problems arising in this immediate post-war period, and that the legislation itself is apparently grounded upon what was said in the *Fort Frances* authority, that the trial Court would consider this a clear case for holding that the Act in question goes beyond the competence of the Dominion Parliament? As at present advised I am unable to think so. The question is for the trial Court and it is undesirable that anything further be said upon it in the present appeal, which in my opinion should be dismissed.

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

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

Solicitors for respondents: *Locke, Lane & Sheppard.*

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April 30;
May 1, 2;
June 18.

MACKAY AND MACKAY v. TAIT AND SHERMAN.

Negligence—Evidence—Question for jury—Breach of statutory duty—Can. Stats. 1932, Cap. 42.

The plaintiffs, who are fishermen, brought action for damages done to their nets by the alleged negligence of the defendants while the nets were under seizure, and in their possession. The seizure was made on account of a violation of section 11 (1) of the Special Fishery Regulations for British Columbia which requires, *inter alia*, that the buoys of all nets shall have the fishermen's initials and licence numbers inscribed thereon. On May 12th, 1944, the plaintiffs, with two fishing-vessels and eleven gill nets, were fishing for dogfish near Pender Harbour. They were approached by a patrol vessel in charge of the defendant Sherman, a fishery officer, who told them they were guilty of a breach of the fishery regulations and he seized their nets and piled them on the deck of the patrol vessel (two of the nets were left behind but were picked up the next day). The patrol vessel then went to Nanaimo arriving on the 14th of May when they were handed over to the defendant Tait, the chief fishery officer who on the next day removed the nets and placed them on the railing of the approach to the Pacific Biological Station wharf where they remained until May 30th, 1944, when, at the instance of Tait, they were returned to the plaintiffs at Pender Harbour. In an action for damages for seizing and retaining their nets, for not piling them properly on the patrol vessel so as to prevent overheating and not

putting them in brimstone to prevent rotting and also preventing them from following their occupation as fishermen. Seven questions were put to the jury, the first four dealing with whether the plaintiffs' boats and nets were marked in accordance with section 11 (1) of the regulations and if not, whether the defendant Sherman had reason to believe that there was a breach of this regulation. The answers were that they were not so marked and that Sherman was right in thinking that there had been a breach of the regulations. Questions 5, 6 and 7 dealt with the amount of the damages which were found at a total of $2,042.80 and for which judgment was entered.

Held, on appeal, reversing the decision of COADY, J. (O'HALLORAN and SIDNEY SMITH, JJ.A. dissenting), that the point upon which the appellants must succeed is that there is no finding of negligence. Upon the jury awarding damages, they might have attributed negligence to both defendants or one or other of them. Assuming there is implicit in the last answer of the jury a finding of negligence, it is not possible to ascertain in what the negligence consisted or whether it was that of Sherman or Tait or both. But the Court is strictly restrained to the facts found by the jury and stated in the special verdict. There must be a new trial.

APPEAL by defendants from the decision of COADY, J. of the 17th of December, 1945, and the verdict of a jury in an action for the wrongful and negligent acts of the defendants in seizing and retaining the fishery licences, nets and other fishing accessories of the plaintiffs and thereafter through the negligence of the defendants in not taking proper or reasonable care of the nets and fishing accessories and permitting them to deteriorate and decay and rot and thereby become valueless and of no further use and preventing the plaintiffs from following their occupation as fishermen. The plaintiffs reside at Pender Harbour. On May 12th, 1944, they employed two boats and gill nets in fishing for grayfish (known as dogfish) near Pender Harbour. They did not have their initials and fishing-licence numbers on the buoys attached to their fishing-nets, which was a violation of the requirements of the Special Fishery Regulations made under The Fisheries Act, 1932, and under section 64 of said Act for such violation the nets were liable to confiscation. Late in the morning of that day the defendant Sherman, a fishery officer, arrived in the patrol vessel "A. P. Knight" and seized and stowed aboard his vessel nine fishing-nets with gear in that they were being used in illegal fishing, and on the following day two more

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nets were seized and stowed aboard the vessel. On May 14th the "A. P. Knight" went to Nanaimo where the nets were removed from the vessel and, with the exception of one, were placed on the railing of the approach to the Pacific Biological Station wharf, the remaining net being placed on the railing the following day. On the instructions of the defendant the chief fishery officer Tait, all the nets were returned to the plaintiffs at Pender Harbour on May 30th, 1944. Following the trial with a special jury the following verdict was rendered:

1. Did the buoys attached to the nets used by each plaintiff have the initials of that plaintiff thereon? No.

2. Did the buoys attached to all nets used by each plaintiff have marked thereon the fishing-licence number of each plaintiff by whom the nets were used? No.

3. Did the boat used by each plaintiff have the fishing-licence number of that plaintiff marked thereon? No.

4. If the answer to the preceding questions or any of them is in the negative, did the defendant Sherman have reason to believe at the time of seizure that the plaintiffs were fishing in breach of the regulations? Yes.

5. What loss or damage, if any, was sustained by the plaintiffs arising from the depreciation in the value of the nets after seizure and before delivery of the nets to the plaintiffs? $1,642.80.

6. What loss or damage, if any, was sustained by the plaintiffs in being deprived of the use of their fishing-gear? $400.00.

7. Total damages? $2,042.80.

The appeal was argued at Victoria on the 30th of April and 1st and 2nd of May, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

J. A. Macdonald, for appellants: Counsel for respondents improperly told the jury that the respondents had been found "not guilty" by a magistrate of the alleged violations of the fishing regulations. Any alleged decision by a magistrate is not binding on the appellants: see *Wright* v. *Hearson,* [1916] W.N. 216; *Lee Yee* v. *Durand,* [1939] 2 D.L.R. 167, at p. 173; *Gowar* v. *Hales,* [1928] 1 K.B. 191, at p. 197; *Reg.* v. *Corby* (1898), 1 Can. C.C. 457. The findings of the jury in answers to questions 5, 6 and 7 should be set aside because this Court is unable to say the appellants were not prejudiced by the evidence improperly received: see *Pirie* v. *Wyld* (1886), 11 Ont. 422, at p. 430. The charge was erroneous as to the care that should be taken of the nets. When they are

seized for illegal fishing they are compelled to seize and confiscate them under section 64 of the Act. There was insufficient direction as to the manner of stowing and caring for the nets on the vessel after seizure. The officers were not under a duty of care to the respondents regarding the nets.

Castillou, K.C., for respondents: A public officer is liable for misfeasance and non-feasance: see *Barry* v. *Arnaud* (1839), 10 A. & E. 646. The case was properly placed before the jury and by their answer to question 5 found that the defendants did not exercise proper and reasonable care under the circumstances. During the time the nets were on the vessel the weather was warm and the wet nets would depreciate and start to rot. The defendants admitted there was no intention to confiscate. They made the seizure for their own advantage as against the plaintiffs and in no better position than the defendant in *Hall* v. *Moss et al.* (1866), 25 U.C.Q.B. 263; *Corse* v. *The Queen* (1892), 3 Ex. C.R. 13. As for the duty of a bailee see Beal on Bailments, 55 to 62; *Palin* v. *Reid* (1884), 10 A.R. 63; *Doorman* v. *Jenkins* (1834), 2 A. & E. 256, at pp. 261-2; *Grill* v. *General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600, at p. 612; *Wilson* v. *Brett* (1843), 11 M. & W. 113, at p. 115. As to the dismissal of the charge against the plaintiffs, they were entitled to show the circumstances under which the nets were taken and what occurred as a result thereof. The following cases are referred to: *Lewis* v. *Kirby* (1845), 1 U.C.Q.B. 486; *Page* v. *Rattcliff* (1832), 1 L.J.C.P. 57; *Mason* v. *The King,* [1933] Ex. C.R. 1; *Smith* v. *Standard Trusts Co.,* [1918] 3 W.W.R. 762; *Boyd & Company* v. *Smith* (1894), 4 Ex. C.R. 116, at p. 127; *Carter* v. *Nichol* (1911), 1 W.W.R. 392; *Rogers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. 209; Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 489, par. 602 and Vol. 10, p. 136, par. 173.

Macdonald, replied.

Cur. adv. vult.

18th June, 1946.

Sloan, C.J.B.C.: I agree with my brother Robertson.

O'Halloran, J.A.: The appellant fisheries officers seized the

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nets of the respondent fishermen while the latter were fishing for dogfish in the Gulf of Georgia, as they had reason to believe the respondents were not observing fishing regulations in force under The Fisheries Act, 1932, Cap. 42, Can. Stats. 1932, and amending Acts. The appellants returned the nets to the respondents some 18 days after seizure and a few days before the hearing of the charges against the respondents for illegal fishing were heard and dismissed.

Alleging that their nets had been damaged through the negligence of the fisheries officers while in their custody, the respondents commenced this action for damages, and after a four-day trial before COADY, J. and a special jury, they recovered judgment for $2,042.80 damages, $1,642 being for depreciation in value of the nets and $400 for loss of use of fishing-gear. Counsel for the appellants attacked the verdict and judgment on a number of grounds. I am in entire agreement with my brother SIDNEY SMITH in his statement of the facts and reasons for judgment. I find it unnecessary to discuss anything else than the issue which I think has developed into the determining point in the decision of this Court, *viz.*, that aspect of the appeal which concerns the adequacy or sufficiency of the questions (and answers thereto), which the learned judge submitted to the jury, after their acceptance by counsel for both parties.

The questions and answers read as follow:

"1. Did the buoys attached to the nets used by each plaintiff have the initials of that plaintiff thereon? No.

2. Did the buoys attached to all nets used by each plaintiff have marked thereon the fishing-licence number of each plaintiff by whom the nets were used? No.

3. Did the boat used by each plaintiff have the fishing-licence number of that plaintiff marked thereon? No.

4. If the answer to the preceding questions or any of them is in the negative, did the defendant Sherman have reason to believe at the time of seizure that the plaintiffs were fishing in breach of the regulations? Yes.

5. What loss or damage, if any, was sustained by the plaintiffs arising from the depreciation in the value of the nets after seizure and before delivery of the nets to the plaintiffs? $1,642.80.

What loss or damage, if any, was sustained by the plaintiffs in being deprived of the use of their fishing-gear? $400.00.

7. Total damages? $2,042.80.

Upon counsel for the respondents-plaintiffs moving for judg-

ment accordingly, the learned judge asked counsel for the appellants-defendants if he had anything to say. The latter replied "I have not, my Lord," whereupon judgment was directed to be entered for $2,042.80 and costs, and the jury was discharged.

A glance at the recited questions reveals the jury were not asked if the damage complained of was caused by the negligence of the defendants, and if so, in what it consisted. The point now to be considered is whether questions 5 and 6 must be regarded as a failure to find negligence, or whether the "missing" questions and appropriate answers thereto supporting the award of damages, ought to be regarded as implicit in the answers to questions 5 and 6 as undeniably reflecting an affirmation that the respondents' damages were caused by the negligence of the appellant-defendants, under the authority of such decisions as *Scott* v. *Fernie* (1904), 11 B.C. 91 and two appeals from this Court, *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 and *Canada Rice Mills, Ld.* v. *Union Marine and General Insurance Co.*, [1941] A.C. 55.

It is fundamental that the interpretation of questions to the jury and their answers thereto is not restricted by the mere words in which these questions and answers may be couched. Words are vehicles of meaning. They are not self-contained things. As Anglin, J. put it in *British Columbia Electric Rway. Co.* v. *Dunphy, supra,* at p. 271, the jury's findings must always be read with and construed in the light of the issues raised in the pleadings, the evidence adduced at the trial, and the trial judge's charge to the jury. It is to these three antecedents we must look in order to learn what the questions mean, and what the jury meant in answering the questions as they did. What has happened in this case arose through no fault of the jury. Nor did it arise through misdirection or non-direction of the jury on the question of negligence. The jury answered the questions they were given to answer. If those questions reflect imperfectly a clear-cut issue which was presented for their decision in a correct charge, then with respect, we have in aggravated form a situation which the principle stated by Anglin, J. was designed to remedy without the delay and expense of a new trial.

Not only was the case for the respondents formulated in the

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pleadings and developed at the trial as an action for negligence, but the learned judge in his instructions to the jury left them in no uncertainty that it was a dominating issue for their decision. In my opinion, with respect, it was rationally impossible for the jury to answer questions 5 and 6 as they did without basing those answers upon their prior conclusion that the respondent-plaintiffs' damages were caused by the negligence of the appellants. The pleadings leave no doubt it is an action for negligence. The issue of negligence, *viz.*, whether what the fisheries officers did or did not do with the nets while in their custody, constituted reasonable care in the circumstances, was canvassed in the evidence in considerable detail. Study of the appeal book convinces me that neither the judge, the special jury nor counsel for both parties, could have had the slightest doubt, that in the case as it was presented by both counsel, the plaintiff-respondents claimed damages for negligent care of the fishing-nets, and that they could not succeed, if they failed to prove to the satisfaction of the special jury, that the damage to the fishing-nets was caused by the failure of the fisheries officers to take reasonable care of the nets while in their custody. That describes the course and trend of the trial.

The atmosphere of the trial was so thick with the issue of negligence, that a jury, and more particularly a special jury, could not overlook its preponderating significance. That issue had so infiltrated and permeated the case, that in consequence, it could not escape likewise infiltrating and permeating their answers to the questions submitted to them. The issues of fact for the jury to determine become clear during the course of the trial. The questions submitted to the jury, although not as explicit as one would expect, nevertheless were accepted by judge and both counsel in the atmosphere of the trial as so sufficiently reflecting the issue of negligence before the jury that it evidently did not occur to anyone that what was so obvious to them, might perhaps not be so obvious when examined in the cold printed record before an appellate Court.

The learned judge charged the jury consistently with the pleadings and the evidence. The jury were told in the first words of the charge that the action was based on negligence.

This was repeated and negligence was defined. The learned judge again referred to the plaintiffs' claim based on negligence. The evidence of the defendants was discussed. The jury were instructed that on that evidence it was for them to find whether there was a failure on the part of the fisheries officers to do that which reasonable men in the circumstances would have done to preserve the nets from damage. The plaintiffs' evidence was discussed particularly in respect to "bluestoning" (for the purpose of preserving the nets) and ordinary neglect was defined. The learned judge told the jury specifically that they must find the fisheries officers negligent before they could award damages, and I stress that excerpt from the learned judge's charge cited in the judgment of my brother SIDNEY SMITH. When that excerpt is read with the above references and considered in the light of the whole of the charge, there is no room for doubt in my mind at least, that the jury were fully and adequately charged on the issue of negligence and the relevant evidence thereon, and also that the jury were charged in language so expressive and definite that they could not have failed to have appreciated that they could not award damages in answer to questions 5, 6 and 7, unless they first found that the defendants were negligent.

When the judge's charge is thus examined the answers to questions 5 and 6 contain an implicit finding of negligence. These questions in the light of the trend and atmosphere of the trial and the judge's charge, must be read as if the words, "if you find the defendants negligent," had been inserted at the beginning of questions 5 and 6. I am unable to resist the firm conclusion that the special jury could not in the light of the judge's charge have understood questions 5 and 6 to read in any other way. For example, it happens occasionally that the word "not" is left out in a sentence in an appeal book before this Court, but it is plain nevertheless from the immediate context or from what went before, that it has been left out in some unaccountable way. Such lapses in language do not mislead a Court of Appeal which is not concerned with patent discrepancies of a purely verbal character.

Another and perhaps more apt illustration is that of an implied term in a contract. The test as to whether such a term may be

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implied is thus graphically described by the late Lord Justice MacKinnon in *Shirlaw* v. *Southern Foundries (1926), Ld.*, [1939] 2 K.B. 206, at p. 227:

> " . . . if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!' "

And *cf. Silver* v. *Cummins* (1940), 55 B.C. 408, at p. 419. The form of the questions was discussed at pp. 374 to 386 of the appeal book, before counsel addressed the jury. That discussion so far as it relates to questions 5, 6 and 7, is necessarily based on the premise (in the light of the pleadings and the evidence) that negligence must first be found before damages could be given, or to put it another way, an award of damages would carry with it the inevitable inference that negligence was first found, and see particularly remarks of appellants' counsel at p. 381.

Moreover, counsel for the respondents-plaintiffs raised the specific question during the discussion on the form of the questions. He asked the learned judge: "Should not there be a question about reasonable care?" But the learned judge said "That will be gone into when I explain the law to the jury." The only rational explanation that interchange conveys is, that (a) since negligence is lack of reasonable care which causes damage, and (b) since questions 5 and 6 concern damages sustained by plaintiffs, therefore (c) the judge would instruct the jury that they could not find damages unless they first found lack of reasonable care. With respect, I feel there is no doubt about this, since that is exactly what the learned judge did in his charge to the jury at p. 431 in the excerpt quoted by my brother SIDNEY SMITH, and *cf. Seaton* v. *Burnand*. *Burnand* v. *Seaton*, [1900] A.C. 135, Lord Robertson at p. 149.

That is reflected also by the attitude of appellants' counsel. When plaintiffs' counsel moved for judgment upon the verdict of the jury, appellants' counsel did not object there was no finding of negligence. The learned trial judge asked him if he had anything to say to which he replied "I have not, my Lord." The objection to the form of the questions is not taken in the notice of appeal, nor is it found in the appellants' factum. The question was raised for the first time when the suggestion that a vital

question appeared to be missing emanated from this Court early in the argument. Appellants' counsel then did not immediately take the point, but later on did so when pressed to say whether he was or was not taking the point. At that stage of the argument this Court was not familiar with the pleadings, the evidence, and the judge's charge, for it had no sufficient opportunity then of reading the questions and answers in the light of those governing elements in their construction.

In my judgment the jury were not left under any erroneous impression whatever as to the real nature of the issues which they had to determine, nor were they at all led to think they were entitled to find for the plaintiffs unless they were of opinion that the negligence of the defendant fisheries officers caused the damage to the nets (and *cf. Jones* v. *Canadian Pacific Railway* (1913), 83 L.J.P.C. 13, Lord Atkinson at p. 20). Questions 5 and 6 were the only vehicles by which they could express their findings upon the issue of negligence. Although those questions were not as expressive verbally, as one would wish, nevertheless it was reasonably clear to all concerned what they meant. The answers to those questions must be read as if they were answers to questions which had fully expressed what everyone at the trial, judge, special jury and counsel, knew was fully implied in them.

This is not a case of the jury failing to answer a question submitted to them (*cf. McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43), or a conflict or inconsistency appearing in the questions or their answers, or a vague or ambiguous answer to a question, or an answer contrary to the evidence, or an answer based on some misdirection or non-direction in the charge leading the jury to misconceive the issues. Everything in the case, pleadings, evidence and judge's charge, combines to point one way, and one way only, *viz.*, that negligence was a dominant issue, no matter what the answers to the first four questions might be, and that the jury could not find damages without first finding negligence in the defendants. As Duff, J. put it in the passage quoted by my brother SIDNEY SMITH from *British Columbia Electric Rway. Co.* v. *Dunphy,* the answers are equivalent to an affirmation that the damage was caused by the defendant's negligence, because the instructions in the judge's

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charge were quite sufficient to enable the jury intelligently to return a general verdict.

In my judgment because of the specific nature of the learned judge's charge and the discussion upon the form of the questions before counsel addressed the jury, there is stronger ground to imply a finding of negligence in the jury's answers in this case than there was in the *Canada Rice* case, [1941] A.C. 55 to imply a finding of a causal *nexus* which the jury were not asked expressly to find. In that case (p. 64) the jury were asked, (6) if the damage was due to heat caused by the closing of the ventilators (Answer: Yes.). Next (7) Was the closing of the ventilators the proximate cause of that damage? (Answer: Yes.), and (8) Was the weather and sea during the time the ventilators were closed a peril of the sea? (Answer: Yes.). But the jury were not asked if the closing of the ventilators was caused by a peril of the sea. This Court decided that what the jury held to be the cause of the damage, *viz.*, the closing of the ventilators, was not in itself a peril of the sea, and hence the plaintiffs could not recover ((1939), 53 B.C. 440, at pp. 454, 457 and 459). The Judicial Committee reversed that decision and held (p. 70) as they considered the special jury had found by implication, that the closing of the ventilators was not a separate or independent cause interposed between the peril of the sea and the damage, but was a matter of seamanship necessitated by the peril and consequently that the damage was a direct result of the peril.

I think there are fewer obstacles in the way of implying the "missing" questions here than in the *Canada Rice* case. It does not appear that the trial judge there brought to the jury's notice that the closing of the ventilators could be regarded as a direct result of a peril of the sea (wind and weather). Here the learned judge specifically directed the jury that they could not find damages unless they first found negligence. In the *Canada Rice* case Lord Wright (p. 66) said:

> . . . The judge in summing-up directed the jury's special attention by putting question 8, to the fact that the policy insured the plaintiff against damage . . . arising from perils of the sea.

Continuing, Lord Wright said:

> Thus the idea of causal *nexus* was brought to their minds.

That seems to imply the only direction the jury received in that

respect was contained in the question itself, and that the "idea of causal *nexus*" of which the jury were thus informed was contained solely in question 8. In short, in this case the *nexus* between cause and effect was bridged by a specific and clear direction to the jury, whereas in the *Canada Rice* case it was not, for as was said in this Court (53 B.C. at p. 456) the jury were unassisted by the direction of the trial judge on this aspect of the case.

Strong as the *Canada Rice* case is in the respondents' favour, *Scott* v. *Fernie* (1904), 11 B.C. 91 seems even stronger. In that case the questions to the jury did not include the two questions which are said to be "missing" here. In their answers the jury found the existence of the defect complained of and also the causal relation between that defect and the injury. But they did not find negligence as that question was not asked. DUFF, J., subsequently Sir Lyman P. Duff, C.J., at p. 95 in giving the judgment of the old Full Court (HUNTER, C.J., MARTIN and DUFF, JJ.) said that the jury's verdict left the question of negligence untouched and was therefore in itself formally inadequate to support the claim, and then continued:

> To get a just conception of the effect of this verdict, however, one must not examine the findings *in vacuo;* one must view them through the atmosphere of the trial; it then becomes at once apparent that the issues for the jury were limited to the issues embodied in the questions submitted to them; and, in substance, the defendant's negligence was regarded, and treated by all parties, as an inference inevitably arising from the existence of the defect charged; a finding of the existence of the defect involving, therefore, a finding of negligenec.

The reason for regarding the finding of negligence as an inevitable inference from a finding of damages, is so much stronger in the case at Bar, because the trial judge told the jury that they must find lack of reasonable care before they could award damages. The case went to the jury on that basis. In Taylor on Evidence, 12th Ed., Vol. 1, p. 493, 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 case as to lead to an inference that a certain fact is admitted between them, the Court or the jury may treat it as proved. . . .

Analogously the conduct of the case by both counsel, confirmed

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by the judge's charge, led the jury to believe that it was admitted or accepted between counsel that if they awarded damages in answer to questions 5 and 6, that such an award carried with it all essential prior findings including a finding of negligence, the dominant issue; and *cf. Scott* v. *Fernie, supra,* at p. 97.

Once the conclusion is reached that negligence is necessarily implied in the jury's finding, it is of no real import in the circumstances of this case that no question was asked regarding the particulars of that negligence. Once a jury finds negligence under the conditions of this case, their verdict is not affected by the fact that they were not asked to specify in what it consisted. That applies even where the question is asked but is answered vaguely. In *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263 the question was asked but the jury's answer was in itself vague and uncertain. Duff, J. at p. 269 said in effect that in view of the jury's finding of negligence there was no practical difficulty in giving their finding the effect of a general verdict,

> because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict.

Nor is it overlooked that appellants' counsel submitted that the learned judge misdirected the jury in instructing them that it was for them to decide whether under the circumstances appellants' failure to "bluestone" the nets constituted lack of ordinary care. At the trial, appellants' counsel asked the learned judge, who, with respect, properly declined to do so, to charge the jury that the appellants were not under any duty to "bluestone" the nets, and also that if appellants' failure to "bluestone" the nets caused the damage, then the appellants could not be held liable therefor. I thought at first this was founded upon a proposition that the appellants possessed certain confiscatorial or other powers under the Fisheries Act, which in the circumstances in evidence, relieved them of the duty of taking ordinary care of the nets after seizure. In so far as that proposition is concerned, I would reject it for reasons given in the judgment of my brother SIDNEY SMITH.

But it is to be rejected also if it is capable of being broadened into a legal proposition that "bluestoning" was not ordinary, but

extraordinary care, and hence that the learned judge on that ground ought to have instructed the jury that failure to "bluestone" could not render the appellants liable. It was not explained satisfactorily upon what ground the learned judge ought to have instructed the jury as a matter of law that "bluestoning" was extraordinary care. At best, that was a matter of evidence for the jury.

The learned judge complied with the law by instructing the jury that it was the duty of the fisheries officers to take ordinary care of the nets while in their possession. He summarized to the jury what the appellants testified they had done with the nets while in their possession, and instructed the jury it was for them to decide whether or not, if they believed that evidence, that it constituted lack of ordinary care. The learned judge pointed out specifically that the appellant Sherman said he did not "bluestone" the nets because he did not consider it was necessary to do so, since there were no fish in them when seized. Whether or not "bluestoning" was necessary in the circumstances, and whether it came within ordinary care, was solely a matter for the jury. It all came within the standard of duty or degree of care required in the circumstances, a matter within the province of the jury, and not of the judge, to decide.

In *Indemaur* v. *Dames* (1866), L.R. 1 C.P. 274 the question whether Indermaur was an "invitee" when he was injured (thereby involving the degree of duty) was left to the jury by Willes, J. The Court of five judges on the rule *nisi* unanimously held it was properly left to the jury and that view was sustained in turn without division in the Court of Exchequer Chamber, and see (1867), L.R. 2 C.P. 311. In *Lochgelly Iron and Coal Co.* v. *M'Mullan* (1933), 102 L.J.P.C. 123, Lord Wright said at p. 131 that whereas statutory duty is conclusively fixed by the statute

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

Again in *Caswell* v. *Powell Duffryn Associated Collieries, Ld.*, [1940] A.C. 152, Lord Wright observed at p. 176 (adopted by Sir Lyman P. Duff, C.J., in *The King* v. *Hochelaga Shipping & Towing Co. Ltd.*, [1940] S.C.R. 153, at p. 156):

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. . . The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury. . . . It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time.

I would dismiss the appeal.

ROBERTSON, J.A.: The appellants are fishery officers under the provisions of The Fisheries Act, 1932, Cap. 42, Can. Stats. 1932. The plaintiffs (respondents) are fishermen. On May 12th, 1944, the respondents were fishing for grayfish near Pender Harbour, British Columbia. They did not have their initials and fishing-licence numbers on the buoys attached to their fishing-nets, in violation of section 11, subsection 1 of the Special Fishery Regulations for the Province of British Columbia, as adopted by order in council under the authority of The Fisheries Act, 1932, Sec. 34. This regulation reads in part as follows:

Section 11—MARKING OF BOATS AND NETS

1. All nets and fishing boats shall bear numbers corresponding with those of the licences under which they are operated, and each boat shall have the initials of the licensee and the number of his licence painted on both sides of the bow, or on both sides of the pilot house or deck cabin (on the boat itself and not on anything affixed thereto, so as to permit it being removed from the boat) in black on a white ground, the figures and letters to be not less than six inches in height, and each net shall have its number and the initials of its licensee legibly marked on buoys of wood or metal, painted white and floating in the water attached to each end of the net, and such numbers and initials shall be permanently kept on such boats and nets throughout the fishing season, and shall be so placed as to be visible without taking up the nets, and any boat or net used without such marks shall be liable to seizure and confiscation. . . .

On the 12th and 13th days of May, 1944, Sherman seized the respondents' nets, stowed them aboard the fishery vessel "A. P. Knight" and took them to Nanaimo on the 14th of May, 1944. On the 15th and 16th days of May, 1944, the fishing-nets were placed on the railing of the approach to the Pacific Biological Station wharf at Nanaimo. All the nets of the respondents were returned to them at Pender Harbour on May 30th, 1944.

The respondents commenced this action on September 30th, 1944, claiming damages from the appellants for seizing and

retaining their nets and for their negligence in not piling the nets properly so as to prevent them from overheating and not putting the nets in brimstone to stop them from rotting and in not hanging the nets in proper places so that they would not rot thus causing or permitting them to decay and rot and become valueless to the respondents, and also thereby preventing the respondents from following their occupation as fishermen. The evidence shows that at the time the nets were seized they were clean. When they were returned to the respondents there was a great deal of seaweed in them. There was also evidence by the respondents that the nets were not properly piled on the "A. P. Knight" and evidence to the contrary on behalf of the appellants. The evidence showed that failure to bluestone, or improper piling, or this seaweed would cause the nets to rot.

The questions submitted to the jury, and their answers are as follow: [already set out in the statement and the judgment of O'Halloran, J.A.].

Judgment was given for the plaintiffs for $2,042.80. The appellants appeal on various grounds. One is that there was no evidence against the appellant Tait. There was evidence (if believed by the jury), in my opinion, to support a finding that Tait was responsible for the damage. While it is true that Sherman was the officer who was in charge of the "A. P. Knight" and of the seizure, yet when the nets were taken to Nanaimo, Tait took charge and it was under his instructions that the nets were placed on the railings. While it was not possible for the respondents to give direct evidence as to how the seaweed got into the nets, it was open to the jury, upon the evidence, to find that these nets were stowed, under Tait's direction, in such a position on the railings that the rising tide would reach the nets and deposit seaweed in them which would cause them to rot.

It was first submitted that there was no duty upon the appellants to do more than retain possession of the nets; that there was no duty upon them to brimstone the nets or to properly stow them on the ship or on the railings so that they would not be damaged, or to take any steps which required the expenditure of money to protect them. It is clear that the nets were not brimstoned. No case in point was cited by either side on this

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submission. In my view a duty lay upon the appellants to do all that was reasonably necessary to protect the nets. It seems to me their position was the same as a bailiff levying a distress. Williams' Canadian Law of Landlord and Tenant, 2nd Ed., at p. 298, quotes from Co. Lit. 47 b:

> Household goods and other things liable to damage from the weather, . . . , should be put in a pound covert.

Woodfall on Landlord and Tenant, 24th Ed., at p. 435 says the same thing; and at p. 436 refers to two cases. These show a distrainer is liable for injury to animals in consequence of the unfit state of the pound at the time of impounding. They are *Wilder* v. *Speer* (1838), 8 A. & E. 547 and *Bignell* v. *Clarke* (1860), 5 H. & N. 485.

The main point upon which the appellants sought to set aside the judgment was based upon section 64, which provided that all nets used in violation of the Act or any regulation made thereunder, or in connection with which a violation of the Act, or any regulation thereunder, was committed,

> shall be confiscated to His Majesty and may be seized and confiscated, on view, by any fishery officer, or taken and removed by any person for delivery to any fishery officer or justice of the peace.

It is submitted that the mere violation of the regulation created, thereby, a confiscation so that when the officers seized the nets they were already confiscated to His Majesty and therefore any damage to the nets would be damage to the property of His Majesty and not of the respondents.

There is no section in the Act containing the provisions set out in the regulation, *supra*. The argument overlooks the fact that section 34 (2) of the Act provides that

> such regulations shall have the same force and effect as if enacted herein.

The regulation provides that where a violation which is charged here takes place, the

> net used without such marks shall be liable to seizure and confiscation.

In other words, then, you have, in effect, in this Act two sections—one, 64, which deals generally with breaches of regulations, and the regulation mentioned, which imposes a duty upon the licensee with regard to nets, and for a violation of such duty a liability to confiscation. The regulation is in the position of a special section in the Act dealing with the matter in question,

and must govern. The mere violation of the regulation then did not thereby create a confiscation.

The point upon which I regret the appellants must succeed is that there is no finding of negligence. It is said that in view of the judge's charge as to negligence, the jury could only have awarded damages if they found the appellants had been negligent; and the jury having given damages, must have so found. I cannot agree with this submission. Upon the evidence the jury might have attributed negligence to both defendants or to one or other of them, depending on whether the jury found that the damage to the nets was caused during the period in which one or other had sole custody, by a negligent act or omission of that defendant, or whether the damage was caused by negligent hanging of the nets at the Biological Station by Sherman, pursuant to Tait's direction.

Assuming for the moment that there is implicit in the last answer of the jury a finding of negligence, which I think there is not, I do not find it possible to ascertain from this answer in what the negligence consisted, or whether the negligence was that of Sherman or Tait individually, or that of both combined.

But this Court, upon well recognized principles of law, is strictly restrained to the facts found by the jury and stated in the special verdict:

Downman v. *Williams* (1845), 7 Q.B. 103, at p. 109, except it is not necessary to have an opinion of the jury upon any fact where there is no dispute between the parties as to the truth of that fact. See *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155, at p. 1201. Under Court of Appeal Rule 5, notwithstanding the failure of the jury to include a finding of negligence in their verdict, this Court has power to draw "an inference of fact" that there was such negligence and make such further or other order as the case may require. See *Canada Rice Mills, Ld.* v. *Union Marine and General Insurance Co.*, [1941] A.C. 55, at p. 65. But that cannot be done in this case because the evidence as to negligence is not of such a character that only one view can reasonably be taken of the effect of it. See *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, at p. 53.

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As a result there must be a new trial. The appellants are entitled to their costs of the appeal. The costs of the trial are to abide the result of the new trial.

SIDNEY SMITH, J.A.: The plaintiffs (respondents in this appeal, and father and son) are fishermen and reside at Pender Harbour. The appellants Tait and Sherman (to whom I will refer as the defendants) are respectively supervisor of fisheries and fishery inspector in the service of the Dominion Government, under the provisions of The Fisheries Act, 1932, Can. Stats. 1932, Cap. 42. The action was brought by the plaintiffs for damage done to their nets by the alleged negligence of the defendants while the nets were under their seizure and in their possession. The seizure was made on account of a violation of section 11, subsection 1 of the Special Fishery Regulations for the Province of British Columbia, which requires, *inter alia,* that the end buoys of all nets shall have the fishermen's initials and licence numbers inscribed thereon. The defendants in their defence set up that the seizure was lawfully made, that the end buoys were not so marked, that the nets were not damaged while in their possession, and that they were in fact returned to their owners in good order and condition. These issues came to trial before COADY, J. and a special jury and resulted in a verdict for the plaintiffs for $2,042.80.

The circumstances which gave rise to the litigation may be stated a little more fully: On the morning of the 12th of May, 1944, the plaintiffs, employing two motor fishing-vessels and 11 gill nets, were fishing for grayfish (known as dogfish) off Scotch Fir Point, some 12 miles north-west of Pender Harbour (I may take judicial notice of these matters of geography). They were closed by the fishery patrol vessel "A. P. Knight" and informed by the defendant Sherman, the officer in charge, that they were guilty of a breach of the fishery regulations, and that he proposed to seize their nets. This he proceeded to do, piling them on the deck of the "A. P. Knight." The weather becoming bad two nets were left in the water and the vessel, having proceeded to, and spent the night at Pender Harbour, returned next day, hauled these up also and thereupon went to Nanaimo, 30 miles

south of Pender Harbour, arriving there on the 14th of May. At Nanaimo the nets were handed over to the defendant Tait who then for the first time came into these transactions and took charge. He gave evidence that he examined the nets on board the vessel and found them in good order with no signs of heating or deterioration. There was evidence too that under his orders the nets on the following day were spread out on a railing on the approach to the wharf at the Biological Station at Nanaimo, and left there loosely piled, so that the wind could blow through them and dry them; also that they were inspected from time to time and on each occasion found in good condition. On 30th May they were returned to their owners at Pender Harbour. The defendants' evidence was that the nets were then in good order and that the deteriorated condition in which they were found at a joint inspection by the parties four days later was due to the improper manner in which they had been piled by the plaintiffs after delivery to them. The plaintiffs, on the other hand, deny this and say that when returned to them the nets were in bad order and useless for fishing and that in their view this was due to one or more of several reasons, *viz.*, that they had not been bluestoned for preservative purposes shortly after being taken from the water, and that the defendants knew, or in their position should have known, that this was necessary; that they were piled in a heap on the deck of the patrol vessel "A. P. Knight," which would tend to heating and deterioration; that on their redelivery to the plaintiffs they had seaweed clinging to the meshes, showing that they must have been stowed in a place which was open to the wash of the sea; that there was no proper care taken of them while so stowed. No explanation was vouchsafed as to why the nets were taken to Nanaimo when Pender Harbour was so much nearer, had available all requisite facilities, and had stationed there a fishery officer. But there may have been a sufficient reason for this. On these questions of fact there was therefore great conflict of evidence; but it all went before the jury and as, in the view I take, the jury, on correct instructions, resolved it in favour of the plaintiffs, there is nothing more that can usefully be said on this heading.

Before dealing with the main issue debated on the appeal, it

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will be convenient to consider another matter which arose almost incidentally but which, in the result, has assumed major importance. This concerns the questions put to the jury by the learned judge. They were seven in number. The first four dealt with whether the plaintiffs' boats and nets were marked in accordance with section 11, subsection 1 of the regulation, and if not, whether defendant Sherman had reason to believe that there was a breach of this regulation. The answers were that they were not so marked (indeed this was not contested by the plaintiffs) and that Sherman was right in thinking that there had been a breach of the regulations. Questions 5, 6 and 7 dealt with the amount of the damages which, as stated, were found at a total of $2,042.80. It was contended by the defendants that these questions and answers were incomplete for the purpose of forming the basis of a verdict, in that they lacked a finding on liability. No doubt it would have been better if the judge had included the usual question in this regard, *viz.*, "Were the defendants, or either of them, negligent?" And the further question: "If so, of what did such negligence consist?" And in fact it was so suggested by counsel for the plaintiffs. The judge replied to this suggestion that "that will be gone into when I explain the law to the jury." It was therefore clearly his intention that the questions he put should deal only with specific points and that the answers must be read in the light of his charge as a whole. As I have intimated, the event may have shown that this was not the best way of dealing with the matter, but I am unable to say that the discretion so exercised by the judge was wrong.

The defendants, however, submit otherwise, although, as I thought, without a great deal of confidence, and without having taken the point in their notice of appeal; they say that there is nothing to indicate that the jury made a finding of negligence against the defendants. It is not a complete answer to this to say that both counsel agreed upon the questions formulated by the learned judge, and that they raised no point with respect to them after his charge. But it is, I think, a sufficient answer that the judge's charge was so framed as to leave no doubt in the jury's mind that there was implicit in any finding they might

make on damages, a further finding—namely, a finding of negligence on the part of the defendants. It seems to me that the whole trend of the trial and the whole reach of his charge alike carry this implication. And the precise words of the learned judge were not lacking in explicitness. His first words were that "this is an action based on negligence," and elaborating on this he pointed out that the *onus* was upon the plaintiffs to establish this negligence, and that they must show by a preponderance of evidence that there had been a breach of a duty on the part of the defendants, and that damage was caused to the plaintiffs directly by reason of that breach. Later he pointed out that if they gave damages, etc.; and later still he used this language:

> But in the consideration of that [namely, the *quantum* of damages] you have first to reach the conclusion, before you get down to consideration of the quantity, as to whether or not the loss was sustained by reason of this neglect of ordinary care on the part of the defendants, who say, in effect, there was no damage to these nets while they were on the boat while being taken to Nanaimo, and they tell you why there was no damage, because they tell you of the care exercised by them in watering those nets, in keeping them in a dampened condition, carefully observing there was not heating of the nets. That they were then taken off the boat and placed on this railing at the Biological Station, clear of the water, where they were being properly aired, that they were brought back and delivered. That there were no fish in those nets and consequently they say that, in their opinion, it was not necessary to bluestone them. They go further and say if damage resulted to these nets, it was after they were delivered. They were placed on this rack by the plaintiffs and left there piled quite deeply, and that the damage was suffered after the delivery.

I would be at a loss to state the case more succinctly than is done in this language. But there is one other feature. When the jury returned and gave their answers to the questions, judgment was immediately pronounced in favour of the plaintiffs for the amount awarded. To my mind it is fantastic to say that a special jury would sit there silently while this was done if they had failed to reach the conclusion that "the loss was sustained by reason of this neglect of ordinary care on the part of the defendants." Any contrary contention seems to me to attribute to the jury a lack of intelligence which is wholly unwarranted.

I think the relevant principles are to be found in the following passages from the judgments in *British Columbia Electric*

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Rway. Co. v. *Dunphy* (1919), 59 S.C.R. 263. At p. 269, *per* Duff, J., as he then was:

> I may add that the answers to these questions read together are equivalent to an affirmation that the plaintiff's injuries were due to the negligence of the defendant company and that the plaintiff is entitled to recover as damages the amount mentioned. Read together the answers constitute a perfectly good finding for the plaintiff for that sum. There can be no practical difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict.

At p. 271, *per* Anglin, J., as he then was:

> . . . Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it.

Applying these principles to the present case, I have no doubt that the jury intended to find and did find negligence on the part of both defendants. It is not necessary to go farther than this and invoke the provisions of rule 5 of the Court of Appeal Rules, 1943, which gives the Court of Appeal power, *inter alia,* to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. But it may be observed that the Judicial Committee (*per* Lord Wright) in somewhat similar circumstances were prepared to do this in *Canada Rice Mills, Ld.* v. *Union Marine and General Insurance Co.,* [1941] A.C. 55. Lord Wright, at p. 65, observed there that the rule in question

> is intended to obviate a new trial in cases where such a course can properly be avoided, and applies even in cases tried with a jury.

In my view there is no occasion to act upon the provisions of this rule in the present case.

Appellants' counsel, in his interesting argument, further submitted that the jury might have found negligence on the part of one defendant only and, if so, there was nothing to show which one. What I have already said is applicable, I think, to this contention, with these further observations: I am unable to find that in any part of the case any distinction was sought to be raised between the liability of the two defendants, and I am not

disposed to differentiate between them now. Far from any such distinction being made, it would seem that the defendants deliberately chose to stand or fall together. For example, in their statement of defence it is stated that

> the defendants in their capacity as fisheries officers . . . lawfully seized the said nets and they were informed by the plaintiffs at the time of said seizure that the said nets had been washed and the defendants caused the said nets to be hung on racks to dry in a proper and careful manner and a few days later delivered the said nets to the plaintiffs who carelessly and negligently piled the nets across three rack bars on a float which was submerged to the water level, the racking space of the nets being too small and being only about eight feet wide by ten or twelve feet long so that the nets were piled from four to ten inches thick on these racks and were left there by the plaintiffs for about six days so that they became damp inside and steaming and decaying.

Such pleading stood, notwithstanding that the evidence disclosed that the defendant Sherman was alone concerned until the defendant Tait took charge at Nanaimo. I have been unable to find anywhere throughout the trial any suggestion that one defendant only might be held at fault.

The cardinal submission made before us was that the act of seizure by Sherman created an immediate confiscation of the nets in favour of the Crown under section 64 of The Fisheries Act, 1932, and that this was so quite irrespective of whether it was so intended by Sherman; and that this being the effect of the statutory provision, no power rested in the fishery officers to relieve against such confiscation by return of the nets; and consequently that any damage sustained by the nets was damage suffered by the Crown, and therefore not in any shape or form recoverable by the plaintiffs. I have examined this argument with respect, and have come to the conclusion that it is without merit. It seems to me that this is a construction which has nothing to commend it, either on principle or authority, and it would require very clear and express words of enactment to induce me to hold that such was the intention of Parliament. Section 64 of The Fisheries Act, 1932 (leaving out the irrelevant words), reads as follows:

> All . . . , nets, . . . used in violation of this Act or any regulation made hereunder, . . . , shall be confiscated to His Majesty and may be seized and confiscated, on view, by any fishery officer, or taken and

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removed by any person for delivery to any fishery officer or justice of the peace.

Reading these words as they stand, they mean, in my opinion, that the nets may become liable to confiscation, but such confiscation in my view may only be made after a hearing, however informal, so long as it is a fair hearing. To hold otherwise would be to run counter to the steady march of authority. It is put thus by Byles, J. in *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, at pp. 194-5; 143 E.R. 414, at p. 420:

> . . . That being so, a long course of decisions, beginning with *Dr. Bentley's case*, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr. Justice Fortescue, in *Dr. Bentley's case*, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also."

In this particular case I think my opinion is strengthened by section 69 of the Act which sets out the machinery by which confiscation is to take place; and I think, too, that it is strengthened by a consideration of section 11, subsection 1 of the regulations before mentioned. This section states quite clearly that the nets "shall be liable to seizure and confiscation," not that they "shall be confiscated" as does section 64 of the Act. It is quite true that the regulations cannot control the Act; it is the other way round. But it is not without significance that those who framed the rules, when drafting the particular offence with which we are here concerned, did not think fit, when dealing with the penal aspect, to reproduce the exact words of the statute, but were content to give to section 64 of the Act what seems to me to be its only tenable construction. Nevertheless the provisions of this section are obscurely framed, and as questions upon them may hereafter arise, it is undesirable that I state any views with respect to them other than those essential for the decision of the present case.

It should be noted that the officers never contemplated confiscation. They made it abundantly clear that they meant no more than to keep the nets for the purpose of exhibits at a future trial before a justice of the peace on a charge of breach of the regulation. As already stated, they returned the nets to their owners before such trial took place. That being so, I think there was a duty upon them to take care of the nets while in their possession. That duty was to exercise reasonable care in all the circumstances. Such was the gist of the charge of the learned trial judge and I think it is good law. (Compare *Hall* v. *Moss et al.* (1866), 25 U.C.Q.B. 263; *Corse* v. *The Queen* (1892), 3 Ex. C.R. 13). Counsel for the defendants was unable to assist us by citing any reported case in which the question had been argued and decided in a contrary sense.

The charge had been heard by a justice of the peace at Pender Harbour and dismissed. Complaint was made by the appellants of this having been adduced before the jury in evidence, and moreover of the doings preceding the hearing having also been brought before the jury with some particularity. Counsel for the respondents maintained that all this was necessary for the sake of certain admissions made by the defendants—notably of the admission made by them that they had no intention at any time to confiscate the nets. The judge exercised his discretion in this respect, and I cannot say that he was wrong. Moreover, he was at great pains when instructing the jury to tell them that the result of the trial at Pender Harbour had nothing to do with the present case and must be disregarded.

It follows that in my opinion there is nothing which affords ground for either allowing the appeal or sending the case back for a new trial. I would dismiss the appeal.

BIRD, J.A.: I would allow the appeal and direct a new trial for the reasons given by my brother ROBERTSON, which I have been privileged to peruse, and with which I concur.

Appeal allowed; new trial ordered, O'Halloran and Sidney Smith, JJ.A., dissenting.

Solicitor for appellants: *Dugald Donaghy.*
Solicitor for respondents: *Henry Castillou.*

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April 29; *June* 18.

REX v. MILINA.

Criminal law—Weapons—Possession of revolver for a purpose dangerous to public peace—Plea of guilty—Duty of judge or magistrate—Criminal Code, Sec. 115.

Held (*per* SLOAN, C.J.B.C., ROBERTSON and SIDNEY SMITH, JJ.A.), that when an accused person pleads guilty, it is not the law that the magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty. But the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads and knows and understands the exact nature of the offence with which he is charged. He must plead guilty in "plain, unambiguous, and unmistakable terms."

Held, further (*per* SLOAN, C.J.B.C., ROBERTSON and SIDNEY SMITH, JJ.A.), that, although a prisoner has pleaded guilty, if while the case is still in course of being dealt with and the proceedings are not closed it plainly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and therefore pleaded guilty under a misapprehension of what constituted guilt, it is clearly the duty of any presiding judge or magistrate to offer to allow him to withdraw his plea if he so desires and to enter a plea of "not guilty."

O'HALLORAN and BIRD, JJ.A. (dissenting) would dismiss the appeal applying *Rex* v. *Johnson and Creanza* (1945), [*ante*, p. 199] and *Rex* v. *Hand* (1946), [*ante*, p. 359].

APPEAL by accused from his conviction by H. S. Wood, Esquire, police magistrate for Vancouver, on a charge of having a loaded automatic pistol in his possession for a purpose dangerous to the public peace contrary to section 115 of the Criminal Code. At 3 a.m. on March 29th, 1946, a policeman stopped accused on East Cordova Street in Vancouver; he questioned him; he became suspicious and on searching him found a loaded revolver under his belt. Accused was represented by counsel who pleaded guilty on his behalf. The magistrate desired to have this plea from the appellant personally and appellant himself pleaded guilty. He did not accept his plea, but first heard the arresting officer under oath describe the circumstances of the arrest and finding the pistol on his person on the street at 3 o'clock in the morning. Counsel for accused then applied for leave to withdraw his plea of guilty, but the learned

magistrate refused to allow him to do so and sentenced him to three years in the penitentiary.

The appeal was argued at Victoria on the 29th of April, 1946, before SLOAN, C.J.B.C., O'HALLORAN, ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

McAlpine, K.C. (*Isman,* with him), for appellant: The charge is under section 115 of the Code. The evidence is all circumstantial. He was found with an automatic pistol on him at 3 a.m. on the street. The defendant pleaded guilty but after the policeman was examined on oath, he should have been allowed to change his plea: see *Rex* v. *Hand* (1946), [*ante,* p. 359]; *Rex* v. *Johnson and Creanza* (1945), [*ante,* p. 199]. That it was not dangerous to the public peace see *Rex* v. *Kube* (1945), [*ante,* p. 181]. It is essential that justice be done. He cannot find on the evidence that the accused is guilty.

Moresby, K.C., for the Crown: On the question of accepting the plea see *Rex* v. *Guay* (1914), 23 Can. C.C. 243, at p. 245. He intended to admit he was carrying a loaded pistol. He did not have a permit. See also *Rex* v. *Rapp,* [1923] 4 D.L.R. 1053. For the reasons set out in the magistrate's report, after he had heard the whole case he should not be allowed to withdraw: see *Rex* v. *Guay, supra.*

McAlpine, replied.

Cur. adv. vult.

18th June, 1946.

SLOAN, C.J.B.C.: I would allow the appeal and direct a new trial for the reasons given by my brother SIDNEY SMITH.

O'HALLORAN, J.A.: The point for decision is whether the learned magistrate was wrong in refusing appellant counsel's application to withdraw a plea of guilty in order to enter a plea of not guilty instead.

The question arises in a rather unusual way. The appellant was represented by counsel who pleaded guilty on his behalf to a charge under Code section 115 of unlawful possession of a loaded automatic pistol for a purpose dangerous to the public peace, and then added "I wish to call him [appellant] and his

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father in regard to the facts." The learned magistrate enquired of the appellant himself how he pleaded, to which the latter replied "Guilty, sir." The Crown prosecutor interposed "we might as well have the facts from the officer; it might as well be under oath." The arresting officer was then sworn, examined by the Crown prosecutor, and cross-examined by appellant's counsel.

In the course thereof the learned magistrate indicated the necessity for compliance with recent decisions of this Court. He referred to *Rex* v. *Godbolt and Sullivan* (1946), [*ante*, p. 278]; 85 Can. C.C. 349 and *Rex* v. *Kube* (1945), [*ante*, p. 181; 85 Can. C.C. 324 (where this Court had set aside convictions under section 115 and substituted convictions under section 121A). He referred also to *Rex* v. *Johnson and Creanza* [*ante*, p. 199]; [1945] 3 W.W.R. 201 and *Rex* v. *Hand* [*ante*, p. 359]; [1946] 1 W.W.R. 421 (where this Court said that a plea of guilty ought not to be accepted unless the judge or magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to assure himself that the accused is pleading guilty to the offence with which he is charged). The learned magistrate having made a remark early in the examination which evinced uncertainty regarding the appellant's guilt under section 115 as distinguished from section 121A, counsel for the appellant urged the appellant's right to change his plea, to which the magistrate replied:

> He has pleaded guilty on the advice of counsel to carrying a gun for a purpose dangerous to the public peace.

Appellant's counsel then proceeded to cross-examine the arresting officer, after which the matter was adjourned until the next day for argument.

After argument the learned magistrate held he would accept the plea of guilty, being satisfied after the examination and cross-examination of the arresting officer, that the offence came within section 115 and not section 121A, and also that the accused, advised by counsel, knew the nature of the offence when he pleaded guilty to it. In his report under section 1020 the learned magistrate says in material part:

> 2. . . . . He was represented by counsel and elected to be tried by me. The charge, which had been reduced to writing, was then read to him and through his counsel he pleaded "guilty." However, I did not accept the

plea through his counsel, but required the prisoner himself to plead, he then pleaded "guilty."

3. I did not then accept his plea, but first heard the arresting officer, under oath, describe the circumstances of the arrest and of the finding of the pistol on his person on the street at 3 o'clock in the morning. Having heard this evidence I decided to accept the plea of guilty in spite of the belated protest of his counsel that I should allow him to change his plea. After that counsel for the accused called the accused himself who gave evidence, under oath, and when he had finished his evidence the accused himself, in my opinion, had proven beyond peradventure of doubt that he had the pistol for a purpose dangerous to the public peace.

I retain the impression gathered from a perspective view of what the transcript discloses, that the learned magistrate was scrupulously endeavouring to apply the recent decisions of the Court of Appeal above cited. To comply with the *Johnson and Creanza* and *Hand* decisions, after counsel for the accused entered a plea of guilty, the magistrate asked the accused himself how he pleaded. But he appears to have been disturbed by the circumstance that this was a charge under section 115, and that twice recently in the *Godbolt and Sullivan* and *Kube* cases the Court of Appeal had set aside convictions under section 115 (not upon pleas of guilty but after trials) and substituted convictions under section 121A. Hence he desired the facts canvassed with some particularity, not only to assure himself that a conviction under section 115 was justified, but also that the accused was fully aware of the nature of that offence as distinguished from section 121A.

After the arresting officer had been examined and cross-examined, the learned magistrate was fully satisfied and I think, with respect, properly satisfied, that the accused was fully aware of the nature of the offence to which he pleaded guilty, at the time he pleaded guilty, and also that those facts justified the plea of guilty to an offence under section 115. Furthermore, after listening to the examination of the accused on the facts by his counsel related to the sentence to be imposed, no reasonable doubt could remain in the magistrate's mind that the accused was guilty as charged under section 115. The significance of this latter examination lies in that although it was related to sentence, the magistrate could still have directed a plea of not guilty to be entered, if he was satisfied the accused had been deprived

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of a full answer and defence, or that in any event there was any reasonable likelihood of a miscarriage of justice taking place.

This introductory statement explains how the situation arose, and why the learned magistrate refused appellant counsel's application to withdraw the plea of guilty. In matters of this kind the judge or magistrate must necessarily have a reasonable discretion. There is no absolute right in the accused to change his plea at will as whim, fancy or "hunch" may sway him. If that were so, there would be no jurisdiction in the magistrate to refuse a change of plea. But that jurisdiction was not questioned, and the issue centres upon the proper discretionary exercise of the jurisdiction. Discretion implies choice (*cf. Evans* v. *Bartlam* (1937), 106 L.J.K.B. 568, Lord Wright at p. 575). If the magistrate has a discretion to accept a change of plea, he must also have a discretion to refuse it. It is true a magistrate may not often refuse it, but that does not deny his discretion to refuse it in a proper case.

Appellate Courts are loath to interfere with the exercise of discretion in Courts of first instance. A recent expression of the principles upon which they will act is found in *Taylor* v. *Vancouver General Hospital et al.* (1945), [*ante*] 79, which applied *Blunt* v. *Blunt,* [1943] A.C. 517; and *cf.* also *Murdoch* v. *Attorney-General of British Columbia* (1939), 54 B.C. 496, at pp. 501-3. In a case of the present character it is hard to believe that a magistrate's discretionary refusal to accept a change of plea from "guilty" to "not guilty" will be interfered with, unless the appellate Court is satisfied that the accused has been denied the opportunity of full answer and defence, or in any event that a miscarriage of justice has actually occurred.

When the magistrate as here has satisfied himself within the meaning of *Rex* v. *Johnson and Creanza* by the facts disclosed in open Court that they justify the conviction to which the plea of guilty has been entered, and also that the accused understands the nature of the offence to which he has pleaded guilty, then it would seem to me, with respect, to be an escape from judicial responsibility to allow a change of plea to "not guilty," unless some triable defence is disclosed by the accused or his counsel or otherwise appears in what is before the Court. This is said

because the plea of guilty has been accepted after a judicial determination, and if it is to be set aside or withdrawn some cause must naturally be shown. In my judgment in such circumstances (*viz.*, when the *Johnson and Creanza* principle has been complied with), a plea of guilty to the offence charged must be regarded as an admission of all facts essential to proof of the offence charged, for by pleading guilty the accused dispenses with the necessity of proving those facts.

When those facts are presented in open Court in accordance with *Rex* v. *Johnson and Creanza* the accused has the opportunity of then challenging them, or of accepting them and advancing some reason why they are insufficient in law to convict, as for example, was done in *Rex* v. *Hand, supra.* In either of these cases he has advanced good ground to change his plea. But that is not the situation here. The essential facts which compelled the magistrate to infer that the appellant's possession of a loaded pistol was for a purpose dangerous to the public peace, were not challenged. The only ground put forward by appellant's counsel was that the magistrate ought not to draw an inference from those facts of "a purpose dangerous to the public peace." But in my opinion the learned magistrate could not reasonably draw any other inference than he did.

The accused (aged 19) was roaming in down-town Vancouver at 3 o'clock in the morning carrying a loaded revolver inside the waistband of his pants. It was unregistered. He refused to tell the arresting officer where he got it or why he had it. He said he was going to meet a friend at the ferry. But he refused to say who the friend was, because he said that might get his friend into trouble. The ferry did not leave for three hours. He was carrying two picklocks as well. Those facts were not substantially challenged at any time, even when the accused testified in respect to sentence and the circumstances were then examined again by his counsel. I am convinced the facts abundantly justified an inference of possessing a pistol for a purpose dangerous to the public peace.

For the foregoing reasons I am satisfied that no miscarriage of justice occurred. It is observed that in *Rex* v. *Johnson and Creanza, supra,* the appellants' submission that they did not

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understand the charge to which they pleaded guilty was rejected because the Court could not conclude that a miscarriage of justice had occurred. The accused was plainly guilty as charged, and he pleaded guilty with full knowledge of the nature of the offence with which he was charged, and was denied no opportunity of putting forward any defence, if he had one.

Before parting with this case I would observe that *Rex* v. *Johnson and Creanza* and *Rex* v. *Hand* may be complied with by a statement of facts in open Court by counsel for the prosecution. These decisions are not to be interpreted as requiring the arresting officer to be examined under oath to supply the facts. That is not to say there may not be an exceptional case, where the magistrate may find it is advisable or necessary to do so. I am of opinion that this case comes within the latter class, because of a justifiable caution which lodged in the magistrate's mind regarding the dividing line between offences under sections 115 and 121A, as the result of this Court's recent decisions in *Rex* v. *Godbolt and Sullivan* and *Rex* v. *Kube*. The course the learned magistrate adopted reflects commendably his desire to examine the facts carefully so that the accused would not be improperly convicted of an offence carrying a maximum sentence of five years, instead of an offence carrying a maximum sentence of 30 days with a fine.

I would dismiss the appeal.

ROBERTSON, J.A.: I agree with my brother SIDNEY SMITH.

SIDNEY SMITH, J.A.: The appellant appeared before magistrate Wood charged with having a loaded automatic pistol in his possession for a purpose dangerous to the public peace, contrary to section 115 of the Criminal Code. He was asked to elect and gave his consent to his case being dealt with summarily. He was represented by counsel who thereupon pleaded guilty on his behalf. The magistrate desired to have this plea from the appellant personally and the appellant himself then pleaded guilty.

What happened afterwards is thus set out in the learned magistrate's report to this Court:

I did not then accept his plea, but first heard the arresting officer, under oath, describe the circumstances of the arrest and of the finding of the

pistol on his person on the street at 3 o'clock in the morning. Having heard this evidence I decided to accept the plea of guilty in spite of the belated protest of his counsel that I should allow him to change his plea.

In Court, when giving his reasons for later accepting the plea of guilty, the magistrate expressed himself in this way:

> This man pleaded guilty after having elected for trial before me, and having in mind the decisions of the Court of Appeal on the attitude of the magistrate in accepting a plea of guilty as set out in *Rex* v. *Johnson and Creanza* [*ante*, 199, at p. 200]; [1945] 3 W.W.R. 201 " . . . unless the judge or magistrate is sufficiently informed in open Court of the facts upon which the accused [so] pleads guilty, to [assure himself that the accused is pleading guilty to the offence with which he is charged]." I have to decide on the facts of the officer's evidence whether I should accept a plea of guilty.

In this regard, I think, with great respect, that the learned magistrate misdirected himself. The language quoted by him is from *Rex* v. *Hand*, [*ante*, p. 359, at p. 361; [1946] 1 W.W.R. 421, at p. 422, which however is substantially the same as that used in *Rex* v. *Johnson and Creanza* [*ante*, p. 199]; [1945] 3 W.W.R. 201. It may be that this language was not particularly apt to express the mind of the Court of Appeal. If that is so, I must accept my full share of responsibility for, as a member of the Court in the *Hand* case, I approved of the employment of this language. But however that may be, it is desirable to state now quite plainly that in my opinion when an accused person pleads guilty it is not the law that the magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty.

What the quoted language does mean is that upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged. And the accused must plead guilty in "plain, unambiguous, and unmistakable terms" (*Rex* v. *Golathan* (1915), 84 L.J.K.B. 758, *per* Lord Reading, C.J.). The cases will be rare indeed in which a magistrate will feel himself obliged to make any special enquiry when the accused, as here, is represented by counsel. The circumstances which are contemplated by the expressions used in the above cases are those in which the accused may be a foreigner, or illiterate, or the charge is one of unusual complexity or of an unusually grave nature. Instances of these

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are to be found in Crankshaw's Criminal Code, 6th Ed., 1062-3. The practice in England is to the same effect and is thus stated in Kenny's Outlines of Criminal Law, 15th Ed., 558:

> If he confesses, *i.e.*, "pleads guilty" he may be at once sentenced. But in serious cases, lest he should be confessing under some misapprehension as to the law or even as to the facts of his case, the court often advises him to withdraw his plea of guilty, and so let the matter be fully investigated.

In the present case there could have been no complaint if the learned magistrate had accepted the plea of guilty, but instead of this, he proceeded to hear evidence on the facts. In the course of the hearing he said, referring to the accused, "he has pleaded guilty. I don't know why." Then his counsel said "I want to speak to that matter." A little later counsel again interposed and said "I submit it is my duty to change my plea." Still later in the proceedings his counsel said: "There should be a plea of 'not guilty' on this particular charge." Next day upon the argument of whether leave should be given to withdraw the plea, the views of accused's counsel and the Court were expressed as follows:

> Counsel: I frankly will take the *onus* of saying it was my fault more than his. I don't see why my client, or the accused, should not be allowed to have his plea withdrawn under the circumstances before you now. The point is, I submit the evidence will show it is true he had a gun on him, but not guilty of the offence charged.
>
> THE COURT: I don't think I can allow him to withdraw his plea.
>
> Counsel: I will say in view of those facts the man I submit to you is entitled to withdraw his plea.
>
> THE COURT: I repeat, I don't think it is a matter of withdrawing the plea, but should I accept his plea.

The learned magistrate then proceeded to give his reasons for refusing to allow a withdrawal of the plea of guilty, the relevant part of which has been quoted *supra*.

Here again, with respect, I think the learned magistrate misdirected himself. He was quite clearly of the opinion that under the *Creanza* ruling, having heard evidence which supported the plea of guilty, he was obliged to accept such plea, notwithstanding that accused's counsel had in the meantime stated emphatically that the plea of "guilty" had been made in error and that he desired to enter a plea of "not guilty." In coming to this conclusion the learned magistrate was under a misapprehension,

for there is nothing in that case or any other case to which we were referred, to support this view.

In these circumstances I think there was no proper exercise of the magistrate's discretion. The legal position is expressed in this way in *Rex* v. *Richmond,* [1917] 2 W.W.R. 1200, at p. 1203 by Stuart, J.:

> . . . Even though a prisoner has pleaded guilty yet if while the case is still in course of being dealt with and the proceedings are not closed it plainly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and therefore pleaded guilty under a misapprehension of what constituted guilt, it is I think, clearly the duty of any presiding judge or magistrate to offer to allow him to withdraw his plea if he so desires and to enter a plea of "not guilty."

I am of opinion that this language may be properly applied to the present case. Indeed this case is *a fortiori* for here there had not even been an acceptance of the plea of "guilty" when the application was made to change it to "not guilty." I am satisfied that had the learned magistrate correctly understood the decisions in the *Creanza* and *Hand* cases he would have exercised his discretion by rejecting the plea of "guilty" and accepting the plea of "not guilty" and proceeding to trial in the usual way. As it was, he did not exercise his discretion at all; and accordingly there was no proper trial and no proper adjudication.

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

BIRD, J.A.: The accused entered a plea of guilty to a charge under Code section 115 for having a loaded automatic pistol in his possession for a purpose dangerous to the public peace.

The plea was first announced by defence counsel after a clear and careful statement of the elements of the offence by the magistrate, who, notwithstanding counsel's declaration, took the precaution to require the accused to plead personally, which he did.

Crown counsel then examined the arresting officer on oath for the declared purpose of explaining the circumstances surrounding the commission of the offence. During the course of the examination the learned magistrate expressed some doubt as to whether he should accept the plea, whereupon defence counsel asked leave to withdraw the plea.

The magistrate then proceeded with the examination of the constable with a view to determining, as I understand his com-

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ments, whether there were circumstances which, as in *Rex* v. *Rapp,* [1923] 4 D.L.R. 1053 (cited to him) would justify his refusal to accept the plea. He ultimately reached the conclusion, and, with respect, I think correctly, that there were no sufficient grounds for rejection of the plea by him. Examination of the record does not disclose a lack of intention to admit the truth of any essential ingredient of guilt, nor any misunderstanding of the offence charged on the part of the accused or of his counsel. Indeed, after the magistrate's explanation of the charge and the subsequent reading of it, there was not, in my opinion, any room for misunderstanding or for misapprehension of what constitutes guilt. The circumstances here in my opinion do not bring the case within *Rex* v. *Richmond* (1917), 29 Can. C.C. 89.

Then it is urged that the application by defence counsel for leave to withdraw the plea of guilty should have been granted, which, in the exercise of his discretion, the learned magistrate refused.

It is clear that the Court had power to allow the accused to withdraw the plea of guilty, but that was a matter for the exercise of discretion by the learned magistrate—*Rex* v. *Plummer,* [1902] 2 K.B. 339—a discretion which in fact he did exercise by refusing to grant the application to withdraw the plea.

In my opinion an appellate Court should not substitute its discretion for that of the magistrate, even though this Court in the circumstances might have granted the leave, unless it reaches the clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in injustice. *Taylor* v. *Vancouver General Hospital et al.* (1945), [*ante*] 42, and cases there cited at p. 50.

In *Rex* v. *Guay* (1914), 23 Can. C.C. 243 it is said that the custom generally followed is to allow an accused to change a plea of guilty to one of not guilty at any time before sentence. But "it does not mean that there are no exceptions and that the discretion of the judge is abrogated." Reference is there made to *Reg.* v. *Brown* (1848), 17 L.J.M.C. 145, wherein it was held that it is purely for the discretion of the judge at the trial

whether a plea may be withdrawn or not. There Lord Denman, C.J. in the Court of Crown Cases Reserved, observed:

> There is no case in which the discretion of the judge, upon this point, has been overruled by us.

Since the plea was made, as I think with full understanding by the accused and his counsel of all the ingredients of the offence, I am unable to say that the magistrate wrongly exercised his discretion. I would therefore dismiss the appeal.

In view of the magistrate's misconception of the effect of the decisions of this Court in *Rex* v. *Johnson and Creanza* [*ante*, p. 199]; [1945] 3 W.W.R. 201 and *Rex* v. *Hand* [*ante*, p. 359]; [1946] 1 W.W.R. 421, apparent from his comments in regard to those decisions which appear on the record, it is desirable that this Court restate its views on the duties of a trial judge when considering a plea of guilty. Therefore, I think it desirable to state; since I participated in each of those decisions, that the effect of those cases was simply this, that a trial Court, before accepting a plea of guilty, ought to be assured by sufficient information furnished in open Court, that the accused fully understands the nature of the charge to which he is asked to plead. The procedure adopted below of calling police evidence for the purpose of satisfying the Court that the crime charged had actually been committed, is unnecessary because once the accused with full knowledge of all the elements of the crime, pleads guilty thereto, that amounts to a complete admission that he has committed the crime charged.

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

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MAY v. HARTIN.

Practice—Appeal—Privy Council—Application for leave to appeal—Imperial order in council, January 23rd, 1911—Statute of Westminster, 1931 (22 Geo. V., Cap. 4).

The Imperial order in council of 23rd January, 1911, passed pursuant to the provisions of the Judicial Committee Act, 1844, to provide for appeals from the Court of Appeal of British Columbia to Her Majesty in Council reads in part as follows:

2. Subject to the provisions of these Rules, an Appeal shall lie—

(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, . . .

Upon the plaintiff's motion for leave to appeal to His Majesty in Council from the judgment of the Court of Appeal dismissing her appeal, the defendant submits that since the Statute of Westminster, passed in 1931, the legal situation is changed; that while the prerogative right of appeal still exists, it is no longer "as of right" since Canada has the power to abrogate it; and therefore in effect to that extent the order in council, *supra*, is repealed by necessary intendment and the position is the same as if the words "as of right" had been struck out of the order in council, in which case the Court has a judicial function to perform in exercising its discretion to grant or refuse leave.

Held, that there is no question as to the value of the matter in dispute being over £500 sterling or that the motion is made within time. There is nothing in the Statute of Westminster repealing any legislation then existing. The statute clothes Canada with power "after the commencement of this Act," *inter alia*, to repeal or amend any Act or order in so far as it is part of the law of Canada. Until such right is exercised, existing Imperial legislation applicable to Canada and passed before the statute continues in full force and effect; and so the order in council passed under the Judicial Committee Act of 1844 has not been affected up to date. The appeal then is "as of right" and will remain so until competent legislation affecting it is passed under the statute. The motion should be granted, subject to the conditions referred to in rule 5 of the order in council.

MOTION by plaintiff to the Court of Appeal for leave to appeal to the Privy Council from the decision of the Court of Appeal of the 6th of November, 1945, dismissing an appeal from the judgment of COADY, J. of the 18th of June, 1945, and holding that the statement of claim does not disclose any interest of the plaintiff Mrs. May in her private capacity or as liquidator of the Gibson Company in the Daybreak Mining Company and it

follows that she can have no claim against the defendant Hartin, trustee of the Daybreak Mining Company in his personal capacity for anything he may have done in 1937 or thereafter in connection with the Daybreak Mining Company or its assets.

The motion was heard at Vancouver on the 7th of December, 1945, by ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

Mrs. May, in person.
Paul Murphy, for defendant.

ROBERTSON, J.A.: The plaintiff moved for leave to appeal to His Majesty in Council from the judgment of this Court dismissing her appeal. The Imperial order in council of 23rd January, 1911, was passed pursuant to the provisions of the Judicial Committee Act, 1844 (see *Reference* case, *infra,* at p. 68), to provide for appeals from this Court to Her Majesty in Council. It reads in part as follows:

2. Subject to the provisions of these Rules, an Appeal shall lie—

(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, . . .

There is no question as to the value of the matter in dispute being over £500 sterling or that the motion is made within time. Counsel for the respondent submits that since the Statute of Westminster (later referred to as "the statute") passed in 1931 "the legal situation has changed"; that while the prerogative right of appeal (in which he includes the right to appeal by special leave) still exists, it is no longer "as of right," since Canada has the power to abrogate it; and therefore, in effect, to that extent, the order in council, *supra,* is repealed by necessary intendment and the position is the same as if the words "as of right" had been struck out of the order in council, in which case the Court has a judicial function to perform in exercising its discretion to grant or refuse leave. In support of this he refers to *Patton et al.* v. *Yukon Gold Corporation,* [1942] O.R. 92 and *Davis* v. *Shaughnessy,* [1932] A.C. 106, decisions respectively upon the Ontario statute and Quebec Civil Code relating to appeals to the Privy Council.

Both before the passage of the statute, and, since, this Court

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has considered appeals as of right where the appeal fell within the terms of the order in council. See *In re Assessment Act and Heinze* (1914), 20 B.C. 149; *Jones* v. *City of Vancouver* (1920), 28 B.C. 166; *Vancouver Breweries Ltd.* v. *Vancouver Malt and Sake Brewing Co. Ltd.* (1933), 47 B.C. 235; and *Cole* v. *Cole* (unreported) November, 1943.

Neither the Ontario statute nor the Quebec Civil Code provides for appeals to the Privy Council "as of right." Neither Canada nor the Province of British Columbia has legislated to abrogate appeals to the Privy Council in civil matters.

Respondent's counsel relies upon the authorities which I shall next consider. In *British Coal Corporation* v. *The King,* [1935] A.C. 500, the Court decided that since the statute, legislation passed by the Parliament of Canada providing that

> Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard

was *intra vires.* Viscount Sankey, L.C., who delivered the judgment of the Judicial Committee, after referring to the passage of the Judicial Committee Acts of 1833 and 1844, said at p. 511:

> . . . In effect therefore Her Majesty in Council was thus empowered to override a Colonial law limiting or excluding appeals to Her Majesty in Council from any colonial Court.
>
> In this way the functions of the Judicial Committee as a Court of law were established. The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions on which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was indeed a *residuum* of the Royal prerogative of the sovereign as the fountain of justice.

He further said at p. 523:

> . . . It is here neither necessary nor desirable to touch on the position as regards civil cases.

In January, 1939, an Act to Amend the Supreme Court Act was read for the first time in the House of Commons. The debate on the motion for the second reading of the Bill was

adjourned in order that steps might be taken to obtain a judicial determination of the question of the legislative competence of the Parliament of Canada to enact the provisions of the Bill in whole or in part. The matter was referred to the Supreme Court of Canada. See *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. The Bill has never been passed.

This Bill provided that the Supreme Court should have exclusive ultimate appellate civil jurisdiction within and for Canada, and its judgment in all cases should be final and conclusive. It repealed the Judicial Committee Acts of 1833 and 1844 and all orders, rules or regulations made under the said Acts "in so far as the same are part of the law of Canada" and provided:

54. (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

Sir Lyman Duff, then Chief Justice, and Mr. Justice Rinfret, as he then was, now Chief Justice of Canada, and Kerwin and Hudson, JJ. held the Bill was *intra vires.* Davis, J. held it was *intra vires* provided an amendment was made that nothing in the Act should alter or affect the rights of any Province in respect of any action or other civil proceeding commenced in any provincial court solely concerned with some subject-matter, the legislation in relation to which was within the exclusive legislative competence of the Legislature of such Province. Crocket, J. held that the Act was *ultra vires.*

I have been unable to find anything in these decisions to indicate that the appeal as of right provided for in the order in council, *supra,* has been in any way affected.

I now turn to a consideration of the provisions of the Statute of Westminster, 1931. Subsection (1) of section 2 provides that:

The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of [Canada].

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Subsection (2) of section 2 provides:

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

By subsection (2) of section 7

> The provisions of section two of this Act . . . . extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

There is nothing in these sections to repeal any legislation then existing. The statute clothes Canada with power "after the commencement of this Act," *inter alia*, to repeal or amend any Act or order in so far as it is part of the law of Canada. It is to be noticed that in the *Reference* case, *supra*, the two Judicial Committee Acts were repealed in so far as the same were part of the laws of Canada. Until such right is exercised, in my opinion, existing Imperial legislation applicable to Canada and passed before the statute, continues in full force and effect; and so the order in council passed under the Judicial Committee Act of 1844 has not been affected up to date. The appeal then is as of right, and will remain so until competent legislation affecting it is passed under the statute.

For these reasons I think the motion should be granted, subject to the conditions referred to in rule 5 of the order in council, which may now be spoken to.

SIDNEY SMITH, J.A.: I agree with my brother ROBERTSON.

BIRD, J.A.: I concur in the reasons filed by my brother ROBERTSON. I would grant the motion subject to the conditions set out in rule 5 of the order in council.

Motion granted.

WILSON v. THE CORPORATION OF THE CITY OF GREENWOOD.

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1946
May 29;
June 24.

Negligence — Offensive odours — Liability of corporation — By-law—Landowner affected by—Right of action—Pleading—Amendment—Costs.

Prior to 1942 there was no system of sewage in Greenwood, other than a septic tank and a cesspool some distance below into which it emptied. In that year Japanese refugees came there in large numbers at the instance of the British Columbia Security Commission. To satisfy the sanitary requirements of the increased population two more cesspools were built near the former one, the last so built being situate about 265 feet from the plaintiff's house. He complained that he had arranged to sell the house, but the sale fell through when the would-be purchaser found there was a bad odour from the cesspools rendering the dwelling-house unfit for habitation. The learned judge found that a nuisance existed upon evidence which supported such finding. Two points were debated to attempt to attach responsibility: (1) That the corporation, as landlord of the houses rented to Japanese, had some responsibility to see that no nuisance resulted from their occupation. The learned judge held against this contention; (2) that the corporation under its health by-law had a similar responsibility. On this issue the learned judge found against the plaintiff.

Held, on appeal, that the learned judge on available evidence found no negligence (which was pleaded) on the part of the corporation and found that while there was odour, it was not such as to affect the health of the inhabitants. It follows that there was no breach of any relevant provision of the by-law, therefore, the argument breaks down on the facts as well as upon the law and the appeal fails.

Upon the opening the appellant proposed to argue on the footing that the city was owner of the land on which the cesspools were constructed. Objection by the respondent on the ground that it was not alleged in the pleadings was sustained and the appellant applied to amend and decision thereon was reserved.

Held, that the amendment be now granted, the respondent to have the right to amend its dispute note as it may be advised; that there be a new trial on this issue, that is to say, the issue of ownership and the legal consequences flowing from any decision thereon, the respondent to have the costs of the first trial and of this appeal.

APPEAL by plaintiff from the decision of COLQUHOUN, Co. J. of the 18th of February, 1946, in an action for damages in respect of an alleged nuisance caused or permitted by the defendant corporation. The plaintiff owner of a dwelling-house in the city, entered into an agreement to sell the house for $1,000, but

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before completion the prospective purchaser repudiated the agreement owing to offensive and pestilential smells from cesspools in the vicinity and within the corporation. There was no system of sewage disposal in Greenwood, other than by septic tanks and cesspools. The controversy arose from the Dominion Department of Labour Japanese division obtaining from the corporation accommodation for Japanese refugees from the Pacific coast in 1942. The upper stories along the main street and various buildings throughout the city were occupied by the Japanese. To satisfy the sanitary requirements of the increased population two additional cesspools were built from which unnatural and offensive odours emanated and it was held on the trial that it amounted to a nuisance emanating from the disposal area. On the contention that the corporation under its health by-law had some responsibility to prevent or abate the nuisance, the learned judge below found against the plaintiff. It was found that there was no negligence on the part of the defendant and that while there was odour, it was not such as to affect the health of the inhabitants.

The appeal was argued at Vancouver on the 29th of May, 1946, before ROBERTSON, SIDNEY SMITH and BIRD, JJ.A.

MacInnes, K.C., for appellant: The city was committing a breach of its own by-law by permitting others to do what they could not do themselves and consenting to it and our property was affected by the nuisance: see *Draper* v. *Sperring* (1861), 10 C.B. (N.S.) 113; *White* v. *Jameson* (1874), L.R. 18 Eq. 303; *Attorney-General* v. *Tod Heatley*, [1897] 1 Ch. 560; *Harris* v. *James* (1876), 45 L.J.Q.B. 545; *Winter* v. *Baker* (1887), 3 T.L.R. 569. The plaintiff sold the furniture and the land and house were left on his hands. We apply to amend the plaint alleging that the defendant is the owner of the land.

Sheppard, for respondent: As to the by-law it was not in force and non-feasance creates no liability: see *Bertrand* v. *Neilson and City of Vancouver* (1934), 49 B.C. 150; *In re Bellencontre*, [1891] 2 Q.B. 122; *Orpen* v. *Roberts*, [1925] S.C.R. 364; *Brown v. City of Hamilton* (1902), 4 O.L.R. 249; *The City of Montreal* v. *Mulcair* (1898), 28 S.C.R. 458; *Smith*

v. *Thackerah* (1866), L.R. 1 C.P. 564. He had no agreement for sale of the house. It comes down to a loss of a prospect.

MacInnes, in reply: It is not a case of non-feasance but one of misfeasance.

Cur. adv. vult.

24th June, 1946.

Per curiam (SIDNEY SMITH, J.A.): This appeal concerns the dismissal of a claim for damages by COLQUHOUN, Co. J. for a nuisance allegedly maintained by the defendant corporation. In his full and careful reasons for judgment the learned judge found that a nuisance existed but dismissed the action upon the ground that the defendant was in no way responsible therefor.

The controversy arose in consequence of the recent sojourn in the city of Greenwood of Japanese refugees from the Pacific Coast. Accommodation had been sought and obtained from the corporation by the British Columbia Security Commission (now the Dominion Department of Labour, Japanese Division), and some 564 children and a corresponding number of adults were housed in various buildings throughout the city. The area comprised in this litigation lies along and to the east of Copper Street between Centre and Greenwood Streets. The upper storeys of this block of buildings were for the most part occupied by Japanese. For the purpose of sanitation and sewage disposal, there was a septic tank situated on lot 7 (which is about the centre of the above area) and a drain-off to a cesspool on some vacant property allegedly owned by the corporation to the south of Copper Street. This cesspool proved insufficient to cope with the sanitary requirements of the increased population and another cesspool (with permission of the corporation) was built nearby on the same property. In addition a drain was constructed from the original cesspool, and this drain ran along Silver Street to the north and in front of the plaintiff's property, to an outlet some considerable distance away, about which there was no complaint. It should be mentioned that there is no system of sewage disposal in Greenwood other than by septic tanks and cesspools.

The plaintiff's house and lot were situated 265 feet to the

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north of the new cesspool. The plaintiff complained that in consequence thereof there was a bad odour, rendering the dwelling-house unfit for habitation. He alleged further that he had arranged to sell his house and contents for $1,000, but that the sale collapsed when the prospective purchaser (who was called and confirmed this) became aware of the complained-of nuisance.

As stated, the learned judge found that a nuisance existed, upon evidence which supported such finding. This Court therefore will not interfere with his conclusion. Two points were debated before him in an effort to attach responsibility for the nuisance on the defendant: (1) That the corporation as landlord of the houses rented to the Security Commission for the Japanese, had some responsibility to see that no nuisance resulted from their occupation. The learned judge held against this contention and it was abandoned upon the argument before us; (2) that the corporation under its health by-law had a similiar responsibility. On this issue the learned judge found against the plaintiff and with this finding we feel bound to agree.

For reasons to be presently mentioned the case must go back for a new trial and therefore it is undesirable to deal with the matter at any great length. It was argued before us that the by-law attached responsibility to the corporation to prevent or abate the nuisance and that not having done so the corporation became liable to anyone who had suffered special damage in consequence thereof. If such a construction were adopted it would mean that the corporation had made itself responsible in damages for any nuisance, however caused, providing only that it arose in consequence of a breach of the provisions of this by-law. That it was the intention of the corporation, when it framed and passed this by-law, to achieve this result, no one can suppose. But the words of the regulation do not bear this meaning. As was said by Duff, J., as he then was, in *Orpen* v. *Roberts*, [1925] S.C.R. 364, at p. 370:

> . . . The object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; . . .

In our opinion it cannot be argued that it was any part of the

intention of the by-law to create, for the benefit of individuals, any right enforceable by action in the circumstances that happened here.

But the short answer is that the learned judge, on available evidence, found no negligence (which was also pleaded) on the part of the corporation; and also found that while there was odour, it was not such as to affect the health of the inhabitants. It follows from this that there was no breach of any relevant provision of the by-law and therefore this argument breaks down on the facts as well as upon the law, and the appeal fails.

Upon the opening of the appeal counsel for the appellant proposed to argue on the footing that the city was the owner of the land on which the cesspools were constructed. This was objected to by opposing counsel upon the ground that it was not so alleged in the pleadings, and the objection was sustained by this Court. Counsel then applied to amend, and decision thereon was reserved. Counsel for the respondent submitted that if the amendment were granted he should have the costs of the trial and the appeal and that there should be a new trial on this new issue alone. The amendment is now granted, the respondent to have the right to amend its dispute note as it may be advised. We direct a new trial on this issue, that is to say, the issue of ownership and the legal consequences flowing from any decision thereon; the respondent to have the costs of the first trial and of this appeal (see *King* v. *Wilson* (1909), 11 B.C. 109). There will be judgment accordingly.

New trial ordered on issue raised by amended pleadings.

Solicitor for appellant: *C. F. MacLean.*
Solicitor for respondent: *Archer Davis.*

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IN THE MATTER OF THE TRUSTEE ACT AND IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT AND IN THE MATTER OF A SUPERANNUATION PLAN FOR EMPLOYEES OF THE WORKMEN'S COMPENSATION BOARD OF THE PROVINCE OF BRITISH COLUMBIA.

Workmen's Compensation Board—Superannuation plan for employees—Originating summons—Questions arising out of administration—R.S.B.C. 1936, Caps. 292 and 312.

Originating summons issued on the application of the Workmen's Compensation Board asking for advice and direction on the following questions and matters arising in the administration of the superannuation fund established pursuant to the provisions of the Workmen's Compensation Act. In the case of the retirement of an employee from employment with the Workmen's Compensation Board, the employee not having served 15 years in the employment and he being retired at his own request or at the request of the Board within five years of his retirement age, or because he has become, in the opinion of the Board, incapacitated by mental or physical disability from properly performing his duties, "(a) Has the Board authority to pay any superannuation allowance to the employee? (b) If so, has the Board authority to pay out the whole balance or what part of it, shown in the separate account kept by the Board for the particular employee? (c) If so, has the Board authority to pay out such amount by way of superannuation allowance in one lump sum? (d) If so, has the Board authority to pay out such amount in instalments spread over months or years, either monthly, quarterly, half-yearly or yearly?" The questions were answered as follows: "(a) Yes. (b) The whole balance; (c) In one lump sum; (d) No. There is no provision for instalment payments."

ORIGINATING summons issued on the application of the Workmen's Compensation Board of British Columbia asking for advice and direction on certain questions arising in the administration of the superannuation fund established pursuant to the provisions of the Workmen's Compensation Act, R.S.B.C. 1936, Cap. 312, and amendments. Heard by MACFARLANE, J. at Vancouver on the 20th of May, 1946.

Coburn, for employees.

Guild, for Workmen's Compensation Board.

Cur. adv. vult.

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MACFARLANE, J.: This is an originating summons issued upon the application of the Workmen's Compensation Board of the Province of British Columbia, asking for advice and direction on the following questions and matters arising in the administration of the superannuation fund established pursuant to the provisions of the Workmen's Compensation Act, R.S.B.C. 1936, Cap. 312, and amendments, and pursuant to a superannuation plan for employees of the Workmen's Compensation Board of the Province of British Columbia effective July 1st, 1941, and approved by the Lieutenant-Governor in Council of the Province of British Columbia:

In the case of the retirement of an employee from employment with the Workmen's Compensation Board, the employee not having served fifteen years in the employment, and he being retired at his own request or at the request of the Board within five years of his retirement age, or because he has become, in the opinion of the Board, incapacitated by mental or physical disability from properly performing his duties, (a) Has the Board authority to pay any superannuation allowance to the employee? (b) If so, has the Board authority to pay out the whole balance, or what part of it, shown in the separate account kept by the Board for the particular employee? (c) If so, has the Board authority to pay out such amount by way of superannuation allowance in one lump sum? (d) If so, has the Board authority to pay out such amount in instalments spread over months or years, either monthly, quarterly, half-yearly, or yearly?

Mr. *R. W. Lane* was appointed by order of HARPER, J. on the 9th day of April, 1946, to represent himself and all others the employees of the Workmen's Compensation Board who have contributed or are contributing to the superannuation fund herein referred to.

The first point is as to the effect of the words "as herein provided" which appear in the opening clause of paragraph 8 of the plan. I do not think the words "as herein provided" are necessarily to be employed as words of limitation, that is to say, to exclude the rights of any one. The primary purpose of that paragraph and of paragraph 9, which follows, is to divide the employees into two classes, those set out in paragraph 8 who are entitled to superannuation allowance, and those in paragraph 9 who are entitled to specified benefits according to their length of service. Those referred to in paragraph 8 are dealt with in regard to their retirement age. That paragraph has nothing to

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do with length of service; it provides that each employee when he reaches the retirement age as specified in paragraph 2—that is 65 for males and 60 for females—or when having reached an age within five (5) years of that he retires at his own request or at the request of the Board, he is entitled to superannuation. That paragraph also includes those who have become incapacitated by mental or physical disability. They also become entitled under that paragraph. The question is, To what do they become entitled? The words used in the paragraph are "superannuation allowance."

As I read the plan as between paragraphs 8 and 9, paragraph 8 is the dominant or prevailing paragraph. The two paragraphs are inclusive of all employees, but if an employee falls within paragraph 8, then he does not fall within paragraph 9, for that paragraph is specifically restricted to those not entitled to superannuation under paragraph 8.

It is necessary then to find which provision for superannuation allowance, apart from paragraph 9, applies to those referred to in paragraph 8.

Paragraph 5 provides that until an employee has been in the service of the Board for 15 years all employee payments and all employer past and future service payments with respect to such employee shall be kept in the Board's superannuation fund and invested. When 15 years' service has been completed, these payments are, by paragraph 6, to be paid to the Government Annuities Branch for the providing under the Government Annuities Act of any available annuity of suitable kind or class and approved by the Board. Until 15 years of service has been completed, these moneys remain in the fund. Paragraph 11 provides that a separate account shall be kept by the Board for each contributor to the superannuation fund and credit shall be given for each contribution made by the employer and employee. Under the provisions of paragraph 10, if such employee leaves the employment before becoming entitled to the employer's past service payments and future service payments, then all payments to which the employee or his dependants or his estate are not entitled shall be used to reduce the Board's future service contributions to the fund. The question here is, Whether these

payments are available for the employee who leaves before completing 15 years of service? or, in other words, Is the employee entitled to such payments if he comes within the classification made in paragraph 8? The wording of paragraph 8 is:

> Each employee shall be entitled to superannuation allowance.

He loses his right to these moneys under paragraph 10 when he leaves before becoming entitled, and that paragraph speaks only of payments to which he is not entitled.

I think, if the employee comes within the language of paragraph 8, he is entitled to the moneys at his credit in the account referred to in paragraph 11.

I would therefore answer the questions as follows: (a) Yes. (b) The whole balance. (c) In one lump sum. (d) No. There is no provision for instalment payments.

Order accordingly.

REX v. SHANNON.

Automobile—Found parked on street—Prosecution of owner for violation of traffic by-law—Onus on owner—Necessity of first proving some one in possession—R.S.B.C. 1936, Cap. 195, Sec. 74.

Where the registered owner of a car found parked on a street is charged with violation of section 8 of the Motor Vehicle Inspection By-law of the city of Vancouver, section 74 of the Motor-vehicle Act places on the owner the *onus* of proving that the person in possession thereof was not a person entrusted by the owner with the possession, but in order for this *onus* to arise, the prosecution must prove that the automobile was in someone's possession.

The fact that an automobile is found parked on a city street does not justify the inference that some one was in possession of it within the meaning of said section. Where there is no evidence that anyone was in possession of or operating the vehicle said section does not authorize the conviction of the owner under a city traffic by-law.

APPEAL by way of case stated by W. W. B. McInnes, Esquire, deputy police magistrate, Vancouver, on his conviction of Wyndom Shannon on a charge that he unlawfully did operate a motor-vehicle on the streets of Vancouver without having affixed thereto a current certificate of approval or rejection issued pursuant to the Motor Vehicle Inspection By-law No. 2556 of the city of

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Vancouver. Argued before WILSON, J. at Vancouver on the 13th of June, 1946.

Bray, K.C., for accused.
A. W. Fisher, for the Crown. *Cur. adv. vult.*

24th June, 1946.

WILSON, J.: This is a case stated by W. W. B. McInnes, Esquire, deputy police magistrate, based on his conviction of Wyndom Shannon on the following charge:

That at the city of Vancouver, on the 28th day of December, 1945, owner of Auto No. B.C. 45-897, Wyndom Shannon, 1373—20th Street, West Vancouver, B.C. unlawfully did operate motor-vehicle No. B.C. 45-897 on the streets of the said city of Vancouver without having affixed thereto a current certificate of approval or rejection issued pursuant to the Motor Vehicle Inspection By-law No. 2556, of the said city of Vancouver.

Section 8 of the Motor Vehicle Inspection By-law of the city of Vancouver provides as follows:

8. No person shall operate a motor-vehicle on the streets of the City after the 31st day of August, 1939, unless there is duly affixed thereto a current certificate of approval or a rejection certificate as herein provided.

Section 74 of the Motor-vehicle Act, Cap. 195, R.S.B.C. 1936, reads thus:

74. The owner of a motor-vehicle shall be held responsible for any violation of this Act, or of the regulations, or of the "Highway Act" or the regulations thereunder, or of the provisions of the "Game Act" in respect of the carrying or use of firearms in motor-vehicles, or of the traffic by-laws of any municipality, by any person entrusted by the owner with the possession of that motor-vehicle; but where the motor-vehicle is in the possession of a person under a contract by which he may become the owner of the motor-vehicle upon full compliance with the terms of the contract, and in whose name alone the licence for the operation of the motor-vehicle is issued, nothing in this section shall impose any liability on any other person as owner of the motor-vehicle. On every prosecution of the owner of a motor-vehicle in respect of any offence otherwise within the scope of this section, the burden of proving that the person so in possession of the motor-vehicle was not a person entrusted by the owner with the possession of that motor-vehicle shall be on the accused.

A motor-vehicle, whereof the accused Wyndom Shannon was registered owner, was found parked on Georgia Street in the city of Vancouver. There is no evidence that any person was in possession of or operating the said vehicle.

The neat point to be determined is whether the provisions of section 74 of the Motor-vehicle Act above cited render the owner liable to conviction under the by-law in the circumstances cited, that is, whether there has been a violation of the by-law by "any

person entrusted by the owner with the possession of the motor-vehicle." In considering this it is, of course, necessary to have in mind that the *onus* is on the owner to prove that the person in possession was not a person entrusted with possession. But, before this *onus* can arise, it is surely necessary to prove that some one was in possession of the vehicle. The learned police magistrate must, I conceive, have thought it proper to draw from the mere presence of the vehicle on the street an inference that some one was in possession of it. The Motor-vehicle Act permits one inference to be drawn against the accused, the inference that the person in possession of the car has it with the owner's consent. But, I am here asked to base this statutory inference on still another inference, that, since the car was on the street, some one must have been in possession of it. With the greatest respect, I do not think such an inference should be drawn. We are here in the realm of criminal or *quasi*-criminal law, and facts should not lightly be presumed against an accused person. Under the circumstances cited, the car might have been stolen and abandoned on the street, in which case no one would be in possession of it. I realize that the necessity in all cases of proving possession may cast a considerable burden on the police, but that is a matter which can be cured by legislation. As the law is now, I think the conviction cannot stand and must be quashed.

Conviction quashed.

BLANEY v. RODDA.

Landlord and tenant—Suite in basement of nursing-home—Order giving possession to landlord—Appeal—Order 294 of Wartime Prices and Trade Board applies—Tenant restored—R.S.B.C. 1936, Cap. 143.

A tenant, who is not a patient, occupies a suite in the basement of a nursing-home under a monthly tenancy. An order was made under the provisions of the Landlord and Tenant Act giving possession to the landlord.

Held, on appeal, reversing the decision of BOYD, Co. J., that as the suite is housing accommodation and subject to order No. 294 of the Wartime Prices and Trade Board, the order should be set aside and the tenant restored to possession.

APPEAL by defendant from the order of BOYD, Co. J. coming up for review under section 23 of the Landlord and Tenant Act. Argued before WILSON, J. at Vancouver on the 12th of June, 1946.

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J. Hall Evans, for plaintiff.
G. S. Miller, for defendant. *Cur. adv. vult.*

19th June, 1946.

WILSON, J.: The landlord operates a nursing-home at 1970 McNichol Avenue, Vancouver. The tenant, who is not a patient in the nursing-home, occupies a self-contained living-suite in the basement of the premises under a monthly tenancy. BOYD, Co. J. has made an order under the Provincial Landlord and Tenant Act giving possession of the suite in question to the landlord. It is admitted he would have no power to do so if the tenancy in question is subject to the provisions of the Federal Housing Regulations, being order No. 294 of the Wartime Prices and Trade Board. The matter comes before me for review under section 23 of the Landlord and Tenant Act.

Section 2 (1) (*a*) of order 294 provides as follows:

> The provisions of this Order shall not apply to any living or sleeping room in an educational, religious, philanthropic, charitable, scientific, artistic, professional, social or sporting institution, or in any hospital or convalescent or nursing home, or in any clubhouse.

It appears to me that the object of this provision is to protect the operators of nursing-homes, *inter alia,* against persons who have entered as patients taking advantage of their possession and refusing, during the present housing shortage, to vacate, although they may no longer require hospital or nursing care. But the premises intended to be protected are those used as a nursing-home and when we have, as here, a suite which is in no way part of the nursing-home, I cannot think that these considerations apply, or that the suite, occupied under an ordinary dwelling-house tenancy, is to be considered part of the nursing-home. The landlord has by his own act divested this part of the premises of that character and removed the suite from that description. I do not see how he can now be heard to restore it. And I do not think that the fact a licence has been issued describing the whole premises as a nursing-home is conclusive as against the tenant, who had no voice in the application for or issuance of the licence. It appears to me the suite is housing accommodation and subject to order 294. Therefore, with the very greatest respect for the contrary opinion of the learned county court judge, who has had an enormous experience in these matters, I think the conclusion he reached is wrong, and that the order should be set aside and the tenant, if evicted, restored to possession. Costs to the tenant. *Appeal allowed.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

DAVIDSON v. DAVIDSON (p. 161).—Affirmed by Supreme Court of Canada, 24th January, 1946. See [1946] S.C.R. 115; [1946] 2 D.L.R. 289.

PROTOPAPPAS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED *et al.* (p. 218).—Reversed by Supreme Court of Canada, 11th June, 1946. See [1946] 4 D.L.R. 1.

TOWNS, E. A., LIMITED v. HARVEY, RUCK AND MOORE, Executors of the Estate of S. C. Ruck, Deceased (p. 414).—Affirmed by Supreme Court of Canada, 11th June, 1946. See [1946] 4 D.L.R. 160.

Cases reported in 61 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

MCCLURE AND MCCLURE v. O'NEIL *et al.* (p. 544).—Affirmed by Supreme Court of Canada, 1st October, 1946. See [1946] S.C.R. 622; [1946] 4 D.L.R. 545.

VAN SNELLENBERG, JR. v. CEMCO ELECTRICAL MANUFACTURING COMPANY LIMITED (p. 507).—Affirmed by Supreme Court of Canada, 1st October, 1946. See [1946] 4 D.L.R. 305.

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victed of an indictable offence not punishable with death, committed after a previous conviction for an indictable offence, is liable to imprisonment for ten years, unless some other punishment is directed by any statute for the particular offence." Accused was charged with attempting to break and enter under Code section 571. The maximum sentence of seven years for breaking and entering under Code section 461 is limited by Code section 571 in an attempt to commit that offence to one-half the term of imprisonment, namely, three and one-half years. The accused had been previously convicted of an indictable offence and holding that Code section 1053 is an "express provision" to which Code section 571 refers, accused was sentenced to seven years' imprisonment. *Held*, on appeal, affirming the decision of LENNOX, Co. J., that Code section 571 makes an "attempt" an indictable offence in itself. It is, therefore, an indictable offence committed after a previous conviction for an indictable offence referred to in section 1053 which imposes a maximum penalty of ten years. The appellant had been previously convicted of an indictable offence and accordingly comes within the maximum penalty of ten years provided for in section 1053. The present sentence of seven years is within that maximum. From the facts and the accused's record no sound reason emerges for disturbing the sentence of seven years. REX v. CAPELLO. - - - **354**

5.——*Charge of attempting to break and enter a shop with intent to steal—Circumstantial evidence only—Facts not inconsistent with accused's innocence — Appeal—Conviction quashed.*] The accused with one Reynolds was charged with an attempt to break and enter a shop with intent to commit the indictable offence of theft. Between 3 p.m. and 11.30 p.m. on the 24th of June, 1945, a window in the shop in question had been broken and the glass removed therefrom. At about 11.30 on the same night Carey and Reynolds were seen by police officers coming out of the alley which led past the rear of the shop premises. The officers questioned them and Reynolds was found to have a screwdriver in his possession, but there was no evidence of Carey being in possession of anything of an incriminating nature. Reynolds was sentenced to two years' imprisonment and Carey one year. *Held*, on appeal, reversing the conviction by deputy police magistrate McInnes, that the circumstances of Carey's discovery in the vicinity of the premises in question and in the company of Reynolds, whose

finger-prints were found on the broken glass, though highly suspicious, nevertheless are not so conclusive of guilt as to justify conviction upon the proper application of the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227; 168 E.R. 1136. REX v. CAREY. - - - - - - - - - - - **88**

6.——*Charge of stealing — Conviction—Certiorari—Admission of affidavit evidence to show lack of jurisdiction — Conviction quashed.*] The applicant was convicted on a charge of stealing a typewriter by the police magistrate in and for the municipality of Delta. On an application for a writ of *certiorari* to quash the conviction, an affidavit of the accused was submitted in which it was alleged that no evidence was given disclosing that the offence charged was committed in the municipality of Delta. *Held*, that the affidavit be accepted and as the Crown has not sought to impugn in any way the statement contained in the affidavit and there was no evidence given at the hearing that the offence was committed within the municipality of Delta, the conviction must be set aside. REX v. ORMONDE. - **244**

7.——*Conspiracy—In possession of morphine — Conviction — Appeal from sentence by Crown—Sentence increased from three to five years.*] The defendants were convicted on a charge of conspiring to commit an indictable offence, namely, to have in their possession a drug, to wit, morphine, and were sentenced to a term of three years in the penitentiary. They appealed from conviction and the Crown appealed from sentence on the ground that the sentence was not commensurate with the gravity of the offence and was not in uniformity with sentences passed on other prisoners for similar offences. *Held*, that the appeal from conviction be dismissed, but the Crown appeals be allowed by increasing the sentences from three years to five years' imprisonment in each case. REX v. YOUNG AND MCQUEEN. - - - - - - - - **84**

8.——*Conviction—Appeal—Sentence reduced—No warrant of conviction by judge on appeal or by convicting magistrate—Habeas corpus — Order directing issue of proper warrant by magistrate.*] Accused was convicted on November 15th, 1945, under Part XV. of the Criminal Code of an offence against the Canada Shipping Act and sentenced to serve eight weeks in gaol. He filed notice of appeal to the county court under section 750 of the Criminal Code and was released on bail pursuant to said section. On January 14th, 1946, the conviction

longed to him and none of the others knew of it. On being charged jointly with possession of morphine, the occupant of the room and accused were convicted. *Held*, on appeal, reversing the decision of SARGENT, Co. J. (SIDNEY SMITH, J.A. dissenting), that the officer admitted in evidence that he did not see what was thrown by accused and it would be almost impossible for the accused to have thrown the paper package in such a way that it could get under the book where it was found. While the testimony brings Sherman under strong suspicion, yet it does not go as far as it must under the principle in *Hodge's Case* (1838), 2 Lewin, C.C. 227, at p. 228, to exclude any reasonable hypothesis of his innocence, and the appeal is allowed. REX v. SHERMAN. - - - - - **241**

13.——*Indecent assault—Evidence—Corroboration—Unsworn evidence of child—Criminal Code, Secs. 1002 and 1003.*] The accused was convicted of indecently assaulting D. a child of tender years. D. was examined by the judge for the purpose of ascertaining whether she had the capacity to be sworn and was directing his mind to the ascertainment of whether the child understood the nature and obligations of an oath. He concluded she possessed such understanding. At the time D. was accompanied by another child of tender years, J. whom the judge also examined. He was not satisfied that J. knew the nature of an oath, but he was satisfied that she had the requisite intelligence to justify reception of her evidence under section 1003 of the Criminal Code, and her unsworn testimony was thereupon received. *Held*, that even if the complainant little girl had given her testimony unsworn, corroboration of what she said is found in the subject-matter of the conversation between her mother and the appellant, once the jury disbelieved the appellant as they did. REX v. COWPERSMITH. - - - - - - - - **401**

14.——*Indecent assault—Identity of the accused—Uncorroborated evidence of ten-year-old child—Alibi—Charge—Misdirection—Appeal—Conviction quashed.*] On the afternoon of the 12th of May, 1945, a girl, ten years of age, was the subject of an indecent assault in a motor-car driven by her assailant. The infant complainant was the only witness who gave evidence as to the identity of the man who assaulted her. She had not known him previously. On arriving home after the assault she described what took place to her mother who at once

reported to the police. The girl stated in evidence that on June 20th following, over five weeks later, she recognized as her assailant the accused who was then sitting in a motor-car parked on a street in the city. She took the licence number of the car and the police then traced the accused as an employee at the shipyards. The next day the girl was taken to the shipyards where she identified the accused among a group of workmen when leaving the shipyards as the man who assaulted her. In her evidence the girl's description of her assailant was limited to that of "a young man with a low cut moustache" and she was unable to describe his features, characteristics or clothes. In support of an *alibi* the evidence of accused was that on the afternoon in question he took his car to a gas station where he installed a fan-belt, put his car on the hoist where he made incidental repairs, taking him most of the afternoon and then went home. In this he was supported by the evidence of the operator of the gas station and of his wife and a friend who saw him there. The accused was convicted. *Held*, on appeal, reversing the conviction by COADY, J., that the evidence of the child was weak and barren of detail when there was ample opportunity for observation of the man and in the charge there was not that "detailed clear and careful" putting of the facts of identification and caution of the danger of founding a conviction thereon. Further there was misdirection when the jury were told that the child's mother had sworn on the trial that the child, when complaining of the assault, had said that the man's hair was brown. In fact the record discloses the mother said at the trial that she did not remember any reference being made to the man's hair. The case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty and in the recited circumstances a verdict of acquittal should be entered. REX v. YATES. - - - - - - - - **307**

15.——*In possession of revolver and other stolen goods — Convicted on four counts—Appeal—Conviction sustained on one count—Retaining possession of revolver and blank driver's licences—Criminal Code, Secs. 115, 399, 464 (b) and 1016, Subsec. 2.*] On the 19th of April, 1945, at 7.55 p.m. two police officers noticed a car at the corner of Broadway and Cambie Street in Vancouver occupied by the two accused and driven by Godbolt. The car proceeded west on Broadway and the police followed in their car.

CRIMINAL LAW—*Continued.*

When close behind Godbolt seemed to speak to Sullivan and Sullivan turned and looked through the rear window at the police car. Sullivan then appeared to take something off a shelf behind him and as he turned, Godbolt veered the car sharply to the kerb, the right-hand door opened, something appeared to be thrown out followed by some white cards. The car continued close to the kerb with the door remaining open. When the police car came almost abreast of the other car, Sullivan seemed to be making motions with his legs as though he was trying to kick something out of the door. They signalled Godbolt to stop, but the latter increased his speed. The police then caught up and forced his car into the kerb. One of the policemen, then looking back, saw a boy pick up something where Godbolt had first turned towards the kerb. The boy came to him and handed him a Smith-Weston revolver which he had picked up. Later the policeman found six drivers' licence forms close to where the revolver was picked up. The accused were arrested and in their car was found a set of pole-climbers, one three-pound hammer, two pieces of soap, two steel punchers, three pieces of wire, one pair of pliers and a quantity of rubber tape. On the trial the evidence disclosed that the revolver and drivers' licence forms with the articles in the car were stolen. The accused were charged and convicted jointly on four counts. *Held*, on appeal, varying the convictions and sentences of LENNOX, Co. J. (SIDNEY SMITH, J.A. would dismiss the appeal) as to the first count of unlawfully retaining possession of the revolver and six blank drivers' licences knowing the same to have been stolen, that it was established that the revolver and licence forms were stolen from the Government offices in Chilliwack and they were in Godbolt's car and ejected from the car where found. There is no explanation from Godbolt for possession of the stolen articles and there is a presumption warranting his conviction. Sullivan was in joint possession of the articles and having failed to give any explanation for his joint possession he is presumed to have known they were stolen and his conviction is warranted. On the second count of retaining possession of pole-climbers, the conviction is set aside as the evidence when read with acceptance of Godbolt's explanation of possession is too inconclusive to fix the appellants with knowledge that the articles were stolen. On the third count of possession of the revolver for a purpose dangerous to the

CRIMINAL LAW—*Continued.*

public peace:—*Held*, that the conviction was unwarranted as there was lack of evidence of possession of the revolver "for a purpose dangerous to the public peace," but invoking Code section 1016, subsection 2 it found the appellants guilty of an offence under Code section 121A and substituted a conviction under that section. On the fourth count of "unlawful possession by day of safebreaking instruments with intent to commit an indictable offence":—*Held*, that all these articles could be used for legitimate purposes and it lay on the prosecution to prove that they were not in the appellants' possession for an innocent purpose. The evidence fails to go that far and the convictions on this count were set aside. On the question of sentence:—*Held*, that the sentence of seven years by the Court below be reduced to six years on the first count and on the substituted conviction under Code section 121A for the third count be thirty days' imprisonment with a fine of $50 and in default of payment a further thirty days' imprisonment. These sentences to run consecutively to the previous sentences of six years. REX v. SULLIVAN AND GODBOLT. - - - - - - **278**

16.——*Justices and magistrates—Jurisdiction—Section 407 of Municipal Act—Effect of—Prohibition—R.S.B.C. 1936, Cap. 199, Sec. 407.*] Section 407 of the Municipal Act provides: "No justice of the Peace shall admit to bail or discharge a prisoner, or adjudicate upon or otherwise act in any case for a city or district municipality where there is a Police Magistrate, except in the case of the illness, or absence, or at the request of the Police Magistrate." Accused applied for a writ of prohibition directed to a stipendiary magistrate for the county of Nanaimo prohibiting him from further proceeding with an information laid against accused upon the ground that the alleged cause of the information arose in the City of Port Alberni for which said city there is a duly appointed police magistrate and it is not within the jurisdiction of a stipendiary magistrate of the county of Nanaimo to proceed with the information, except at the request of the police magistrate. The magistrate did not propose to sit at Port Alberni but at Nanaimo. The information was laid at Nanaimo, the offender residing in Ladysmith. *Held*, that the words "case for a city" may apply not only to cases where the offence is committed, but to cases having other elements, namely: "where the offender is apprehended within the limits" or where the administration of

the Act was in the hands of officials of the city, or where initiatory proceedings were taken or where the trial was proposed to be held. The application is dismissed. REX v. CROSS. - - - - - - **376**

17.——*Murder—Adjournment to ascertain whether further evidence for defence available—Circumstantial evidence—Interpreting at trial—Charge—Criminal Code, Sec. 1014, Subsec. 2.*] *On an application by* counsel for appellant briefed by the Minister of Justice for the Indian Department for an adjournment for two weeks in order to ascertain if fresh evidence may be available:—*Held*, that applications of this nature should, generally speaking, be supported by some material on affidavit and were it not for the peculiar aspects and circumstances herein the Court would regard the motion with disfavour, but counsel's statement is accepted that there is a possibility of further evidence in favour of the appellant being brought to the Court's attention. As this is a murder case in a distant area of the Province and because of the special circumstances of this case, including the fact that it is supported by the Department of Justice and in order to avoid any possible miscarriage of justice, the adjournment is granted. On March 13th, 1944, the body of one Mesmer (a trapper) was found by police officers frozen in the ice with face down at a point about 800 yards up the Finlay River from deceased's cabin. He died from the effect of two gunshot wounds, having points of entry in his back. A *post mortem* examination showed that one shot entered deceased when he was standing and the other when he was prone on his face. A 30-30 calibre bullet was found in his body. The accused, an Indian 23 years old, lived with his foster-father and mother in a cabin at Finlay Forks about 10 miles from Mesmer's cabin, and upon police officers searching the cabin, they found various articles, including a 300 Savage rifle all of which were proved to have been the property of deceased. When searching, accused handed one of the officers a 30-30 rifle and a buckskin case containing shells for a 30-30 rifle, accused saying they belonged to himself. Tests by a police ballistics expert showed that the rifling marks on the bullet casing found on deceased's body were identical with the rifling marks found on the bullets discharged from accused's rifle. In Mesmer's cabin the police found four or five bottles of lemon extract partly full, one of which was half full containing alcoholic content, the others being

non-alcoholic. The accused gave evidence on his own behalf without an interpreter although one was present. He swore that he was in Mesmer's cabin, that Mesmer gave him a drink and after that he got crazy and knew nothing, that he may have gone up the Finlay River, he did not know, that he stayed in Mesmer's cabin all night and the next morning Mesmer's partner Hans Fifer returned to the cabin and he told him "He gave me drunk too much. Maybe I shot him. I don't know nothing, I don't know nothing about it." He then asked Fifer to go down to McDougall's cabin and send a wire for a policeman. On cross-examination he was asked the question "I am asking you and I am suggesting that he was 14 paces ahead of you when you shot him, what do you say to that? What? Answer: "Yes." Accused was convicted of murder. Counsel bases his appeal on two main grounds: (1) That the trial was unsatisfactory in that the evidence of accused, who is an Indian, and not given through an interpreter, prejudice occurred to him because he only spoke broken English and did not, in his evidence, put his case properly to the jury and this was shown on his cross-examination; (2) that the learned Chief Justice did not charge the jury in accordance with the rule as to circumstantial evidence laid down in *Hodge's Case.* Held, that in view of the accused's evidence in chief he was not prejudiced by his evidence on cross-examination, and there is no single formula which it is the duty of the trial judge to employ. As a rule he should be well advised to adopt the language in *Hodge's Case*, but the formula used by the Chief Justice was sufficient. This is a case where section 1014, subsection 2 of the Criminal Code should be applied and the appeal is dismissed. REX v. PRINCE. - **99**

18.——*Murder—Provocation — Accident —Direction to jury—Reasonable doubt as between murder and manslaughter—Criminal Code, Secs. 252, Subsec. 2, 259 (c) and 1016, Subsec. 2.*] The accused and one Helen Lee lived together from August to December, 1943, when they quarrelled and she left him, but he persisted in trying to find her as she went from one boarding-house to another attempting to avoid him. In April, 1944, she, with a friend Doris Olson obtained rooms 501 and 502 in the Mayli Rooms on Hastings Street in Vancouver with a communicating door between them. Helen 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

CRIMINAL LAW—*Continued.*

with the deceased Lennox in room 501 and Doris was on her bed in room 502 reading, with a six-months' old child of her sister whom she was looking after, when there was a knock on the door leading from the hall into room 501 and the accused forced his way into the room. He had a rifle partly under his overcoat and strapped to his shoulder. He took the gun out and while swinging it about said "everybody stand back" several times. Then the gun suddenly went off and the bullet hit Lennox in the stomach. Helen then grabbed the rifle and while struggling for it, they went through the adjoining door into room 502 where Lennox followed them and seized the accused from behind and the two men fell on Doris' bed where accused, who also had a three-pronged file with a sharp end, stabbed Lennox in the stomach with it. When Doris first saw accused come into room 501 she slammed the door shut between the two rooms and ran downstairs to telephone the police. The accused gave evidence and said the gun did not go off until after Helen had seized it and it was not until after they had struggled into room 502. Lennox died two hours after the shooting. Accused was convicted of murder. *Held,* on appeal, that on the whole of the facts and with a proper direction, the only reasonable and proper verdict, if not of murder, would be one of manslaughter. The jury must have been satisfied of facts which proved Harrison guilty of manslaughter. Section 1016, subsection 2 of the Code should be applied and for the verdict found should be substituted a verdict of manslaughter and in substitution for the sentence passed by the trial judge should be imposed a sentence of imprisonment for life. REX v. HARRISON. (No. 2). - - - - - - - **420**

19.——*Plea of guilty — Duty of Court to ascertain facts—Failure of accused to understand charge — New trial refused.*] A plea of guilty ought not to be accepted unless the judge or magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty to assure himself that the accused is pleading guilty to the offence with which he is charged. From examination of the depositions considered in conjunction with sections 69 and 340, subsection 2 of the Criminal Code the Court was unable to conclude that any miscarriage of justice occurred and the appeal was dismissed. REX v. JOHNSON AND CREANZA. - - - - - - **199**

20.——*Retaining stolen property—Evidence — Exculpatory statements denying guilt—Admissibility—Not within the governing confessions—Criminal Code, Sec. 399.*] Police officers, while engaged in the investigation of an offence quite separate and distinct from that with which the accused was here charged, discovered in a bedroom in an auto-camp cabin occupied by the accused and his wife a quantity of motion-picture equipment contained in several packages. Suspecting the goods were stolen and having decided to lay a charge against accused in that connection, one of the two officers asked accused for an explanation as to how and under what circumstances he had the equipment, to which accused replied that it was the property of his brother. The officer then told him he might be charged with retaining stolen property and gave him a proper precautionary warning. Then in response to questions the accused repliel "that the stuff was not stolen, that his brother had come from Winnipeg three months prior and had brought it with him." Evidence on the trial disclosed that the equipment was stolen a month after accused said his brother had brought it from Winnipeg. Accused appealed from his conviction for retaining stolen goods knowing the same to have been stolen on the grounds of wrongful admission in evidence of certain statements made by accused to police officers and that there was not sufficient evidence of retaining. *Held,* affirming the conviction by Boyd, Co. J., that the appeal be dismissed. *Per* Sloan, C.J.B.C.: The statement of accused falls within the principle enunciated in *Rex* v. *Hurd* (1913), 21 Can. C.C. 98 and there is in consequence no necessity to consider whether, if it were a confession, it would be inadmissible under the circumstances herein. There is ample evidence to support the conviction. *Per* O'Halloran, J.A.: The statement cannot be regarded as "a confession." Taken at its full value at the time it was made, it was not in itself inculpatory for there was no element of guilt in the facts there acknowledged. It did not in itself involve guilt, directly or by legitimate inference, nor was it essential to proof of the crime charged. The statement when made and when advanced by the prosecution as admissible evidence was entirely exculpatory for it excluded in itself any legitimate inference of guilt under Code section 399. *Per* SIDNEY SMITH and BIRD, JJ.A.: The Crown called the two officers who testified that the accused was properly warned and that his statements

were made voluntarily without threats or inducement. The judge was satisfied with the evidence given and that the Crown had sustained the onus of proving that the statements had been voluntarily made and there was ample evidence from which the learned judge could conclude that the accused was in possession of the goods and was retaining them. *Per* ROBERTSON and SIDNEY SMITH, JJ.A.: When exception is taken to the admission of evidence, the evidence objected to must be set out with particularity in the notice of appeal. REX v. MANDZUK. - **16**

21.——*Speedy trial—Appeal—New trial ordered—Formal judgment entered—Motion to direct mode of new trial—Refused.*] On appeal by accused from his conviction by a police magistrate, the conviction was quashed and a new trial directed. After the formal judgment was entered the appellant moved the Court for a direction that the new trial be before a jury. *Held*, dismissing the motion (SIDNEY SMITH, J.A. dissenting), that the Court lacked jurisdiction. REX v. HAND. (No. 2). - **384**

22.——*Summary conviction — Case stated — Form and contents — Intoxicating liquor — Unauthorized prescription for — Proper form of case stated.*] The appellant, being a physician, was convicted of unlawfully giving a prescription for liquor to other than a *bona-fide* patient in a case of actual need. On appeal by way of case stated the information and complaint and the conviction were filed in the registry with the recognizance and the case stated to which latter was attached the transcript of evidence. *Held*, that the information and complaint and the conviction should not have been sent up and a case stated, being a statutory appeal and one limited to points of law, it follows that the evidence should not be sent up. Where the proceeding is questioned on the ground that there was not any evidence to support the adjudication the magistrate may quote or send up the relevant portions of the evidence and those portions unnecessary to the making of the test "Was there any evidence" should not be sent up. The case stated ought not to have been entituled "In the Supreme Court of British Columbia" and the practice which has prevailed should be discontinued. The application may be amended by the applicant within seven clear days from the date of the proceeding to be questioned and must be in writing. The magistrate may not amend the application. Where the respondent intends to attack an application for a case stated, he should bring it into Court as an exhibit to an affidavit after verification by the magistrate and as it stood upon the expiry of the seven clear days within which it was open to him to make his application. Section 89 (4) of the Summary Convictions Act states that the case shall be transmitted to the Supreme Court. It is therefore unnecessary in a case arising under our Act that the applicant should specify the Court to which it is desired that the case be stated. *Held*, that the case be remitted to the learned magistrate for amendment as indicated. Proper form of case stated. REX v. ARTHUR. - - **408**

23.——*Summary trial — Consent to — Compliance with statute—Evidence of—Official transcript—Criminal Code, Secs. 774 and 781.*] The accused were convicted on charges of stealing an automobile. On appeal, objection to the jurisdiction of the magistrate was raised on the ground that the official transcript of the proceedings in the Court below disclosed that the learned magistrate failed to comply with section 781 of the Criminal Code in that he did not ask the appellants if they consented to trial summarily by him. Counsel for the Crown contended that failure to observe the jurisdictional requirements in question was cured because the formal conviction in each case states the accused consented to be tried summarily. *Held*, that the formal conviction is something which is drawn up after judgment convicting accused. The official transcript of what took place discloses that jurisdictional requirements were not complied with and there can be no proper conviction. A formal document drawn up afterwards cannot displace the accepted official transcript of what actually took place. No proper trial took place and the convictions must be quashed. REX v. CAPELLO. REX v. GORDON. REX v. CRAWFORD. - - - - - - - **90**

24.——*Weapons—Possession of revolver for a purpose dangerous to public peace—Plea of guilty—Duty of judge or magistrate—Criminal Code, Sec. 115. Held (per* SLOAN, C.J.B.C., ROBERTSON and SIDNEY SMITH, JJ.A.), that when an accused person pleads guilty, it is not the law that the magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty. But the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads and

INJUNCTION, INTERIM — *Application to continue until trial—Constitutional law—Validity of statute attacked—The National Emergency Transitional Powers Act, 1945—Orders of Administrator of Motor Vehicles and Parts — R.S.C. 1927, Cap. 206 — Can. Stats. 1945, Cap. 25.*] The plaintiff company carried on a business in second-hand cars and in conjunction therewith operated a general automobile garage business in the course of which it repaired and reconditioned used cars bought for resale. Between 23rd November, 1944, and the 20th of March, 1946, the company had been convicted four times for contravention of the Wartime Prices and Trade Board Regulations respecting purchase and sale of used motor-vehicles. On one occasion it was fined $350, on two other occasions $500 and on a fourth occasion $1,000. Owing to these infractions, the Wartime Prices and Trade Board cancelled its licence in respect of the operation of its business as a dealer in used cars, entered upon its premises, seized three motor-vehicles and certain books and records and prohibited the plaintiff from selling any motor-vehicles, except with the concurrence of the representative of the Board at Vancouver. The claim endorsed on the writ was for a declaration that The National Emergency Powers Act, 1945, is *ultra vires* and order in council P.C. 8528 and all orders issued by the Administrator of Motor Vehicles and Parts under the provisions of the administrator's orders are *ultra vires* and for an injunction and other consequential relief. This is an application to continue until the time of the action an *interim* injunction made *ex parte* by COADY, J., and the Court is asked in substance not to preserve the subject-matter as it now is or even as it was when the action was taken, but to restore it to the condition in which it was before this action was taken. It was held that this cannot be dealt with without deciding first whether there was a probability that the plaintiff could succeed on its claim and as that involves a constitutional point of the highest importance as to the conditions upon which the Federal Government is entitled to invade the field of the Provinces, this should not be attempted even if it were proper on a motion of this kind, without notice to the Attorney-Generals of the Dominion and the Province. *Held*, on appeal, affirming the order of MACFARLANE, J. (O'HALLORAN, J.A. dissenting), that if an interlocutory injunction (whether mandatory or restrictive) is not granted below, it is very seldom that a Court of Appeal will grant one and with the exception of *Home Oil Distributors Ltd. v. Attorney-General of British Columbia* (1938), 53 B.C. 355, there has been no reference to any decision in which an *interim* injunction has been granted where the matter in debate involved the question of the vadility of a statute. This application was substantially one to restore and not merely to preserve and as the plaintiff had not established or could establish the kind of case warranting the continuance of the injunction, it should be dismissed. CAMPBELL MOTORS LTD. v. GORDON *et al.* - - - - - - - - - **481**

LABOUR ORGANIZATION — *Member injured in his employ — On compensation—Then application for and granted withdrawal card from union—Subsequent tender of withdrawal card and application for union card — Refusal—Action—Damages—Costs.*] The plaintiff, a member of the defendant union and employed as a welder in the North Vancouver Shipyards, was injured in his employ in June, 1943, and was thereafter on compensation for injuries suffered. On September 30th, 1943, being satisfied that he would not be able to return to his employment as a welder where he had been, applied for and was granted a withdrawal card from the union. About February 2nd, 1945, plaintiff attended at the shipyards and arranged for his return as a welder. He then tendered his withdrawal card at the office of the union and applied for a union card. This was refused. Nothing further happened until March 20th, when the plaintiff's solicitor received a letter advising that if the plaintiff wished to apply for reinstatement as a member, he was free to do so and his application would be considered on its merits. On the evidence it was found that the plaintiff did apply, but it was refused as the union required payment of all dues covering the period since the withdrawal card was issued. The plaintiff refused to pay and the application was not proceeded with. The plaintiff brought action for a declaration that he was entitled to reinstatement as a member of the union and for directions that the secretary-treasurer of said union do accept the deposit of the withdrawal card held by the plaintiff and the payment of one month's dues and issue a union card to the plaintiff and for a declaration that the plaintiff is a member in good standing of the union and damages. On the argument at the conclusion of the trial the plaintiff asked for and was granted leave to amend his prayer for relief in the alternative for a declaration that the defendants wrongfully refused or neglected to submit the application for reinstatement of the plaintiff to the general membership or

LABOUR ORGANIZATION—*Continued.*

the executive committee and for directions that the application of the plaintiff be so submitted and damages. *Held,* that the plaintiff is not entitled to a declaration for membership as that is a matter for the executive or the membership to decide, but he is entitled to a declaration that his application be submitted either to the executive or to the membership to be dealt with as they see fit. The only damage is for violation of the right to have his application for membership considered by the executive or membership, a right that was denied him. For this he is entitled to nominal damages only, fixed at $50, each party to pay his own costs. GUELPH V. WHITE AND CARRON FOR THEMSELVES AND FOR AND ON BEHALF AND FOR THE BENEFIT OF ALL OTHER MEMBERS OF THE BOILERMAKERS' & IRON SHIPBUILDERS' UNION LOCAL NO. 1, SO INTERESTED. **453**

LAND REGISTRY ACT—*1913 amendment of section 22 (1) of the Act—Effect of—Non-registration of conveyance — Registration of judgment—Priority—R.S.B.C. 1936, Cap. 140, Sec. 37; Cap. 91, Sec. 35.*] A judgment creditor applied for confirmation of the registrar's report recommending that certain lands of the judgment debtor are liable to be sold to satisfy the judgments. The two judgments were registered on July 23rd, 1943, and March 30th, 1944, respectively. On the 19th of June, 1935, the judgment debtor had executed and delivered to Minto Trading and Development Company, Limited, a duly-attested deed conveying the lands in question to that company, but the deed was never registered. The Minto company, relying on the judgment in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 and other cases along the same line contended the principle therein decided was that an execution creditor can only sell the property of the debtor subject to all such charges, liens and equities as the property was subject to in the hands of this debtor. Here the lands in question were not at the date of the registration of the judgment and are not now the property of the judgment debtor. It was held that the case of *Entwisle* v. *Lenz & Leiser* is one directly applicable and binding on the Court unless there has been, since the date of that decision, a change in the statute law applicable, but in 1913 section 22 (1) of the Land Registry Act (now section 37) was amended by substituting the words "at law and in equity" for the words "in all Courts of justice." This amendment has the effect of making lands registered in the name of a judgment debtor his property both at law

MALICIOUS PROSECUTION — *Want of reasonable and probable cause—Mens rea—Honest belief of prosecutor—Duty to make enquiry — Malice — Province of judge and jury.*] While the plaintiff was driving his car at Duncan, B.C., the engine "stopped dead." He was advised by a garageman that the engine was "beyond repair." He then sold the car to a garageman named Grassie for $20, who said he was "going to junk it," and he let the plaintiff have the number plate. The plaintiff took the number plate to the Government office and said "I want to report this car sold as junk." He then signed a form of relinquishment which included the words: "The undersigned hereby certifies that the motor-vehicle under Motor-vehicle Licence No. ....., has been . . . Damaged beyond all possibility of being repaired or used as a motor-vehicle." He then obtained a refund of $2.85 on his licence fee. A day or two after the sale Grassie put another engine in the car, made certain other repairs and sold it to one Gregson, who applied for a licence telling the clerk it was for the "old car of Mr. *Leighton's*," without telling her the engine was changed, and a licence was issued to him with the old number. The defendant Henry, a police corporal, acting under instructions from the defendant Hood, inspector of motor-vehicles, laid a charge against the plaintiff under section 62 of the Motor-vehicle Act of unlawfully making a false statement in the notice of relinquishment of the licence. The plaintiff was acquitted. The plaintiff then brought this action for malicious prosecution and on the answers to questions by the jury, the learned judge found there was lack of reasonable and probable cause and gave judgment for the plaintiff against both defendants. *Held*, on appeal, reversing the decision of HARPER, J., that the question of reasonable and probable cause was, although a question of fact, one to be determined by the Court and not by the jury and unless there is no dispute about the facts (and there was an important dispute of fact in this case), the judge should have the jury answer questions upon which he could come to the conclusion as to

MALICIOUS PROSECUTION—*Continued.*

whether there was or was not reasonable and probable cause. The learned judge did not declare his view on the question of reasonable and probable cause until after the jury's verdict had been recorded, so that the jury, not having any instructions from the learned judge upon this important point, were left to determine the case without consideration of this point except in so far as they were told that if "you find that there is an absence of reasonable and probable cause" you are allowed to infer malice. In effect this was leaving to the jury to find whether or not there was reasonable and probable cause which is not in accordance with the law. The learned judge did not tell the jury anything about the defence, namely, that they were carrying out their official duties and that it was possible for both defendants to feel quite honestly that there had been a technical breach of the Act and a prosecution was justified. Further as the jury were not instructed by the learned judge as to his opinion upon the question of reasonable and probable cause, it was not in a position to deal with the question of malice. There should be a new trial unless the Court was of opinion that there was no evidence to support the jury's finding of malice. The Court, concluding that there was no evidence to support the jury's finding of malice, the appeal was allowed and the action dismissed. LEIGHTON V. HOOD AND HENRY. - - - **186**

MARRIAGE — *Nullity of — Impotency — Domicil and residence of the parties—Jurisdiction—Residence of petitioner alone not sufficient.*] The petitioner sued for a decree that the marriage celebrated between her and the respondent be declared null and void on the ground of his impotence. They were married at Edmonton in the Province of Alberta on October 10th, 1942, and lived together in that Province until August, 1943, when they separated. The petitioner then came to British Columbia where she has resided continuously and the respondent remained in Alberta where the petition was duly served upon him, but he did not enter an appearance. The petition was dismissed on the ground that the Court has no right to entertain the action as the respondent is not domiciled within this jurisdiction. *Held*, on appeal, affirming the decision of FARRIS, C.J.S.C., that on a petition to have a marriage declared a nullity on the ground

NEGLIGENCE—*Continued.*

ity—Public Schools Act, R.S.B.C. 1936, Cap. 253, Sec. 133.] On the 22nd of September, 1941, at about 3.30 in the afternoon the infant plaintiff, being a pupil at a public school under the jurisdiction of the defendants at Duncan, B.C., was hit in the eye by a hockey stick in the hands of another pupil when playing a pick-up game of grass hockey on the playground of the school premises. The boys were 11 years old. After school was over the children went to the teacher in charge of the game, Miss Burne, and asked permission to be allowed to play the game that afternoon. She told them they could have the equipment, that they should choose sides and commence play and she would be out later to supervise the game as at the time she had to attend a teachers' staff meeting. The children obtained the equipment, went outside, chose sides and commenced to play. Boys and girls were in the game. After playing for about 20 minutes and before Miss Burne arrived, a boy, one Purvey, got between Gard and the ball on his wrong side, thereby breaking a rule and then raised his stick above his shoulder, thereby breaking another rule, and in so doing he struck Gard in his right eye causing serious and permanent injury. In an action for damages against the Board of School Trustees it was held on the trial that the game may be dangerous when played by children with a slight amount of instruction, the teacher should have known it was dangerous and was negligent in permitting boys 11 years old with little experience to play the game without supervision. She was acting in the course of her employment and the trustees were liable for her acts. *Held*, on appeal, reversing the decision of MACFARLANE, J. (O'HALLORAN, J.A. dissenting), that danger may eventuate in any game and in that sense injury to one of the players might be foreseen, yet that danger is one of the risks of the game which every parent knows goes with the game, and the chances of any risk eventuating in a game of grass hockey played by children is very slight. The possibility of danger emerging was only a mere possibility which would never occur to the mind of a reasonable man and therefore Miss Burne was not negligent in permitting the game to proceed without her supervision. To hold otherwise would be to lay down a standard of conduct which must be pronounced as much too exacting. GORDON PETER GARD, AN INFANT SUING BY HIS NEXT FRIEND, AUGUSTINE GARD, AND THE SAID AUGUSTINE GARD v. THE BOARD OF SCHOOL

NEGLIGENCE—*Continued.*

TRUSTEES OF THE CITY OF DUNCAN (CONSOLIDATED) SCHOOL DISTRICT, AND THE TRUSTEES THEREOF. - - - - **323**

4.——*Evidence — Question for jury — Breach of statutory duty—Can. Stats. 1932, Cap. 42.*] The plaintiffs, who are fishermen, brought action for damages done to their nets by the alleged negligence of the defendants while the nets were under seizure, and in their possession. The seizure was made on account of a violation of section 11 (1) of the Special Fishery Regulations for British Columbia which requires, *inter alia*, that the buoys of all nets shall have the fishermen's initials and licence numbers inscribed thereon. On May 12th, 1944, the plaintiffs, with two fishing-vessels and eleven gill nets, were fishing for dogfish near Pender Harbour. They were approached by a patrol vessel in charge of the defendant Sherman, a fishery officer, who told them they were guilty of a breach of the fishery regulations and he seized their nets and piled them on the deck of the patrol vessel (two of the nets were left behind but were picked up the next day). The patrol vessel then went to Nanaimo arriving on the 14th of May when they were handed over to the defendant Tait, the chief fishery officer who on the next day removed the nets and placed them on the railing of the approach to the Pacific Biological Station wharf where they remained until May 30th, 1944, when, at the instance of Tait, they were returned to the plaintiffs at Pender Harbour. In an action for damages for seizing and retaining their nets, for not piling them properly on the patrol vessel so as to prevent overheating and not putting them in brimstone to prevent rotting and also preventing them from following their occupation as fishermen. Seven questions were put to the jury, the first four dealing with whether the plaintiffs' boats and nets were marked in accordance with section 11 (1) of the regulations and if not, whether the defendant Sherman had reason to believe that there was a breach of this regulation. The answers were that they were not so marked and that Sherman was right in thinking that there had been a breach of the regulations. Questions 5, 6 and 7 dealt with the amount of the damages which were found at a total of $2,042.80 and for which judgment was entered. *Held*, on appeal, reversing the decision of COADY, J. (O'HALLORAN and SIDNEY SMITH, JJ.A. dissenting), that the point upon which the appellants must succeed is that there is no finding of negli-

gence. Upon the jury awarding damages, they might have attributed negligence to both defendants or one or other of them. Assuming there is implicit in the last answer of the jury a finding of negligence, it is not possible to ascertain in what the negligence consisted or whether it was that of Sherman or Tait or both. But the Court is strictly restrained to the facts found by the jury and stated in the special verdict. There must be a new trial. MACKAY AND MACKAY v. TAIT AND SHERMAN. - **506**

5.——*Intersection — Pedestrian-way — Pedestrian crossing in front of close approaching street-car—Struck by motor-truck beyond street-car—Motion for non-suit—Adjourned to end of hearing—Cross-examination of co-defendant's witness—Effect of — Damages — Verdict — Appeal.*] On the 15th of August, 1945, at about 8 p.m. when the weather was fine and the pavements dry, a street-car of the defendant company proceeded west on Hastings Street in Vancouver from Victoria Drive towards Salsbury Drive on a down grade at from 20 to 25 miles an hour. When still some distance from Salsbury Drive one Stewart, the motorman saw the plaintiff stepping off the kerb at the south-east corner of the intersection and walk to the south track evidently intending to catch his car. Stewart's vision was then obscured by an east-bound street-car passing him. He then slowed down and sounded his gong and when about 15 feet from the intersection, he again saw the plaintiff suddenly emerge from behind the east-bound street-car. He then applied his brakes and sounded his gong. The plaintiff proceeded at a run across the front of his car, clearing it by about five feet. When clear of the north track the plaintiff was confronted by the defendant Knap's motor-truck travelling westerly about 10 feet back of the front of the street-car and from two to three and a half feet north of the street-car travelling at about 25 miles an hour. When the plaintiff saw the Knap truck he ran in a north-westerly direction, Knap swerving his truck to the right endeavouring to avoid him, but he struck the plaintiff who was severely injured. Knap's evidence was in conflict with that of Stewart and one Turner (a passenger on the street-car) in swearing that the street-car did not slow up but continued at 25 miles an hour up to the pedestrian-way and there was no sounding of the gong. A city by-law limited the speed of a street-car to 18 miles an hour. The jury found all the parties guilty of negligence and apportioned the fault: the plaintiff 10 per cent. and Knap and B.C. Electric Ry. Co. 45 per cent. each. *Held*, on appeal, affirming the decision of WILSON, J. (BIRD, J.A. dissenting in part and would allow the appeal of the B.C. Electric Ry. Co.), that the jury were entitled to accept or reject any part of the evidence of any witness, and they may have accepted Knap's evidence as to the speed of the street-car in preference to that of Stewart and Turner and upon these facts the jury were justified in finding that it was the negligent actions of Stewart which forced the plaintiff to jump from in front of the west-bound car into the path of the motor-truck. As to Knap the jury found his negligence to be "travelling too fast towards an intersection." They had Knap's evidence that he was going "not more than 30 miles an hour." It was no excuse that he followed the street-car thinking he would be safe in doing so. The jury found the plaintiff was guilty of contributory negligence in that he misjudged the speed of the street-car. There is no reason to disturb the finding of the jury. At the conclusion of the plaintiff's case counsel for the B.C. Electric Ry. Co. applied to have the case taken from the jury. After argument, the learned judge asked counsel if he would under the circumstances have any objection to his reserving his motion, putting the case to the jury and considering the motion after the jury's verdict. He suggested it would save a lot of trouble and said "I will consider your motion on the evidence I have heard up to this time." After the jury had answered questions, the learned judge heard argument and dismissed the motion. *Held*, on appeal, that where counsel for the defendant desires to make a submission of "no case," he must elect to call no evidence, otherwise the trial judge will refuse to rule. Counsel for the B.C. Electric Ry. Co. did not call any witnesses, but upon the defendant Knap calling Stewart (the motorman) said counsel cross-examined him at length bringing out evidence favourable to his client. This put him in the same position as if he had led evidence. Having cross-examined Stewart, the B.C. Electric Ry. Co. lost the right to pursue its motion for a non-suit. PROTOPAPPAS V. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED *et al.* - **218**

6.——*Offensive odours—Liability of corporation—By-law—Land-owner affected by —Right of action—Pleading—Amendment—Costs.*] Prior to 1942 there was no system of sewage in Greenwood, other than a septic tank and a cesspool some distance below

PRACTICE—*Continued.*

dispense with the passing of accounts and to have the administration bond delivered up to be cancelled, there was submitted in lieu of his accounts, the consents of all the persons who, according to the affidavit of the administrator, are entitled to share in the distribution of the estate. These releases approve of, consent to and accept the accounts of the administrator and consent to the passing of the same being dispensed with. *Held*, that the Court should be able itself to receive and deal with the accounts, that it is the Court which has to be satisfied, notwithstanding the customary procedure before the registrar and that the Court has power to direct the manner of the giving of the notice under the Administration Act, and if the Court is prepared to relieve its officers of this responsibility in clear cases, it need not necessarily be considered as an evasion of the statutory requirement. It was ordered that the bond be delivered up. *In re* ESTATE OF MARY E. HARRISON. - - - - - - **201**

3.——*Appeal — Jurisdiction — Landlord and Tenant Act—County Courts Act—Leave to appeal—Judge acting as arbitrator by consent of parties—R.S.B.C. 1936, Cap. 58, Secs. 118 and 119; Cap. 143, Sec. 19 et seq.*] On appeal from an order made under section 19 of the Landlord and Tenant Act directing the issuance of a writ to the sheriff of the county of Vancouver to place the respondents in possession of designated premises held by the appellant tenant, two jurisdictional objections were advanced, first, that the appellant had not obtained leave from the learned judge below or from this Court as required by section 119 of the County Courts Act and secondly, that no appeal lies because the learned judge acted as a referee or arbitrator between the parties, the learned judge below having stated "The matter having been left to me by arrangements between counsel, it seemed to me I was acting more in the capacity of a referee than as a judge." *Held*, that having consented to a determination of the matter in a manner which required the judge to depart from the course of Court procedure, the parties must be held to have taken his decision as that of an arbitrator, and hence his decision must be regarded as extracurial and without appeal. CHONG HING WAH KEE COMPANY LIMITED v. G. H. CHEN, OTHERWISE KNOWN AS G. Y. CHEN. - **93**

4.——*Appeal — Privy Council—Application for leave to appeal—Imperial order in council, January 23rd, 1911 — Statute of Westminster, 1931 (22 Geo. V., Cap. 4).*] The Imperial order in council of 23rd January, 1911, passed pursuant to the provisions of the Judicial Committee Act, 1844, to provide for appeals from the Court of Appeal of British Columbia to Her Majesty in Council reads in part as follows: "2. Subject to the provisions of these Rules, an Appeal shall lie—(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, . . ." Upon the plaintiff's motion for leave to appeal to His Majesty in Council from the judgment of the Court of Appeal dismissing her appeal, the defendant submits that since the Statute of Westminster, passed in 1931, the legal situation is changed; that while the prerogative right of appeal still exists, it is no longer "as of right" since Canada has the power to abrogate it; and therefore in effect to that extent the order in council, *supra*, is repealed by necessary intendment and the position is the same as if the words "as of right" had been struck out of the order in council, in which case the Court has a judicial function to perform in exercising its discretion to grant or refuse leave. *Held*, that there is no question as to the value of the matter in dispute being over £500 sterling or that the motion is made within time. There is nothing in the Statute of Westminster repealing any legislation then existing. The statute clothes Canada with power "after the commencement of this Act," *inter alia*, to repeal or amend any Act or order in so far as it is part of the law of Canada. Until such right is exercised, existing Imperial legislation applicable to Canada and passed before the statute continues in full force and effect; and so the order in council passed under the Judicial Committee Act of 1844 has not been affected up to date. The appeal then is "as of right" and will remain so until competent legislation affecting it is passed under the statute. The motion should be granted, subject to the conditions referred to in rule 5 of the order in council. MAY v. HARTIN. - - - - - **544**

5.——*Appeal from magistrate to county court—Security not deposited in time—Application to extend time to deposit security refused — Appeal from refusal to Supreme Court—Dismissed.*] Section 55 of the Small Debts Court Act provides that an appeal shall lie either to the nearest county court or a judge of the Supreme Court. Notice of appeal from the decision of the magis-

trate at Duncan, B.C., was given to the county court at Duncan, but security was not given within one week after the decision appealed from, as required by section 55 of said Act and the magistrate refused to allow further time to do so as he may under said section 55. The appellant appealed to a judge of the Supreme Court from the refusal of the magistrate to extend the time. On preliminary objection by the respondent that the appellant had chosen his forum and must therefore appeal to the forum he had chosen:—*Held*, dismissing the appeal, that when notice of appeal is given to the county court that court becomes seized of the matter and any interlocutory or other relief should be obtained from that court. KYLE v. HALL. - - - **364**

6.——*Appeal to Privy Council—Application for leave—Discretion—"Great general or public importance or otherwise"—Privy Council rule 2 (b).*] A motion to the Court of Appeal for leave to appeal to the Privy Council from the decision of the Court of Appeal dismissing an appeal from an order refusing a trial by jury in this action was dismissed. *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 111, followed. TAYLOR AND TAYLOR v. THE VANCOUVER GENERAL HOSPITAL *et al.* **79**

7.——*Application for leave to appeal to Supreme Court of Canada—Approval of security—Notice of appeal out of time—Application to extend—R.S.C. 1927, Cap. 35, Secs. 64 and 66.*] The judgment under appeal was pronounced on the 27th of November, 1945, and entered on the 7th of January, 1946. On the 3rd of January, 1946, the appellants' solicitors received instructions to appeal to the Supreme Court of Canada and notified the respondent's solicitors by letter on the same day. The judgment sum of $9,109.43 together with the taxed costs of trial and appeal were deposited with the respondent's solicitors to abide the result of the appeal to the Supreme Court of Canada. This motion was taken out on February 1st, 1946, to approve the security of $500 deposited on February 1st, 1946, and to allow an appeal to the Supreme Court of Canada, and as the time for appeal expired on January 26th the motion included an application to extend the time for bringing the appeal. *Held*, a *bona fide* intention to appeal was shown before the time expired on January 26th, 1946. In the recited circumstances one is unable to say the appellants are asking for anything "so eminently unjust" that it

ought to be refused. What constitutes "special circumstances" must depend upon the "interests of justice" as reflected in the particular case. The appeal is allowed accordingly and the time for appeal is extended until the 16th of February, 1946. Security as deposited is approved. *Levi* v. *MacDougall et al.* (1944), 60 B.C. 492, applied. E. A. TOWNS LIMITED v. HARVEY, RUCK AND MOORE, EXECUTORS OF THE ESTATE OF S. C. RUCK, DECEASED. - **362**

8.——*Application for trial by jury—Issues involved of an intricate and complex character—Scientific investigation—Discretion—Application refused—Appeal — Rules 429 and 430.*] In an action for damages arising out of alleged negligence both in the performance upon the female plaintiff of a surgical operation for a bladder condition as well as in the services rendered to her by the individual defendants who are physicians and surgeons and by the defendant hospital, it was alleged that the elements of negligence charged resulted in the onset of an infection of the blood which made necessary the removal of part of the plaintiff's right hand due to the development of a gangrenous condition. The plaintiffs' application for a jury under rule 430 was refused on the ground that the action could not conveniently be tried with a jury as the issues involved were of an intricate and complex character and required scientific investigation. *Held*, on appeal, affirming the decision of COADY, J. (O'HALLORAN, J.A. dissenting), that it has been shown that the evidence of physicians and surgeons will attain the height of a scientific investigation which cannot conveniently be tried with a jury and the learned judge properly exercised his discretion. TAYLOR AND TAYLOR v. THE VANCOUVER GENERAL HOSPITAL *et al.* - - - - - - - - - **42**

9.——*Barrister and solicitor — Suspension from practice — Appeal — Procedure—Additional evidence — Sittings in camera — R.S.B.C. 1936, Cap. 149.*] Before hearing the appeal upon its merits from the decision of the Benchers of The Law Society of British Columbia suspending the appellant from practice as a barrister and solicitor, the appellate tribunal heard argument on two points, namely: (a) Does rule 100 of the Rules of The Law Society of British Columbia passed pursuant to the Legal Professions Act require the same procedure to be followed in the admission of additional evidence on the appeal as is required on an appeal before our Appeal Court? (b)

PRACTICE—*Continued.*

Should the sittings of the tribunal be in public or *in camera? Held*, as to (a) that administrative tribunals performing judicial or semi-judicial functions are required to act judicially, but are not required to follow court procedure and the Benchers of The Law Society as well as this tribunal come within this definition. Additional evidence can only be admitted as and when the appellate tribunal is satisfied that the justice of the case requires the same to be admitted. As to (b), over the centuries the English Benchers have established a course of procedure nearly as old as the courts themselves and the right of the English Benchers or the British Columbia Benchers to sit in private has never been questioned, on the contrary has always been accepted. The proceedings were initiated in private and it would appear that unless good cause be shown to the contrary, the visiting tribunal should continue the proceedings in the same manner as instituted. *In re* LEGAL PROFESSIONS ACT AND THE BENCHERS OF THE LAW SOCIETY OF BRITISH COLUMBIA AND F APPELLANT. - - **1**

10.——*Costs — Action for damages for negligence—Money paid into Court—Acceptance of in satisfaction — Plaintiff to pay defendant's costs after payment in—Rules 255, 259 and 261.*] In an action for damages for injuries caused by the defendant's negligence, the writ was issued and the statement of claim delivered on June 6th, 1945. An appearance was entered and a defence denying negligence and liability delivered on September 14th. No reply was delivered within ten days. On October 22nd defendant's solicitor wrote plaintiff's solicitor admitting liability to be assessed at trial and stating he proposed to amend at the trial making this admission. The plaintiff's solicitor assented. The plaintiff set the action down for trial on November 1st, 1945. On November 30th the defendant gave notice of motion for leave to amend his defence by admitting negligence and liability and for leave to pay into Court $2,079.01 in satisfaction of the plaintiff's claim. The motion was granted. On December 8th an amended defence was delivered and said sum was paid into Court. No reply was delivered. On January 14th the plaintiff's solicitor notified the defendant's solicitor by telephone that he intended to accept the sum paid into Court in satisfaction of his client's claim and on January 15th served him with notice to this effect. On the trial on January 16th, plaintiff's counsel claimed the right to payment out of the money in

PRACTICE—*Continued.*

Court and to all his costs to be taxed. Counsel for the defendant conceded plaintiff's costs up to the time of payment into Court, but not thereafter and that the defendant should be given his costs thereafter. *Held*, that the plaintiff will have all costs up to the payment into Court. Neither side will recover any costs incurred during the period from December 8th to December 17th allowed to the plaintiff to make his decision whether or not he should accept the sum paid in. From that date on, the plaintiff, who has conceded that the defendant is right on the issue of *quantum* must pay the defendant's costs. WHALEN V. CARIBOO GREYHOUND LINES LIMITED. - - **303**

11.——*Costs — Custody of securities — Fees charged for—Whether allowed as disbursements or items of expenditure.*] An application to vary the report of the registrar by allowing as "disbursements" or as "items of expenditure" two fees charged in the accounts of The Royal Trust Company for safe custody of securities of considerable value in the estate was dismissed. *In re* THE TRUSTEE ACT AND *In re* ESTATE OF LAURA MILLER DUNSMUIR. - - **361**

12.——*Costs — Notaries — Court of Appeal Act — "Good cause" — Application for enrolment—Appeal—R.S.B.C. 1936, Cap. 57, Sec. 28; Cap. 205, Secs. 4 and 15.* Pursuant to the provisions of the Notaries Act the defendant obtained an order directing his enrolment as a notary public. The order was set aside on appeal. On motion to settle the judgment: — *Held*, that "good cause" in the terms of section 28 of the Court of Appeal Act is shown for departure from the rule that costs follow the event. In the circumstances disclosed, it is neither fair nor just as between the parties that payment of costs should be ordered. THE LAW SOCIETY OF BRITISH COLUMBIA V. GALLAGHER. - - - - - **349**

13.——*Discovery — Examination for — Sale of land—Action for fraudulent misrepresentation—Limited to issues raised by the pleadings—Scope of—Rule 370c.*] In an action for damages for fraudulent misrepresentation on the sale of a farm, four specific factors are alleged in the statement of claim to constitute misrepresentation by the defendant which are denied by the defendant. Upon examination for discovery of the defendant he refused to answer the following question: "53. Just tell me the conversation. I do not care where you start, but give me the conversation, and I would suggest the logical place to start

would be at the beginning. Now, you met Mr. Tisman. What did you do and what did you say?" Upon motion to compel the defendant to answer the question the learned Chamber judge refused the motion upon the ground that the question "had the appearance of being in the nature of a fishing-question and one which does not fall within the category of questions limited to the issues raised by the pleadings." *Held*, on appeal, reversing the decision of HARPER, J., that as the question may raise matters which are relevant to the issues raised on the pleadings, it must be answered. Where an action is brought in respect of verbal misrepresentations alleged to have been made to the plaintiff, defendant is entitled to enquire on plaintiff's examination for discovery as to the substance of the whole conversation and is not bound to confine his examination wholly to the alleged misrepresentation. TISMAN v. RAE. - **477**

14.——*Divorce — Costs against co-respondent—Discretion as to—Column 2 of Appendix N — Divorce and Matrimonial Causes Act, R.S.B.C. 1936, Cap. 76, Sec. 35 —Divorce Rules 87 and 88.*] Upon a decree of divorce being granted, counsel for the petitioner applied for taxation of costs against the co-respondent on a scale higher than Column 2 of Appendix N, which is the column applicable to divorce proceedings. Appendix N provides that an order for taxation on a higher scale may be made in the following cases: (a) Where some difficult point of law or construction is involved; (b) where the question litigated is important to some class or body of persons; (c) where the question litigated is of general or public interest; (d) where the result of the action or counterclaim is in effect determinative of rights between the parties beyond the relief actually recovered or denied in the action or counterclaim; or in any other case for special reason. The only applicable provision of Appendix N above quoted which would authorize taxation on a higher scale would be "in any other case for special reason." The question is, does such special reason exist here? *Held*, that nothing was done by the co-respondent in the proceedings themselves which would constitute special reason. While the conduct of the co-respondent which resulted in these proceedings was reprehensible, it does not furnish a special reason within the meaning of the rule. It must have some relation to the subject-matter of the action or conduct of the party in reference to the litigation itself and not to the morality of the act of the party prior to the litigation. Jurisdiction for such an order must be found under the provisions of Appendix N and in this case one cannot find that any special reason exists. The costs against the co-respondent will be taxed on the usual scale. HOPGOOD v. HOPGOOD. - - **450**

15.——*Letters of administration — Application for — Letters probate previously granted in England—Effect on application —R.S.B.C. 1936, Cap. 226, Sec. 4—Probate rule 65.*] On an application for a grant of letters of administration with will annexed to an attorney named by the executors of the estate, letters probate of which estate had been granted to the said executors in England, it was held that section 4 of the Probates Recognition Act is permissive only and not mandatory. It is intended to provide executors appointed in jurisdictions to which the Act applies a more convenient procedure for dealing with the British Columbia estate if they wish to adopt it. If, however, they prefer to proceed as they could have done before the Act came into force, they may in their discretion do so. The application is granted. *In re* ESTATE OF GEORGINA HALE, DECEASED. - **321**

16.——*Non-suit—Non-suit without hearing evidence—New trial.*] Upon the trial of an action a judge has no right, without the consent of the plaintiff's counsel, to non-suit the plaintiff upon his counsel's opening statement of the facts and without hearing the evidence tendered by him. WATSON v. GIRARDI, GIRARDI AND CALABRIGO. - **406**

PRIVY COUNCIL—Appeal to—Application for leave—Discretion—"Great general or public importance or otherwise"—Privy Council rule 2(*b*). - - - - - - - **79**
See PRACTICE. 6.

2.——*Application for leave to appeal—Imperial order in council, January 23rd, 1911 — Statute of Westminster, 1931 (22 Geo. V., Cap. 4).* - - - - - **544**
See PRACTICE. 4.

PROMISEES—Evidence of—Promise to devise by will in consideration of services—Death of promisors—No provision in wills — Pleading — Amendment. - - - - **468**
See CONTRACT. 2.

PUBLIC PEACE—Possession of revolver for a purpose dangerous to. - **532**
See CRIMINAL LAW. 24.

PUBLIC UTILITIES—*Public Utilities Act—Motor Carrier Act—Two applicants to operate a bus service in same district—Hearing by board of Public Utilities Commission—Order in favour of B.C. Electric Ry. Co.—Appeal from board's order — Questions of law—B.C. Stats. 1938, Cap. 47; 1939, Cap. 36.*] On the 8th of August, 1945, the B.C. Electric Ry. Co., Ltd., being a public utility, applied under section 12 of the Public Utilities Act for a "certificate of public convenience and necessity" to operate in Victoria a bus service upon two routes in a district known as the Fairfield-Gonzales district. Since 1909 the B.C. Electric had been giving street-car service in part of this district. The city of Victoria authorized the operation of a bus service on the route in respect of which the B.C. Electric applied for a certificate and consented to the B.C. Electric operating a bus service on it. On the 8th of August, 1945, The Veterans' Sightseeing and Transportation Co. Ltd. (known as the Blue Line), not being a public utility within the meaning of the Act and therefore only able to apply under the Motor Carrier Act, also applied for a licence to operate a bus service in the Fairfield-Gonzales district on two routes. No authorization had been obtained by it from the city of Victoria to operate a bus service on these routes. The administration of the Motor Carrier Act is vested in the Public Utilities Commission under section 33 of the Act. Both applications came on for hearing at the same time before the Commission. The Commission made two separate orders; one granted the B.C. Electric's application and the other refused the Blue Line application. Under section 105 of the Public Utilities Act the Blue Line appealed to the Lieutenant-Governor in Council against the decision giving the B.C. Electric a licence upon a question of fact and pursuant to section 106 of the Act the Lieutenant-Governor in Council referred the appeal to the Court of Appeal. Under section 97 of the Act leave was given by the Chief Justice of British Columbia to appeal on questions of law. Under section 55 of the Motor Carrier Act the Blue Line appealed to the Lieutenant-Governor in Council against the refusal of its application and there it remained pending the disposition of the appeals under sections 97 and 105 of the Public Utilities Act as there is no authority under the Motor Carrier Act to refer it to the Court of Appeal. Under section 12 (*a*) of the Public Utilities Act the Commission could not approve the B.C. Electric's application unless after a hearing it was satisfied that the "privilege, concession, or franchise" proposed be granted was (a) necessary for the public convenience and (b) properly conserved the public interest. Section 61 of the Motor Carrier Act contains the same provision. It was common ground that it was necessary for the public convenience that a certificate should be granted. The only question remaining then was: Did the licences for which applications were made properly conserve the public interest? The Blue Line submitted the Commission proceeded upon wrong principles of law in that: (a) It did not consider whether the application of the B.C. Electric properly conserved the public interest; (b) that it had decided it would be unfair to allow the Blue Line to compete in the district in question and thereby violated section 10 of the Motor Carrier Act; (c) in basing its decision in part on the theory that the consent of the city was necessary before a licence could be granted; (d) in proceeding on a "consistent" policy, for which there was no rule or principle laid down in either Act to support any such policy; (e) in taking into consideration the statement that the various municipal councils in greater Victoria had under discussion a unified transportation system for the area as a whole; (f) in finding that at the time of the application the B.C. Electric was giving transportation to the area in question by No. 6 tram-line whereas the Commission should have found the contrary and that the B.C. Electric was only serving a fringe of the area in question with that line. *Held*, on appeal, (O'HALLORAN, J.A. dissenting), that the decision of the Commission should be affirmed. The two Acts, generally speaking, impose administrative and not judicial duties upon the Commission. There are some sections under which the Commission must act as a judicial body, but they are not relevant in the case at Bar. The Board as an administrative body exercises its discretion according to policy and expediency. It does not decide between the legal rights of the parties; neither of the parties here had any except the right to apply under the respective Acts. Upon an application to the Commission for a licence, the consent of the municipality is necessary under both Acts and as the Blue Line did not have the necessary consent, it could not operate its proposed bus service. As it was admitted that the service was necessary and there was only one applicant to which the licence could be granted, the