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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.

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JUDGES

OF THE

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

During the period of this Volume.

CHIEF JUSTICES OF BRITISH COLUMBIA:

THE HON. MALCOLM ARCHIBALD MACDONALD.
THE HON. DAVID ALEXANDER McDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICES:

THE HON. MALCOLM ARCHIBALD MACDONALD.
THE HON. DAVID ALEXANDER McDONALD.

JUSTICES:

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THE HON. GORDON McGREGOR SLOAN.
THE HON. CORNELIUS HAWKINS O'HALLORAN.
THE HON. DAVID ALEXANDER McDONALD.
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THE HON. WENDELL BURPEE FARRIS.

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ATTORNEY-GENERALS:

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

MEMORANDA.

On the 27th of February, 1942, the Honourable Aulay Morrison, Chief Justice of the Supreme Court of British Columbia, died at the City of Vancouver.

On the 3rd of May, 1942, His Honour Herbert Ewen Arden Robertson, Judge of the County Court of Cariboo, died at the City of Victoria.

On the 6th of May, 1942, Wendell Burpee Farris, one of His Majesty's Counsel learned in the law, was appointed Chief Justice of the Supreme Court of British Columbia, in the room and stead of the Honourable Aulay Morrison, deceased.

On the 6th of May, 1942, Harry Wilfrid Colgan, Barrister-at-Law, was appointed Judge of the County Court of the County of East Kootenay, in the room and stead of His Honour George Herbert Thompson, resigned.

On the 10th of June, 1942, His Honour John Owen Wilson, Junior Judge of the County Court of the County of Cariboo, was appointed Judge of the said Court and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Herbert Ewen Arden Robertson, deceased.

On the 15th of June, 1942, Eric Donaldson Woodburn, Barrister-at-Law, was appointed Junior Judge of the County Court of the County of Cariboo and a Local Judge of the Supreme Court of British Columbia.

On the 28th of September, 1942, the Honourable Joseph Nealon Ellis, a Puisne Judge of the Supreme Court of British Columbia, died at the City of Vancouver.

On the 15th of December, 1942, Henry Irvine Bird, Barrister-at-Law, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Joseph Nealon Ellis, deceased.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JUNIOR.

C. A.
1941

Sept. 11, 12, 23.

Company law—Shares issued and registered—Rectification of register—Privity of contract—Consideration—R.S.B.C. 1936, Cap. 42, Secs. 78 (3) and 255 (1).

Apld
Re B.C. Aircraft Propeller etc.
63 W.W.R. 80
(B.C.S.C.)

The British American Timber Company, incorporated in the State of South Dakota in 1907 and registered as an extraprovincial company in British Columbia, owned certain timber lands in this Province. Said company (called the Dakota company) entered into a contract with one Jones (called Jones, Sr.), who was vice-president of the company, on the 1st of June, 1917, for the purchase of 1,038 shares of the company's stock, in payment for which he gave two promissory notes for the par value of the shares. It was a term of the contract that the notes were to be held by the Dakota company until paid or until such time as dividends declared and paid by the company would pay the principal and interest, and that the stock certificates be endorsed by Jones, Sr. and held by the company as collateral security for the notes. Those in control of the Dakota company decided to form a British Columbia company of the same name (adding the word "Limited" to it) to take over its timber holdings. The respondent company was accordingly incorporated in British Columbia on December 10th, 1917. On the 17th of December, 1917, a contract between the two companies was filed with the registrar of companies whereby the Dakota company transferred its

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BRITISH AMERICAN TIMBER CO. LTD. v. JONES

timber lands to the respondent, and was to receive 9,276 fully paid-up shares in the respondent company, these to be issued to such persons as the Dakota company might nominate. Of those nominated Jones, Sr. was to receive 1,038 fully paid-up shares and he was allotted these shares by the B.C. company on December 24th, 1917, for which the company made a return of the allotment a month later. The two companies had the same directorate. Jones, Sr. disposed of 285 shares in his lifetime, and share certificate No. 75 was issued for the remaining 753 shares, which was held by the respondent as collateral security with the above-mentioned notes which were held by the respondent. Jones, Sr. died prior to April 6th, 1920. These proceedings by petition were brought on the 28th of March, 1941, by the B.C. company under section 78 (3) of the Companies Act to amend the register by cancelling the 753 shares standing in the name of Jones, Sr., and R. W. Jones, Jr. was, by order of the Court, appointed to represent the heirs and next of kin. On the hearing of the petition the petitioner's prayer was granted, and the issue of 753 shares of the capital stock of the petitioner, as represented by share certificate No. 75 was cancelled, and the share register of the petitioner herein was rectified accordingly.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (MCDONALD, J.A. dissenting), that enough essential facts have not been disclosed on the record to enable a Court to decide whether the respondent is entitled or not entitled to an order for rectification, and the proper disposition of the appeal is to direct a new trial.

APPEAL by defendant from the order of MORRISON, C.J.S.C. of the 21st of May, 1941, granting the petitioner's prayer that the issue of 753 shares of the capital stock of the British American Timber Company Limited, as represented by share certificate No. 75, be cancelled, and that the share register of said company be rectified accordingly. The British American Timber Company incorporated under the laws of the State of South Dakota in January, 1907, owned certain timber lands in British Columbia, said company having been registered as an extraprovincial company in British Columbia. The British American Timber Company Limited (the petitioner herein) was incorporated in British Columbia in December, 1917, for the purpose of acquiring and taking over the timber lands and assets of the said Dakota company. By agreement of June 1st, 1917, between one R. W. Jones (hereinafter called Jones, Sr.), who died prior to 1920, and the Dakota company, said company agreed to allot and issue certain of its shares to Jones, Sr. and said Jones, Sr. was to give his notes payable on demand covering the par value of said stock to be held by the Dakota company

until paid by Jones, Sr. or until such time as dividends declared and paid by the Dakota company should pay the principal and interest, and it was agreed that the stock as issued should be endorsed by Jones, Sr. in blank and be held as collateral security to the said notes. By agreement of 17th December, 1917, between the two companies, the Dakota company transferred its timber lands to the petitioner in consideration for 9,276 fully paid shares of the petitioner (B.C. company) and the shares were directed and nominated to be distributed among the shareholders of the Dakota company in accordance with the number of shares they held in that company, including 1,038 fully paid-up shares to the said Jones, Sr., and in January, 1918, the petitioner (B.C. company) made a return of allotments of the said shares, showing 1,038 shares of the B.C. company as having been duly allotted as fully paid up to the said Jones, Sr. Share certificate No. 75, issued to Jones, Sr. for 753 shares, was endorsed by Jones, Sr. and is in the possession of the petitioner. The balance of the 1,053 shares (*i.e.*, 285 shares) had been disposed of by Jones, Sr. in his lifetime, leaving him as holder of 753 shares under share certificate No. 75. Petitioner has in its possession said share certificate No. 75, and the said promissory notes. No payment was made on the purchase price of the shares. By order of MURPHY, J. of the 26th of March, 1941, in these proceedings, R. W. Jones, Jr. of San Francisco, U.S.A. was appointed to represent the heirs and next of kin of the late R. W. Jones. Under section 78 (3) of the Companies Act the petitioner prays for an order that the issue of 753 shares of the capital stock of the company, as represented by share certificate No. 75, be cancelled, and that the share register of said company be rectified accordingly.

The appeal was argued at Victoria on the 11th and 12th of September, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Carmichael, for appellant: By issuing its share certificate fully paid up the respondent is estopped from denying the fact that it was issued for consideration: see *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004 at p. 1017; *Markham and Darter's Case,* [1899] 1 Ch. 414; *Bloomenthal* v. *Ford,* [1897] A.C. 156;

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Parbury's Case, [1896] 1 Ch. 100; *Mackenzie* v. *Monarch Life Assurance Co.* (1911), 45 S.C.R. 232; *Re Dominion Combing Mills Ltd.*, [1930] 3 D.L.R. 98, at p. 104; *In re Coasters, Limited*, [1911] 1 Ch. 86. The agreement of December 17th, 1917, and respondent's return of allotments shows the real intention of the parties. The respondent not being an interested party is not properly before the Court: see *Western Union Fire Insurance Co.* v. *Alexander* (1918), 25 B.C. 393. On the jurisdiction to rectify the register see Halsbury's Laws of England, 2nd Ed., Vol. 5, p. 232, sec. 402; *Ex parte Shaw* (1877), 2 Q.B.D. 463; *Ward and Henry's Case* (1867), 2 Chy. App. 431; *In re Tahiti Cotton Co. Ex parte Sargent* (1874), L.R. 17 Eq. 273; *Re Kimberley North Block Diamond Company; Ex parte Wernher* (1888), 59 L.T. 579; *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, at p. 440; *Sichell's Case* (1867), 3 Chy. App. 119; *Re Gramm Motor Truck Co. of Canada* (1915), 26 D.L.R. 557, at pp. 558-9. The respondent admits payment for these shares by the Dakota company: see *In re Indo-China Steam Navigation Company*, [1917] 2 Ch. 100, at p. 106. Only in a clear case should the register be rectified: see *Simpson's Case* (1869), L.R. 9 Eq. 91; *Stewart's Case* (1866), 1 Chy. App. 574, at pp. 585-6; *In re Gresham Life Assurance Society. Ex parte Penney* (1872), 8 Chy. App. 446, at p. 448; *Askew's Case* (1874), 9 Chy. App. 664; *Re Bagnall and Company (Limited); Ex parte Dick* (1875), 32 L.T. 536. The Court of Exchequer will not, where complete justice cannot be done, direct the name of a shareholder to be removed: see *Re Greater Britain Insurance Corporation Lim.; Ex parte Brockdorff* (1920), 124 L.T. 194. Whatever rights the Dakota company had was never exercised, and the Statute of Limitations concludes the matter. The Courts have always refused relief under the circumstances: see *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218; *Crook* v. *Corporation of Seaford* (1871), 6 Chy. App. 551, at p. 554. Nearly 24 years have elapsed. An application to rectify must be made promptly: see *Sowell's Case* (1838), 3 Chy. App. 131, at p 138; *Re Greater Britain Insurance Corporation Lim.; Ex parte Brockdorff* (1920), 124 L.T. 194. The petitioner is trafficking in its own shares: see *Trevor* v. *Whit-*

worth (1887), 12 App. Cas. 409; *Re Wallbridge Grain Co.*, [1918] 2 W.W.R. 886; *Hood* v. *Caldwell,* [1923] 2 D.L.R. 1026. The Dakota company and the B.C. company are separate legal entities: see *Pioneer Laundry and Dry Cleaners, Ld.* v. *Minister of National Revenue,* [1939] 4 D.L.R. 481, at p. 486; [1940] A.C. 127, at 137; *Re Modern House Manufacturing Co.* (1913), 14 D.L.R. 257; *Re Colonial Assurance Co. Ltd.* (1916), 29 D.L.R. 488. Consideration for the transfer cannot be enquired into.

Campbell, K.C., for respondent: The application is under section 78 (3) of the Companies Act. The principles upon which the Court will act to rectify the register are laid down in *Liquidator of the Monarch Oil Co. v. Chapin* (1917), 37 D.L.R. 772, at pp. 774-5; *Sichell's Case* (1867), 3 Chy. App. 119, at p. 122. The order below was made in the exercise of the learned judge's judicial discretion and will not be interfered with by the Court of Appeal: see *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11; *Blygh* v. *Solloway Mills & Co. Ltd.* (1930), 42 B.C. 531; *Russell* v. *Stubbs, Ltd.,* [1913] 2 K.B. 200*n,* at p. 206. Novation and privity of contract took place between Jones and the respondent in 1917 when it succeeded to the Dakota company and took over the Dakota's assets and liabilities. This was done when the personnel of the two companies were identical. Jones himself was an officer in both companies. That there was novation see Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 314. The issue to Jones was *ultra vires* the powers of the respondent, and the consideration was illusory and the shares were issued contrary to the statute at 100 per cent. discount: see *Re Ontario Express and Transportation Co.* (1894), 21 A.R. 646; *Re Jones and Moore Electric Co. of Manitoba* (1909), 10 W.L.R. 210; *Ooregum Gold Mining Company of India* v. *Roper,* [1892] A.C. 125; *Pellatt's Case* (1867), 2 Chy. App. 527; *Mosely* v. *Koffyfontein Mines, Limited,* [1904] 2 Ch. 108, at p. 114; *In re Eddystone Marine Insurance Company,* [1893] 3 Ch. 9. Shares cannot be sold at a discount: see section 124 (2) of the Companies Act. The issue was *ultra vires,* as shares cannot be paid for in dividends: see *In re Investors Ltd. (Ball's Case),* [1918] 3 W.W.R. 180; *Caston's Case* (1886), 12 S.C.R. 644; *Fisher's Case. Sherrington's Case* (1885), 31 Ch. D. 120. The

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promissory notes were only conditional payment, and in the event of non-payment of the notes the original claim revives: see *Canada Furniture Co.* v. *Banning* (1917), 39 D.L.R. 313, at p. 316. Neither letters of administration nor letters of probate to the estate of R. W. Jones have been issued, and the estate and heirs have no *status* in this appeal: see *Whyte* v. *Rose* (1842), 3 Q.B. 493. There were no laches, as the estate and heirs of R. W. Jones as early as 1920 indicated abandonment of all interest. Estoppel does not apply in the case of an *ultra vires* issue in which the purchase price is not paid: see *Bloomenthal* v. *Ford,* [1897] A.C. 156.

Carmichael, replied.

Cur. adv. vult.

23rd September, 1941.

MCQUARRIE, J.A.: I agree with my brother O'HALLORAN that the appeal should be allowed and a rehearing of the petition ordered. I consider that all the material facts were not disclosed on the hearing of the petition to enable the learned judge below to come to a decision in the matter. On the rehearing that can be rectified and the necessary documents be produced.

O'HALLORAN, J.A.: On 21st May, 1941, the respondent British American Timber Company Limited obtained an order under section 78 of the Companies Act, Cap. 42, R.S.B.C. 1936, rectifying its share register by cancelling the issue of 753 shares of its capital stock to Ray W. Jones on 17th December, 1917. Ray W. Jones died prior to 6th April, 1920. Upon the application of the respondent on 26th March, 1941, the Court appointed Ray W. Jones, Jr. to represent the heirs and next of kin of Ray W. Jones, deceased and counsel on his behalf opposed the petition for rectification. The learned judge appealed from did not indicate his reasons for granting the petition.

The petition alleges the certificate for the 753 shares is in the possession of the respondent, and also alleges that certificate has been "duly endorsed" by Ray W. Jones, deceased. But the certificate was not put in evidence in the Court below. And it is not in evidence before this Court, despite constant reference to it by counsel who, however, were unable to agree to present it in evidence, as they were equally unable to agree to a statement

of essential facts, such, as in the absence of evidence, would enable a judicial review of the rectification order.

To whom or under what circumstances the shares are "duly endorsed" is not disclosed in the record. Evidence thereof, for example, might show the appellant without any interest in the shares, or it might deny the right of the respondent to rectification, or it might bring to light the conditions under which the shares were issued to the deceased, endorsed by him, and are now held by the respondent. As this case has unfolded itself, these considerations cannot be regarded as foreign to the real question under section 78 of the Companies Act, *supra,* whether the name of Ray W. Jones, deceased, was entered in the company's share register "without sufficient cause."

I must conclude enough essential facts have not been disclosed in the record to enable a Court to decide whether the respondent is entitled or is not entitled to an order for rectification. In my view the proper disposition of the appeal is to direct a new trial; the petition should be reheard.

I would allow the appeal accordingly with costs of the appeal to the appellant, but the costs of the abortive hearing below to abide the result of the new hearing.

McDONALD, J.A.: Some 24 years ago, on 1st June, 1917, a Dakota company bearing the same name (except as to the word limited) as the respondent petitioner entered into a contract with one Jones, now deceased, whose estate is represented by the appellant and to whom I shall refer as "Jones, Sr." The latter was vice-president of the Dakota company, and the contract was for the purchase by him of a large number of shares in the company which were issued to him as fully paid up, and in payment for which he gave the company his promissory notes totalling $118,766.38. It was a term of the contract that the notes were to be held by the Dakota company until paid or "until such time as dividends declared and paid by the company would pay the principal and interest thereof." It is stated though not proven that these notes have never been paid, but if not paid they are presumably long since outlawed. For the purposes of this judgment I shall assume them to be unpaid as I think the fact is immaterial.

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The Dakota company owned timber lands in this Province, and those who controlled it decided to form a British Columbian company of the same name to take over its timber holdings. The respondent petitioner was accordingly incorporated in this Province about 10th December, 1917. A contract between the two companies dated 17th December, 1917, was filed with the registrar of companies, whereby the Dakota company transferred its timber lands to the petitioner and was to receive in payment 9,276 fully paid-up shares in the petitioning company, these to be issued to such persons as the Dakota company might nominate. That company nominated Jones, Sr. to receive 1,038 shares, presumably because of his share-holdings in the Dakota company; Jones, Sr. was allotted these 1,038 shares in the local company on 24th December, 1917, which company made a return of the allotment a month later.

At the time of the transfer of timber, apparently the two companies had the same directorates. This fact, quite irrelevant legally, in view of such decisions as *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, which show that companies remain separate entities in spite of any similarity of personnel, seems to account for the errors which have crept into the present proceedings.

The allottee Jones, Sr. disposed of 285 shares during his lifetime and we are concerned only with the remaining 753 of his original 1,038. We are told that the petitioner entered in its books as a debt of Jones, Sr. the amount which he owed the Dakota company, and that Jones, Sr. endorsed the certificate for his shares and deposited it with the petitioner, presumably as security for his debt. There is not a particle of evidence of this latter statement and I would doubt its materiality if proved.

After 24 years of apparently complete inaction on both companies' part the local company began the proceedings now under appeal, which are by petition brought under section 78 (3) of the Companies Act, to amend the register by cancelling the 753 shares standing in the name of Jones, Sr. who died prior to 6th April, 1920. This section, which follows an English section, provides a summary procedure for rectifying the register, where a name is either wrongly entered or omitted. But it does not exclude other remedies, *e.g.*, by action: see *Reese River Mining*

Co. v. *Smith* (1869), L.R. 4 H.L. 64, at p. 81. Under the section the Courts can decide questions of title to shares; but as the Court of Appeal laid down in *Ex parte Shaw* (1877), 2 Q.B.D. 463, in a "complicated or doubtful case the jurisdiction ought not to be exercised." I think this was not a proper case to bring under the section even if the petitioner had made out a *prima facie* case.

Far from its having done this, however, it has showed clearly on its own material that its claim is altogether misconceived and unfounded. There is not a particle of evidence to show that Jones, Sr.'s name is wrongly on the register: all goes to show that it is rightly there.

It is said that the shares were issued to Jones, Sr. by mistake. This must mean the petitioner's mistake; but the petitioner made no mistake whatever; it did exactly what it had agreed with the Dakota company to do, and exactly what it intended to do. There was not even a failure of consideration for what it did; it issued the shares as consideration for the transfer of timber lands, and it received the transfer. All that can be said (and this is unsupported by evidence, even if relevant) is that the petitioner acquired a debt against Jones, Sr. which it expected him to pay and which he did not pay. But where is there any element of mistake?

There was never at any time any privity of contract between the petitioner and Jones, Sr.; the only contracts were between the two companies and between Jones, Sr., and the Dakota company. Obviously no mistake between the two companies (even if one was suggested, which it is not) could be before us, for the Dakota company is not a party to these proceedings. The question of mistake between Jones, Sr. and the Dakota company is also irrelevant here, but the positions and identity of the two companies have been confused in argument before us, and I shall briefly advert to what would be the position if the claim were that of the Dakota company. The transaction between Jones, Sr. and the Dakota company was that Jones, Sr. agreed to buy shares and to pay for them. The transaction was for immediate delivery of the shares and deferred payment. Here again I cannot see the slightest evidence of mistake; each party

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got exactly what it and he expected. There was no failure of consideration, for the company got Jones's covenant and his notes: see *Central Trust and Safe Deposit Company* v. *Snider*, [1916] 1 A.C. 266, at p. 271. The property in the shares duly passed to Jones and it seems to me clear that even the Dakota company must have failed in proceedings such as these, and the petitioner's position is weaker still.

It is unnecessary to consider the cases cited on estoppel. If the petitioner could show a good title to the shares it might still be defeated by estoppel. But it fails to show any title.

Apart from the fact that the petitioner's claim is unfounded in law, mention may be made of the flimsiness of the evidence on which it relied. This consisted of the vague, and what must have been the hearsay, evidence of one George W. Thompson, a Vancouver accountant, who obviously could have no personal knowledge of many matters involved, and whose affidavit contains many gaps which petitioner's counsel has endeavoured to fill in by quite unverified statements.

I can scarcely conceive of the possibility of a man being deprived of property (worth, we are told, some $130,000) by the summary decision of a judge in Chambers on the evidence we have before us. Here the objections are intensified by the fact that the property is that of a dead man, that the claimant comes forward after 24 years, when presumably the representative will be taken by surprise, and will need every facility for making investigation, difficult under the best of circumstances after such a lapse of time. I think it is contrary to principle to decide summarily any claim, under section 78, where there is any serious dispute of fact; it becomes more unsatisfactory where, as here, there are probably serious questions of laches and limitations; and it is necessary, for a proper decision, that the resisting party should have the fullest opportunities for getting discovery, only possible in an action. But apart from the fundamental objections to the practice followed here, I have no hesitation in saying that the petition should have been dismissed for being entirely misconceived on its face. I would allow the appeal with costs here and below.

Appeal allowed, new trial ordered, McDonald, J.A. dissenting.

Solicitor for appellant: *J. F. Downs.*
Solicitor for respondent: *J. A. Campbell.*

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June 20.

Contract—Sale of shares in company—Specific performance—Consideration —Want of mutuality.

The plaintiff and defendant entered into an agreement whereby the defendant agreed to transfer to the plaintiff five shares in a company on condition that the plaintiff would purchase 6,000 shares in said company from a certain other party. The plaintiff then purchased the 6,000 shares from the party named but the defendant then refused to transfer the shares. In an action for specific performance the defence was raised that specific performance could not be granted because of want of consideration and want of mutuality.

Held, that the plaintiff's purchase of the 6,000 shares from the third party was a sufficient consideration for the defendant's promise to transfer the shares, although the defendant received no benefit from such purchase, as the plaintiff, relying on the defendant's promise, had done an act by which the third party had benefited.

Held, further, that the defence of want of mutuality could not be raised as the plaintiff had performed his part of the contract by purchasing the 6,000 shares.

ACTION for specific performance of a contract for the sale of five shares in the Review Publishing Company Limited by the defendant to the plaintiff. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 14th of May and 20th of June, 1941.

Bull, K.C., for plaintiff.
Locke, K.C., for defendant.

Cur. adv. vult.

27th October, 1941.

FISHER, J.: In this case I have first to say that I do not consider the defendant a credible witness and, where I have only his testimony and that of the plaintiff on any of the matters in question herein and the testimony is conflicting, I accept the evidence of the plaintiff. I have also to say that I accept the evidence of the plaintiff in preference to that of the witness J. E. Pulley as to what occurred between the parties on July 29th, 1940.

As to what occurred between the parties on July 27th and 29th, 1940, the plaintiff says in part as follows:

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Just state what you said to the defendant on your first visit on July 27th, 1940. I told him a transaction was in the offing, between Sutherland and myself, toward acquiring Sutherland's interest in the Review Publishing Company Limited, but since I was only interested in getting control of the company, I had to receive an assurance or otherwise from Macdonald that he would agree to deliver his shares to myself. . . .

Yes, just go on. He expressed great pleasure that Sutherland could receive moneys for his investment up there, and told me he was delighted to give me the shares, he wanted to see Sutherland get some money out of the company. Then he made a search through a cupboard in his dispensary.

You were in his dispensary, were you? Yes, but all he could locate was an old balance sheet, but he told me he would have a search over Sunday, and I was to come back on the 29th, Monday morning, and the shares would be ready for me, which I did. . . .

Now, did you return on Monday, the 29th? Yes, Monday morning.

Did you go into the dispensary? Yes.

And what happened then? As soon as he saw me, he went to this cupboard he had searched previous, and took out a packet and handed it to me.

. . . .

There were certificates in the package comprising five shares in all? Yes.

Who opened the packet? I did.

In the presence of Macdonald? Yes.

Could he see what you were doing? Yes.

Did you spread the certificates out and read them? Yes.

Did you make any comment about them? I asked two questions.

What were they? I noticed the Lawrence share was blank on its reverse side, and I had remembered Lawrence from my adolescence, and asked if Lawrence was dead or alive, and he said he was deceased for some years. I noticed also that one share had been transferred to Mrs. Macdonald, and I asked Mr. Macdonald if Mrs. Macdonald would concur also in seeing to the transfer of this share into my name, and he said there would be no difficulty.

Did you then put the documents back in the packet? Yes.

Did you say anything about what your intentions were with regard to those documents? I told him I was returning to Vancouver almost immediately, but that I was going to leave those certificates, and take them in to Dr. Sutherland.

Did you add anything to that? Did you say, "I am going to take them in to Dr. Sutherland?" I told Mr. Macdonald that it was a firm understanding then between us that these certificates would be mine in the event I purchased 6,000 shares from Dr. Sutherland.

And what was his reply to that? He said, "That is fine." He said he did not want to participate in the company any further, saw no need for it.

I accept this evidence of the plaintiff as substantially correct and, having expressed my view already as to the credibility of the parties themselves, I do not think I need express any view as to just what occurred at the meeting of the company on August 19th, 1940. It is sufficient to say that, after considering all the evidence and the arguments of counsel, I am satisfied that

what may be called the balance of probabilities is also in favour of the plaintiff's case. At the time in question herein there were 12,007 shares issued in the Revelstoke Review Publishing Company Limited and the plaintiff was considering the purchase of the 6,000 shares held by Dr. W. H. Sutherland for the sum of $2,500. It is a fair inference and I am satisfied that the plaintiff had been informed that J. H. Mohr, publisher, of Revelstoke, B.C., held 6,000 shares and that the defendant, also of Revelstoke, held four of the remaining seven shares. I pause here to point out that, although according to the annual report of the company for 1938 the defendant did hold four shares, the actual fact would appear to be that one of the shares stood in the name of one W. M. Lawrence according to certificate No. 3, dated April 21st, 1915 (see Exhibit 13). Under such circumstances it would seem improbable to me that the plaintiff would invest, as he did, the sum of $2,500 in the purchase of 6,000 shares unless and until he believed he had contracted for sufficient additional shares to give him control of the company. It would also seem improbable to me that the plaintiff obtained the information he apparently got as to the death of the said W. M. Lawrence from anyone other than the defendant. On the other hand the defendant, being a druggist and not a publisher of a newspaper, would appear to have been holding a few shares in his name, having received the first one at the time of the incorporation of the company in 1915, for the purpose of enabling the company to comply with the legal requirements. The certificates for such shares were not in his possession but in the possession of *Briggs,* who was the company's solicitor, until the year 1924 when *Briggs,* being about to leave Revelstoke, handed them over to the defendant, as I find, tied up in a package containing papers belonging to the company. Under such circumstances it would seem probable to me that the defendant would agree to let the plaintiff have the shares, for which he had paid only a nominal sum if he paid anything, if Dr. Sutherland could "get some money out of the company" by the sale of his 6,000 shares to the plaintiff. One has to admit, of course, that what seems improbable sometimes happens but, as I have already intimated, I think in this case that the balance of probabilities is in favour of the plaintiff.

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The defendant admits delivering the said package to the plaintiff on the said July 29th, 1940, but states that it was not opened in his presence at that time and that he did not know then and does not know for sure now that it contained the said share certificates. The documents marked Exhibits 8, 12 and 14, however, cannot be ignored and they, even if they stood alone, would make it impossible to accept any such statement. Said Exhibit 8, being a letter from the defendant to the plaintiff's solicitor dated September 27th, reads as follows:

Re enquiry *re* the Review Publishing Co. would say as to my shares they were only lent to Westman to take to Dr. Sutherland purely for checking purposes, as I did not know exactly how the shares stood and for the doctor to write to the registrar at Victoria—one of the original owners had died—at the meeting called the shares were returned to me.

Exhibit 12, being a letter from the defendant's solicitor to the plaintiff's solicitors, dated October 5th, 1940, reads as follows:

Re Westman and Macdonald. The writ herein lately served upon Mr. Macdonald has been shown to us and we are writing this letter as we think it possible that you may not be acquainted with some of the facts in this matter.

We are instructed that in the conversation between Westman and Macdonald which took place in the latter part of July Westman stated that he was contemplating the purchase of Dr. Sutherland's interest in the company but no reference was made by either Westman or Macdonald to the purchase of Macdonald's shares by Westman. There was, however, some conversation as to the distribution of the shares at that time and Mr. Macdonald gave Westman his share certificates charging him to deliver the same to Dr. Sutherland to assist Dr. Sutherland in checking on the distribution of the shares and Mr. Macdonald suggested that Dr. Sutherland write to the registrar of companies at Victoria for this purpose.

Part of paragraph 2 of Exhibit 14, being the original statement of defence (afterwards amended so as to delete said part and plead that the defendant did not know that the package contained any of the said share certificates) reads as follows:

The defendant further says that on or about the 29th day of July, 1940, the plaintiff called upon the defendant at the latter's place of business at Revelstoke and represented that he, the plaintiff, was negotiating with one Dr. W. H. Sutherland with regard to the purchase of the shares of the said Dr. W. H. Sutherland in the Revelstoke Review Publishing Company, Limited and that the plaintiff and the said Dr. W. H. Sutherland were desirous of ascertaining the then distribution of the shares of the said company. The defendant agreed to hand to the plaintiff certain share certificates hereinafter referred to in order to assist the plaintiff and the said Dr. W. H. Sutherland in ascertaining the then distribution of the shares of the said company. The defendant, in pursuance of the said arrangement,

handed to the plaintiff share certificate number 3 for 1 share in the said company in the name of W. M. Lawrence, share certificate number 4 for 1 share in the said company in the name of the defendant and endorsed by the defendant unto his wife, Julia Mae Macdonald, share certificate number 5 for 1 share in the said company in the name of Arthur Johnson and endorsed by the said Arthur Johnson unto the defendant, and share certificate number 9 for 2 shares in the said company in the name of Walter Jordan and endorsed by the said Walter Jordan unto the defendant.

From said exhibits I think it would be a fair inference and I would find that on the said July 29th, 1940, the defendant knew that the package delivered by him to the plaintiff contained the said share certificates.

My conclusion on the whole matter is that the plaintiff has proved that the defendant did contract and agree with the plaintiff, as the latter says in his evidence as above set out, that the said certificates, *viz.*, the five contained in said package, would be the plaintiff's in the event that the plaintiff purchased 6,000 shares from Dr. Sutherland. In other words, I find that the defendant did agree with the plaintiff that he would sell and transfer to the plaintiff five shares in the Revelstoke Review Publishing Company Limited subject to the performance of the following condition, *viz.*, that the plaintiff should purchase other shares in the said company, to wit, 6,000 shares, from Dr. W. H. Sutherland. It is or must be admitted by counsel for the defendant that such an agreement, if made, is not void for lack of consideration. See *Fred T. Brooks Ltd.* v. *Claude Neon General Advertising Ltd.*, [1932] O.R. 205, at 207, where Masten, J.A. says:

Mr. McMaster also suggests that if Robertson did agree as above mentioned such agreement is void for lack of consideration. But Robertson was requesting the plaintiffs to sign this agreement to sell their shares to the Neon company and they did so agree, and consideration need not be a benefit to the promisor. It is sufficient if the promisee does some act from which a third person benefits and which he would not have done but for the promise or some act which is a detriment to the promisee; *Alhusen* v. *Prest* (1851), 6 Ex. 720, and *per* Blackburn, J., in *Bolton* v. *Madden* (1873), L.R. 9 Q.B. 55.

In the present case counsel for the plaintiff claims specific performance by the defendant of his contract as aforesaid but limits his claim to the three shares standing in the name of the defendant according to certificates Nos. 5 and 9 (see Exhibits 3 and 4), the said certificate No. 3 for one share having been endorsed over to the plaintiff by the executor of the W. M.

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Lawrence estate on August 15th, 1940, and the other certificate, No. 4, for one share dated April 21st, 1915, having been endorsed by the defendant to his wife some time before the agreement with the plaintiff, *viz.*, on November 10th, 1924. I am satisfied that, if specific performance should be ordered, it can be limited to the shares which the defendant is able to transfer. See Fry on Specific Performance, 6th Ed., secs. 473 and 1257.

As to whether specific performance should be ordered it is submitted by counsel on behalf of defendant that such relief should be refused in the present case for want of mutuality and Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 335, sec. 367, is relied upon. In my view, however, the principle there laid down, *viz.*, that want of mutuality is in general a ground for refusing a judgment of specific performance, has no application to a case such as I have here where I have found that there was what might be called a conditional contract and the condition has been fulfilled. As was said in the *Fred T. Brooks Ltd.* v. *Claude Neon General Advertising Ltd.* case, *supra,* so I would say here, that the plaintiff promisee did an act from which a third person benefited and which he would not have done but for the promise of the defendant who is therefore now bound to perform his part. I have also to say that it is not a case where the payment of a sum of money as damages affords an adequate remedy. As counsel for the plaintiff suggests, the three shares may be said to have no intrinsic value but a "nuisance" value as with the Lawrence share they give control of the company. In my view there has been on the part of the defendant a breach of a contract as aforesaid which the Court should order to be specifically performed by the defendant. I am satisfied that the contract is sufficiently certain for enforcement and that there can be no question as to its fairness.

There will, therefore, be judgment in favour of the plaintiff against the defendant for the specific performance by the defendant of his contract made with the plaintiff for the sale and transfer to the plaintiff of the three shares represented by share certificates Nos. 5 and 9 and, if the plaintiff so desires, a declaration that the said share certificates are the property of the plaintiff and should be returned to him.

Judgment for plaintiff.

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June 24, 25.

Criminal law—Company—Director concurring in false statement—Trial judge dies during hearing—Evidence taken on first trial included in record on second trial—Jurisdiction—Criminal Code, Secs. 414 and 831.

Section 831 of the Criminal Code reads: "Proceedings under this Part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this Part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him and may cause such portion of the proceedings to be repeated before him as he shall deem necessary."

The accused was tried for an offence under section 414 of the Criminal Code before McIntosh, Co. J. and shortly after the evidence of the principal witness for the Crown was taken, the learned judge died. Later accused was brought before Harper, Co. J. and under the alleged authority of section 831 of the Criminal Code the evidence of said witness taken on the first trial was placed before the learned judge and read into the record. The accused was convicted.

Held, on appeal, reversing the decision of Harper, Co. J., and ordering a new trial, that said section 831 contemplates proceedings commenced, not before a judge since deceased, but before a living judge unable for any reason to proceed with the trial. It is a section to which a narrow and limited construction should be given, and the language used therein has reference to the temporary incapacity of an existing judge and not the complete lack of capacity of a non-existing judge. They connote a judicial capacity which cannot immediately function, not a complete cessation of it.

Held, further, that even if it is authorized by section 831 the discretion to resort to it should not have been exercised. The learned judge based his judgment upon the evidence of this witness as credible evidence, although the witness was not before him. He lacked an important aid in reaching a conclusion, namely, the deportment and demeanour of the witness.

APPEAL by defendant from his conviction by Harper, Co. J. on the 20th of May, 1940, on a charge of unlawfully concurring as a director in making a false balance sheet of the financial position of the Freehold Oil Corporation Limited, with intent to deceive the shareholders of the company, contrary to section 414 of the Criminal Code. The case first came up before His Honour the late Judge McIntosh, who died shortly after hearing certain Crown witnesses, including that of Mrs. Lytle, an

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important witness for the Crown who lived in Toronto. Later accused was brought to trial before HARPER, Co. J. who, under the alleged authority of section 831 of the Criminal Code, included in the evidence before him the evidence of Mrs. Lytle taken before the late Judge MCINTOSH. The official stenographer at the first hearing was called, shorthand notes proven, and the evidence read into the record.

The appeal was argued at Vancouver on the 24th of June, 1940, before MACDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Elmore Meredith, for appellant: The learned judge below adopted all the proceedings before the late Judge MCINTOSH, who died during the first trial. There was no jurisdiction to do this under section 831 of the Criminal Code. It was not a fair trial in not calling Mrs. Lytle as a witness. In the case of *Rex* v. *Brooks* (1902), 9 B.C. 13, the learned judge was away from the Province and it does not apply. There was nothing to base discretion on. The witness should be before the Court.

Soskin, for the Crown: There is no case directly in point. In the case of *Rex* v. *Desmarais* (1922), 40 Can. C.C. 214, the learned judge resigned office and the section applied. See also 16 C.J., p. 1269, sec. 3007.

Meredith, replied.

Cur. adv. vult.

25th June, 1940.

MACDONALD, C.J.B.C. (oral): The trial on a charge of unlawfully concurring in making a false statement of the financial position of the Freehold Oil Corporation Limited, commenced before His Honour the late Judge MCINTOSH, and after the evidence of Mrs. Lytle, the principal witness for the Crown was taken, the judge died. Later the accused was brought to trial before HARPER, Co. J. Under the alleged authority of section 831 of the Criminal Code the evidence of Mrs. Lytle taken before the late judge was placed before HARPER, Co. J. The official stenographer at the first hearing was called, shorthand notes proven and the evidence read into the record; it therefore became part of the proceedings in the second hearing.

My brother SLOAN and I think that this procedure was not authorized by section 831. We were not referred to any decisions of assistance in construing it. I think it contemplates proceedings commenced, not before a judge since deceased but before a living judge unable for any reason to proceed with the trial. This is suggested by the language employed and the use of the present tense. If susceptible to two constructions the one suggested best conserves the interests of justice. Sometimes it is necessary for an Appeal Court to consult the trial judge. That necessity might arise where a judge continues proceedings started before another judge. I would not be inclined to construe the section broadly: the use of it in the manner suggested in this case might lead to a miscarriage of justice.

Even if it is authorized by section 831 the discretion to resort to it should not, with great deference, have been exercised. It is clearly a discretionary, not a mandatory power. The evidence of Mrs. Lytle was most important: the guilt or innocence of the accused either would, or at least might, depend upon it. The trial judge's report shows that it was of the most vital character. The charge relates to a single cash item in a balance sheet of the Freehold company and this witness participated in the transaction giving rise to it. It is enough to say that the trial judge based his judgment upon it, accepting it as credible evidence although the witness was not before him. He had to compare it with the evidence of defence witnesses before him in person. The learned judge therefore lacked an important aid in reaching a conclusion, *viz.*, the deportment and demeanour of the witness. The former judge, now deceased, had that assistance: the second judge had not. I think, therefore, an important element in exercising a sound discretion was, with respect, overlooked: it was not considered: what was considered was the expense of bringing this witness from Toronto and the necessity of giving a broad interpretation to the section. However, as stated, we think the section has no application to the facts.

I would direct a new trial.

SLOAN, J.A.: This appeal turns upon the construction of section 831 of the Code which reads as follows:

831. Continuance of proceedings before another judge.

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Proceedings under this Part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this Part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary.

In this case His Honour the late Judge MCINTOSH died during the trial and HARPER, Co. J. then continued the proceedings under the provisions of the said section. The question *in liminie* is whether he had jurisdiction to do so, and the answer to that depends upon whether section 831 applies in the circumstances. In my view it does not. It is a section to which I give a narrow and limited construction because in its application it is one which may well tend to the unfair trial of an accused person. That becomes manifest when it is realized that the replacing judge has a very wide discretion as to whether or not he shall direct the recall of witnesses to repeat their evidence before him. If, for instance, as in this case, there is a direct conflict between the chief Crown witness and the accused can it be said that the accused is not prejudiced by the absence of that Crown witness when the learned trial judge has nothing upon which to judge the truthfulness of the Crown's evidence except the cold pages of the typed transcript? Approaching the section then in that light, in my opinion the language used therein has reference to the temporary incapacity of an existing judge and not the complete lack of capacity of a non-existing judge. I base that view upon the phrase "where such judge is for any reason unable to act." "Such judge" must, I think, refer to an existing judge and not to one who has died and is no longer a judge. The words "unable to act" imply in addition to their negative aspect that there is a present ability to act which for some reason cannot be exercised. They connote a judicial capacity which cannot immediately function, not a complete cessation of it.

With respect I would allow the appeal and order a new trial.

O'HALLORAN, J.A. (oral): In my opinion section 831 does not apply where the substituting judge cannot exercise the powers of the deceased judge. The deceased judge heard Mrs. Lytle give her evidence and could pass upon her demeanour and

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credibility. The substituting judge did not hear Mrs. Lytle give her evidence, and, of course, could not pass upon her demeanour and credibility. It was impossible for him therefore to exercise the same powers in that respect as the deceased judge.

Judgment of demeanour and credibility is an integral element in the exercise of the judicial function in cases of first instance, particularly so in the trial of criminal cases. I cannot read section 831, as destroying that essential element of the judicial function. If it were so intended in cases like the present, that intention would be expressed in clear and unequivocal language. For an example of specific provision being made for the case of a deceased judge, or a judge who has ceased to function, *vide* Order LXXII., r. 1 of our Supreme Court Rules as amended 4th April, 1929.

I agree in directing a new trial.

Appeal allowed; new trial ordered.

LAW LIBRARY LAW SOCIETY VANCOUVER B.C.

BARKER v. WESTMINSTER TRUST COMPANY *ET AL.*

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April 8, 9, 10; *June* 12.

Testator's Family Maintenance Act—Estate of deceased wife—Husband's petition under Act dismissed—Appeal heard and judgment reserved—Death of husband before delivery of judgment—Motion to add executors of husband as parties—R.S.B.C. 1936, Cap. 285, Sec. 3.

A husband petitioned for adequate provision for maintenance from his deceased wife's estate under the Testator's Family Maintenance Act. They were married in 1911. He joined the Canadian forces in 1914, but in eighteen months was discharged as unfit. During this time the wife obtained a separation allowance. In 1917 he went into the lumber business but in the course of one year the business failed with the loss of $1,000. In 1918 he and his wife contributed to the purchase of a ranch in Burnaby upon which they raised goats. This proved a success, and in 1929 they sold out for $10,000 and jointly purchased lands in Surrey. Shortly after the wife went on a trip east and the husband commenced gambling on the Stock Exchange, resulting in great loss. A judgment for a large sum was obtained against him, which was eventually settled by the wife paying $2,500. Prior to this the wife had obtained her share of the assets in her own name. In May, 1931, the wife left him and obtained a divorce in Reno, Nevada. She married again, but two days after the marriage she left her second husband and

Disd
Wetsel v. Nat. Trust
4 D.L.R. (2d) 171

Disc'd
Re McMaster
10 D.L.R. (2d) 436

Cons'd
Tschewicz v. Bate
14 D.L.R. (2d) 99

See
Re Jones Estate
30 W.W.R. 498

Cons'd
Re Hornett
38 W.W.R. 385

Disd
Re Jones Estate
37 W.W.R. 597

Cons'd
Re Jones
30 D.L.R. (2d) 316

Appld
Re Jones Estate
36 W.W.R. 337

Cranston
WWR 321
44 WWR 1
& 41 DLR (2d) 495

Koff
(2) 484
2)
FOLL'D
owe
R (3d)
6 SC)
WWR 234

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returned to the petitioner in Surrey, where she built a house and they lived together until her death in February, 1937. She had in the meantime obtained a divorce from her second husband in Mexico. The net value of her estate was $12,934, which included $3,711, balance owing her by petitioner in respect of certain lands she had sold to him under agreement for sale. This land, which was unimproved rural land from which there was no revenue, was substantially all he had at the time of her death. They had no children, and by her will executed just before her death she left one dollar to her husband and the remainder of her estate to two nieces. The learned trial judge found that upon the evidence he was satisfied that the wife had just cause for disinheriting her husband, and dismissed the petition. The petitioner appealed, and upon the appeal being heard judgment was reserved. Two days later, and before judgment was delivered, the petitioner died. Counsel for the petitioner then moved that the executors of the deceased appellant be added as parties.

Held, reversing the decision of MANSON, J. (McDONALD, J.A. dissenting), that the executors of the appellant be added as parties and that the appellant's estate receive from the wife's estate the house property and the real estate unencumberd.

SLOAN, J.A. would allow the appeal and direct judgment be entered *nunc pro tunc* as of the date when arguments were concluded. The appellant should be given the house property and the real estate unencumbered.

Per O'HALLORAN, J.A.: The maxim "*actio personalis moritur cum persona*" does not apply and the appellant's action survives. The appellant's equitable right under the Testator's Family Maintenance Act passes to his personal representatives. If an intestacy had occurred he would have received her entire estate, and that is what he is entitled to, in the absence of grounds which would have justified his wife giving him less than the policy of the law indicates as proper. That conclusion is indicated by the governing considerations, namely: disinheritance of the husband, his means and circumstances, the size and nature of the wife's estate, the lack of children who would properly have an interest, and the part he played in building up and preservation of his wife's estate.

Per McDONALD, J.A.: The problem is whether the powers given by the Act are such that they can or should be exercised in favour of anyone other than the petitioner himself. Under this Act maintenance by the estate of a deceased person is in the nature of a bounty. The appellant had nothing vested in him when he died. He had had a right to ask for a bounty but no bounty had been awarded him. He alone had a right to ask and that right died with him.

APPEAL by plaintiff from the decision of MANSON, J. of the 14th of June, 1940, dismissing the plaintiff's petition for maintenance and support from his wife's estate under the Testator's Family Maintenance Act. The facts sufficiently appear in the head-note and argument.

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The appeal was argued at Victoria on the 8th, 9th and 10th of April, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Fraser, K.C., for appellant: Appellant and his wife were married in 1911. He enlisted in 1914, and when discharged in 1916 was unfit for service. He received a small pension of $3.75 per month. During his absence in the army his wife received separation allowance of $35 per month. In 1918 he and his wife started a goat ranch in Burnaby as partners. This proved a success and in 1929 when they sold the ranch they had between them about $10,000 with which they bought property in Fort Mann and Surrey. The property was put in her name. In 1929 the wife went east and when away the petitioner started speculating in stocks and lost heavily. On her return she stayed with him until 1931, when she left him and went to the United States, and in 1932 obtained a divorce from him in Reno. In April, 1932, she married in the United States, but two days after the marriage she telegraphed the petitioner that she wanted to come back. She came back and they built a house on one of their Surrey properties where they lived together until her death on the 1st of February, 1937. In the meantime she obtained a divorce from her second husband in Mexico. In January, 1937, the wife sold to the petitioner two of the properties that were in her name by bill of sale, and upon which he owed over $3,500 at the time of her death. These properties, owing to the amount owing to the wife's estate and the taxes that were due, were of no value whatever. At the time of his wife's death he had nothing. The learned judge exercised his discretion on a wrong principle: see *McDermott* v. *Walker* (1930), 42 B.C. 184, at p. 201; *Bosch* v. *Perpetual Trustee Co.*, [1938] 2 W.W.R. 320. He also erred in holding that the wife had just cause for "disinheriting the petitioner." The test is whether adequate provision has been made for his proper maintenance and support. All he has is the unimproved lands sold to him by his wife upon which substantially the whole of the purchase price is still owing to the wife's estate, and it has no earning value whatever. As to the shares of Union Carbide received by him and sold, he believed he had the right to use it and she admits he retained the proceeds as a loan.

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The learned judge erred in treating the wife's conduct as just, because her act was deliberate and on advice of counsel. Two earlier wills were executed leaving everything to her husband. They lived together for five years before her death and he was a faithful attendant during her last illness. The nephews and nieces to whom the estate was given are in good circumstances and require no assistance. This is a proper case for an order under the Testator's Family Maintenance Act.

J. A. McGeer, for respondent beneficiaries: The petitioner was adequately provided for and his character and conduct were such as to disentitle him to the benefit of an order under the Act. The only evidence in support of the petition was that of the petitioner and the learned judge did not believe him. He contradicted himself in many cases as to receipts and expenditures during their married life. The assessor gave the value of the properties in his name at $23,160. When they were on the goat ranch it was her money that purchased the property. When his wife was away in 1929 he used Union Carbide shares belonging to her, and it was found by the learned judge that he forged the certificate. In January, 1937, husband and wife arrived at a settlement whereby he received the properties transferred to him by bill of sale in that month, and the 40 acres he received from the municipality for constructing roads. He received his fair share of their combined assets.

C. D. McQuarrie, for respondent Westminster Trust Company: The appellant was amply provided for. There is a wide discretion in the learned trial judge under sections 3 and 4 of the Act. The character and conduct of the husband was passed upon by the learned judge and he decided the wife was justified in her action. He found the husband was guilty of fraud. The Court of Appeal should not interfere: see *Claridge* v. *British Columbia Electric Railway Co. Ltd.* (1940), 55 B.C. 462, at 466; *Young* v. *Cross & Co.* (1927), 38 B.C. 200, at p. 203; *Trumbell* v. *Trumbell* (1919), 27 B.C. 161.

Fraser, replied.

Cur. adv. vult.

12th June, 1941.

SLOAN, J.A.: The motion to add the executors of the deceased appellant is granted and the appeal is allowed, my brother MCDONALD dissenting.

A word of explanation is necessary as to what is the effective order we make. My brother O'HALLORAN is of opinion the appellant's right of action survives, and he would in effect vest the entire estate of the deceased wife in the deceased husband's executors.

My brother MCDONALD is of the opinion that the action does not survive, and therefore dismisses the appeal.

I find it unnecessary to decide that question. A few days after the appeal had been heard, when we reserved judgment, the appellant died, and because of the principle that no one shall be prejudiced by an act of the Court I would follow the course adopted in a similar situation by Vice Chancellor Hall in *Turner* v. *London and South-Western Railway Co.* (1874), 43 L.J. Ch. 430, and by the Court of Appeal of Ontario in *Gunn* v. *Harper* (1902), 3 O.L.R. 693 and deliver the same judgment now as I would have delivered had we given judgment at the conclusion of the appeal, that is, I would allow the appeal and direct judgment be entered *nunc pro tunc* as of the date when arguments were concluded.

My direction would be that the appellant be given the house property and the real estate unencumbered. In order that there might be a majority view as to the form of the judgment, I agree, for this purpose, that the appellant's executors be added.

The effective order, then, is that the executors of the appellant be added and that the appellant's estate receive from the wife's estate the house property and the real estate unencumbered.

Costs of all parties to be paid out of the wife's estate on a solicitor and client basis.

O'HALLORAN, J.A.: The appellant's wife died in February, 1937, aged 53, leaving a net estate of almost $18,000, which included the home in which she was then living with him in Surrey, near New Westminster. The net value of the real estate was sworn at $12,934, in which was included $3,711 balance owing her by the appellant in respect to land which she had sold him under agreement for sale. They were married in 1911, and had resided in British Columbia since 1917. There were no children of their marriage. By her will the deceased wife gave all her estate to the children of a sister in New York State, with

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the exception of one dollar which she bequeathed to her appellant husband.

The appellant's application for just and equitable provision out of her estate pursuant to the Testator's Family Maintenance Act, Cap. 285, R.S.B.C. 1936, was refused in the Court below. The learned judge held "the wife had just cause for disinheriting her husband." His appeal to this Court was heard on the 8th, 9th, and 10th of April, 1941. The Court reserved judgment on Thursday the 10th of April at the luncheon adjournment. The appellant died two days later. His counsel then moved to add his executors as parties. Counsel for the respondents resisted this motion on the grounds it was an *actio personalis moritur cum persona,* or in any event that the right to continue the appeal did not pass to the executors under the Testator's Family Maintenance Act.

I. The maxim *actio personalis moritur cum persona* is not applicable.

In *Hambly* v. *Trott* (1776), [1 Cowp. 371]; 98 E.R. 1136, at 1138 Lord Mansfield, having said the maxim was not generally true described it to mean that

> all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

At p. 1139 Lord Mansfield continued:

> For so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, . . .

I cannot find that the maxim has been extended beyond actions in tort in which loss did not result to the estate, or in any event beyond actions in contract founded on injury to person or reputation only: *vide* Archbold's Q.B. Practice, 14th Ed., 1026; Daniell's Chancery Practice, 8th Ed., 229; *Wilson* v. *McClure* (1911), 16 B.C. 82, IRVING, J.A. at p. 88; and Broom's Legal Maxims, 10th Ed., 622.

If it is necessary to determine whether loss to the estate has occurred notwithstanding the intervening death, the action must proceed at least to the determination of that issue. For then if the cause of action is extinguished, it is not because of the death of the person, but because the estate has not been rendered less beneficial by reason of death. They are two different things. If

death extinguishes the cause of action no trial may take place; whereas if loss to the estate is the test, death does not extinguish the cause of action, for a trial must take place after death to determine if loss to the estate has occurred. In *United Collieries, Lim.* v. *Simpson* (1909), 78 L.J.P.C. 129 Lord Shaw described the maxim at p. 136 as

> of doubtful origin, has produced confusion rather than guidance in specific cases, and is used rather to dress up a conclusion already formed than as a safe guide towards a conclusion.

As this is not a case in tort or in contract arising out of tort, the maxim can have no application. We are concerned with an equitable right vested by statute. We are concerned with proceedings founded upon a duty of the wife to her husband to provide adequately for his "proper maintenance and support." In *Peebles* v. *Oswaldtwistle Urban District Council* (1896), 65 L.J.Q.B. 499, the Court of Appeal held that the right to enforce a statutory duty passed to the personal representatives. Reference was there made to a note to *Wheatley* v. *Lane* (1668), [1 Wms. Saund. 216*a*]; 85 E.R. 228, reciting the

> principle of the common law, that if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done.

Emphasis was then placed upon the ensuing portion of the note to *Wheatley* v. *Lane* at p. 229, reading:

> But this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived.

And *vide* Broom's Legal Maxims, *supra,* at p. 622. The Court of Appeal held the statutory duty in the *Peebles* case came within "any other duty to be performed" in *Wheatley* v. *Lane* and thus excluded the maxim. And *vide* also *Phillips* v. *Homfray* (1892), 61 L.J. Ch. 210, at pp. 212-14, and *Darlington* v. *Roscoe & Sons,* [1907] 1 K.B. 219. The right sought to be enforced here, *e.g.,* an equitable right vested by statute, is equally "any other duty to be performed." Certainly it does not sound in tort or in contract arising out of tort. In the circumstances the maxim is inapplicable.

It is to be observed for this and succeeding discussions that while the statute does not employ direct and mandatory language

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to impose an obligation upon the testator to frame a will in a particular way, yet it does in its objective effect impose an obligation upon the testator not to deprive his wife of "proper maintenance and support." The existence of this latter obligation is the reason the statute gives a judicial discretion to vary the will if the wife is deprived of "proper maintenance and support." This seems obvious for to hold otherwise would offend against the principle of "sufficient reason," as it is employed in the science of correct thinking. For if there is no duty in the testator to provide adequate provision there can be no "sufficient reason" for a Court to direct adequate provision. That is to say there could then be no judicial discretion as to what is adequate provision and *vide* caption VII. *post.*

II. The appellant's equitable right under the Testator's Family Maintenance Act passes to his personal representatives.

In my view this case bears a close analogy to *United Collieries, Lim.* v. *Simpson, supra,* where it was also held the maxim *actio personalis moritur cum persona* did not apply (p. 131). The question there to be decided was whether the right to present a claim under the Workmen's Compensation Act, 1906, passed to the executrix of an alleged dependant who died without having made a claim within the statutory period. By the statute, if a workman was killed leaving a person wholly dependent on his earnings, a sum equivalent to his wages for the preceding three years, or if in part dependent, a sum determined to be "reasonable and proportionate" was made payable to the dependant if the claim was made within six months from the workman's death. The workman died on 14th July, 1907. His mother, alleged to have been supported by him (although it does not appear whether wholly or in part) died on 16th October following, without having made any claim on the company. However, her executrix advanced the claim on 10th December, within the six-month period. It was allowed by the House of Lords. The term "dependants" as defined in section 13 of the statute was not expressed to include personal representatives.

In the *Simpson* case there was a statutory right to payment provided it was shown the applicant was dependent wholly or in part upon a workman killed in the course of his employment,

which of course were all matters of proof. In the case at Bar there is a statutory right to payment if it is shown adequate provision for the proper maintenance and support of the applicant was not made in the will of the testatrix. In both statutes the right to apply lapses if not made within a stated time. In the *Simpson* case, it was held the right became vested upon the workman's death. In this case likewise it must be held the right vested on the death of the testatrix. A will speaks from the date of death, and the applicant's right must be determined as of that date. In *In re Lewis, Deceased* (1935), 49 B.C. 386, a monthly payment ordered to commence on the death of the testator (which occurred nearly ten months prior to the order) was upheld by this Court.

In *Murgatroyd* v. *Stewart* (1938), 54 B.C. 172 a majority of this Court held that application under the Testator's Family Maintenance Act may be made before the issuance of probate of the will. By necessary implication the right to apply is thereby related back to the date of death. In the *Simpson* case the statute provided for payment of a lump sum if the applicant was wholly dependent upon the workman's earnings. Here, also, a lump sum payment may be made if the Court thinks fit: *vide* section 5. But the statute in the *Simpson* case also provided that if the applicant was in part dependent on the workman's earnings he should be entitled to an amount determined to be "reasonable and proportionate." That is very like the statute in this case, which provides that if the applicant has been inadequately provided for, the Court may provide an amount which is "adequate, just, and equitable in the circumstances."

If as shown above, the appellant's right to relief vested at the date of his wife's death in 1937, then that vested interest passes to his personal representatives. It is, of course, conceded it would not pass if the claim could not exceed a monthly sum for support which had been paid up to the date of the appellant's death, as occurred in *James* v. *Morgan* (1909), 78 L.J.K.B. 471, involving a contract for maintenance or support of a child. But that is not this case. For even if the utmost provision a Court could make in this case were a monthly payment for support of the husband out of the estate income, yet as that right vested in

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him on his wife's death in February, 1937, the right to get in the payment thereof from that date to the appellant's death in April, 1941, would naturally pass to his personal representatives.

In the language of Lord Mansfield cited *supra,* the appellant's cause of action is founded in a duty which the testatrix owed him. That duty was recognized by the statute when it provided the Court should intervene on the application of a wife, husband or child who claimed to have been deprived of "proper maintenance" in the will of the testator. It must follow, therefore, that the appellant's right to apply under the statute passes to his executors. That being so, and the maxim *actio personalis moritur cum persona* being excluded, the objections to the motion to add the executors of the appellant as parties must fail. I cannot find anything in the statute inconsistent with that view. On the contrary there is much to support it. By section 3 thereof the application may be made "by or on behalf of" wife, husband or children of the testator.

Moreover, by section 13 thereof:

> The application may be made by an executor on behalf of any person entitled to apply or by any guardian or next friend of an infant.

I am unable to establish any relation between section 13 and the preceding section 12. But if in section 13 "an executor" had read "the executor or trustee" as it does in section 12, it would then certainly seem to point to the executor of the testator. Moreover as it is grouped with the "guardian or next friend of an infant," the conclusion seems inescapable that "an executor" in section 13 does not refer to "the executor" of the testator, or in any event, that it is used generally to include an executor of a wife or husband as well as the executor of the testator.

It was contended, however, that the intent of the statute is to benefit only living persons, and that sections 3 and 13 must be interpreted in that light. To read that intent into the statute in the absence of language supporting it unequivocally or by necessary implication, is an attempt to apply the *actio personalis* rule by indirection, in a case where it has been shown already in caption I. that rule is definitely excluded. It could not be denied, of course, that the right of a wife to obtain future support for her necessary household and incidental expenses of living would naturally cease with her death. But not so in

regard to such support for the period between the death of the testator and her own death. For her right to that support vested in her at the time of the testator's death, and as such became hers in the same way as realty then vested in her became hers, although not known, realized or enforced during her lifetime. As such it would pass to her personal representatives upon the principles supporting the authortities cited in captions I. and II. hereof.

The analogy to alimony has been pressed. But alimony is a purely personal allowance to the wife in monthly or weekly payments for her support. The Court may alter it by increasing or diminishing it or by taking it away, *vide Watkins* v. *Watkins,* [1896] P. 222, at p. 223 and *Tangye* v. *Tangye,* [1914] P. 201, at 208. It is true the Court may in a proper case make that kind of an order under the Testator's Family Maintenance Act, and *vide* section 15 thereof. But as the statute itself plainly indicates, and as applied in *Walker* v. *McDermott, infra,* the provision in a proper case (such as it is later shown I think this is) may extend to an equitable share in the estate; and *vide* sections 5, 6, 8 and 16 of the statute. The order in such a case being of a final character, any analogy to alimony is excluded. In *Victor* v. *Victor,* [1912] 1 K.B. 247 the Court of Appeal distinguished the payment of an annuity under a separation deed from alimony.

It seems to follow necessarily that once it appears that the statutory relief can be of the final character which the giving of a share in the estate must be, then the proceedings should continue in the executor, up to the point at least of determining whether (1) any relief should be given at all; and (2) if so, whether it should be confined to a purely personal allowance for support, or whether it should be a share in the estate such as given in *Walker* v. *McDermott* which has no analogy to alimony. In either event the merits of the appeal must be considered and to do that, the motion to add the executors must first be granted.

Even if it is assumed that if a monthly payment were directed, the relief would be analogous to alimony, it by no means follows that a claim for monthly payments between the death of the testatrix in 1937 and the appellant's death in 1941 would be

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extinguished. For it cannot be assumed that the husband's death extinguishes the wife's right to collect arrears of alimony up to the date of his death. It is true that Luxmoore, J. came to that conclusion in *In re Hedderwick. Morton* v. *Brinsley,* [1933] Ch. 669, in a case where the wife's right to arrears had plainly ceased on other grounds. But recovery of arrears of alimony was allowed by Sargant, J. in *In re Stillwell. Brodrick* v. *Stillwell,* [1916] 1 Ch. 365, which was followed and applied by Finlay, J. in *Firman* v. *Royal,* [1925] 1 K.B. 681.

It is to be noted that in *In re Hedderwick. Morton* v. *Brinsley* the right to prove in bankruptcy (if the husband's estate was insolvent) for arrears of alimony was refused on the authority of *Linton* v. *Linton* (1885), 15 Q.B.D. 239; whereas if the estate was solvent the right to recover was refused on the ground that arrears of alimony did not constitute a legal debt, the only remedy being attachment, which right disappeared with the husband's death. But in *Linton* v. *Linton* the Court of Appeal was not considering the right to recover arrears against the estate of a deceased husband. It was considering only the right to prove in bankruptcy in a case where the husband had purposely allowed his alimony payments to fall into arrears.

Having been adjudged bankrupt on his own petition, the husband in *Linton* v. *Linton* then contended that the claim for his arrears of alimony should be proved in bankruptcy and future payments should be valued and proved for as well. That was his expedient to defeat the order for alimony. The Court of Appeal rejected both contentions. The view expressed by Luxmoore, J. in *In re Hedderwick. Morton* v. *Brinsley* that *Linton* v. *Linton* had decided that arrears of alimony could not be enforced except by attachment, does not seem to have been accepted by Sir Samuel Evans in *Tangye* v. *Tangye,* [1914] P. 201, for at p. 208 he remarked that Bowen, L.J. was dealing there

> with a case where obviously the respondent had no goods or property which could be reached by the ordinary forms of execution.

To say, as was said in *In re Hedderwick. Morton* v. *Brinsley* that payment of arrears of alimony cannot be enforced because they do not constitute a legal debt is not in itself an answer. In *McKay* v. *McKay* (1933), 47 B.C. 241, MURPHY, J., in holding alimony was not a debt, yet stated it might be a money demand.

It is manifestly an "obligation" to pay, "a duty to be performed" within the meaning of *Wheatley* v. *Lane, supra,* in caption I. in respect to which the action survives in the executor. In *Linton* v. *Linton* the Court of Appeal in holding that arrears of alimony were not provable in bankruptcy, quite obviously did so on the ground that obligation to pay alimony transcended the duty to pay an ordinary debt; for if the arrears had been held to be provable in bankruptcy, the order for alimony would have been largely defeated.

Nor is there any analogy in the case of a husband's death before payment of his wife's costs in divorce or judicial separation proceedings. In such a case, "the very foundation of the suit has gone," as stated by Lord Hanworth, M.R. in *Beaumont* v. *Beaumont,* [1933] P. 39, at p. 48,

as there is no longer a *nexus* between the two spouses seeing that the marriage has been dissolved by the husband's death.

But under the Testator's Family Maintenance Act, on the contrary, it is the death of the testatrix—the destruction of the *nexus* between the spouses—which gave the foundation of the present proceedings. Furthermore, in *Beaumont* v. *Beaumont* it was held the Court had no jurisdiction to order payment of the wife's costs unless there was a fund in Court. But here the whole estate is "in Court" for all practical purposes, since it is provided by section 12 of the statute that without the consent of all persons entitled to apply or by order of Court, the executor or trustee is prohibited from distributing any portion of the estate within a six-month period (*vide* section 12).

In another type of case *Thomson* v. *Thomson,* [1896] P. 263 the husband died during the pendency of his petition to vary a marriage settlement in favour of his wife. As I read it, the decision turned not upon death of the husband, but rather on the fact that there were no children of the marriage. It seems clear to me from a close perusal of the case that if there had been children of the marriage the action would have been continued in the husband's executor. The Court held that under the Divorce Act and the Matrimonial Causes Act it had no jurisdiction in the circumstances to vary the marriage settlement unless there were children of the marriage—*vide* Lindley, L.J. pp. 271-2 and Sir F. H. Jeune, P. p. 268. If the Testator's Family

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Maintenance Act had denied relief to a husband or wife unless there were children of the marriage, then *Thomson* v. *Thomson* would be in point.

In the circumstances, therefore, the right to continue the proceedings passes to the husband's executors in any event, and the motion to add them as parties should be granted accordingly.

III. Preliminary statement to main appeal.

The Court should, therefore, consider the merits of the appeal as they existed when the husband was alive. For with the foregoing objections overruled, the rights of the parties *inter se* should be considered as they existed at the commencement of the litigation: *vide In re Keystone Knitting Mills Trade Mark* (1928), 97 L.J. Ch. 316. The Court in coming to its conclusions should be governed by the circumstances as they existed when the statute was invoked. In *Walker* v. *McDermott,* [1931] S.C.R. 94, the subsequent birth of twins to the applicant daughter was excluded from consideration.

Before the Court attempts to consider what provision is "adequate, just, and equitable in the circumstances" it should determine whether that provision is confined to support out of the income of the estate for necessary household and incidental expenses of living analogous to alimony, or whether it may extend to the award of an equitable share in the estate. If the latter conclusion is reached (as it is later), then the next enquiry should be what standard, measure or yardstick governs "the opinion of the judge before whom the application is made" as to whether "adequate provision" has been made in the will for that is the standard which should guide him in directing what is "adequate, just, and equitable in the circumstances."

IV. The Testator's Family Maintenance Act as interpreted in *Walker* v. *McDermott.*

Section 3 of the Testator's Family Maintenance Act, Cap. 285, R.S.B.C. 1936, reads:

> 3. Notwithstanding the provisions of any law or statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate,

just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband or children.

Section 5 of the statute enables the Court to direct that "the provision shall consist of a lump sum." A lump sum provision is a payment out of capital, *viz.*, a share of the *corpus* of the estate.

What is meant by "proper maintenance and support" which is "adequate, just, and equitable in the circumstances"? In *McDermott* v. *Walker* (1930), 42 B.C. 184, the majority of this Court seemed to regard "maintenance" and "support" as synonymous, and came to the conclusion that the statute did not apply unless the applicant had not adequate means of support. MARTIN, J.A. (later C.J.B.C.) grouped "maintenance" and "support" but with no apparent distinction. MACDONALD, J.A. (now C.J.B.C.) with whom MARTIN and GALLIHER, JJ.A. agreed, more plainly identified the two at pp. 198-200 for he said at the bottom of p. 199, that the statute

only refers to those for whose maintenance at the time of the testator's death no adequate means of support [of their own] are available.

The Court held the claimant daughter disentitled to even one dollar out of the $25,000 net estate her father had bequeathed to her stepmother. The Court directed her to pay the costs of the appeal and also in the Court below in which she had been successful: *vide* 42 B.C. 354.

In the Supreme Court of Canada [1931] S.C.R. 94, Rinfret, J. seems to have expressed the same view in his dissenting judgment at p. 101:

She [the petitioner] does not state that she is in need of maintenance, nor that her husband and herself are unable to meet their necessary household and incidental expenses of living. All she says is that they "are unable to save any money whatsoever."

However, the majority of the Court (Anglin, C.J.C., Duff, Newcombe and Lamont, JJ.) rejected this interpretation and held the daughter was entitled as against her stepmother to $6,000 out of the $25,000 estate notwithstanding (1) the father had not supported his daughter for five years before his death; and (2) that she had been married one year prior to his death to a young man in a responsible position with a large company, who was in receipt of a reasonably good salary and with good prospects for the future; and (3) the stepmother had con-

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tributed largely to the upbuilding and preservation of the estate both in original capital advanced and in work and management up to the time of the father's death.

It is obvious, of course, that such a judgment could not be founded upon a mere duty to support; it must be manifest that the term "maintenance" was read to mean something more than "support" in its ordinary and accepted sense, and was given a meaning consistent only with a wider conception of the equitable powers conferred by the statute. Duff, J. (as he then was) in giving the judgment of the Court, having said that the testator justly felt himself under great obligation to his wife, continued at p. 98:

> But I can see nothing in all this to lead to the conclusion that the testator, if properly alive to his responsibilities, as father no less than as husband, ought to have felt himself under an obligation to hand over all his estate to his wife and leave his only child without provision.

On the facts stated the father's "responsibilities" to which the Court pointed, could not refer to a duty to "support," for he had not supported his daughter for five years and she was doing very well. Nor was there any room for duty on his part to "maintain" her, since he had not maintained her for five years and she had bettered her position on marriage. The only "responsibility" left was not to disinherit her, but rather to "advance" her, *viz.*, to give her a substantial share of his estate, consistent with the claims of his widow and the fact that the latter had contributed substantially to the building up and preservation of the estate which he left. The larger the estate the larger the share to which the daughter would be entitled for the learned judge said at p. 96:

> And in exercising its judgment . . . , the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

McDermott v. *Walker* is the leading decision upon the interpretation of our statute. The Court of Appeal attempted to confine it to support in a restricted sense; and *vide In re Lewis, Deceased* (1935), 49 B.C. 386, at 390-1. The Supreme Court of Canada, however, refused to follow that view and adopted a wider interpretation, which in principle and practice accepts a more equitable distribution of the estate as within the purposes of the statute. The Court of Appeal considered that the twenty-

four year old married daughter was not entitled to a penny of her father's $25,000 estate, and mulcted her in costs in two Courts. The Supreme Court of Canada considered she was entitled to a $6,000 share in the estate even though her father had not supported her for five years and she had bettered her position on marriage.

The view of the statute taken by the Supreme Court of Canada in *Walker* v. *McDermott* seems with respect, to be consistent with that adopted by the Judicial Committee in *Bosch* v. *Perpetual Trustee Co.*, [1938] A.C. 462, an appeal from New South Wales. Lord Romer pointed out at p. 477, that in the New Zealand statute (substitute British Columbia for our purposes), the words "maintenance and support" were used instead of "maintenance, education and advancement" in the New South Wales statute then before him. His Lordship evidently did not regard this difference in statutory language as pointing to a difference in interpretation, for he discussed the principles applied in New Zealand decisions as if they were applicable and observed at p. 477 that the language of the New Zealand statute

> . . . is in the same form for all practical purposes as the provision [N.S.W.] with which this appeal is concerned.

Lord Romer attached much weight to the use of the word "proper" in relation to "maintenance." He said at p. 476:

> The use of the word "proper" in this connection is of considerable importance. It connotes something different from the word "adequate." A small sum may be sufficient for the "adequate" maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his "proper" maintenance.

It is of interest to compare Lord Romer's expression "fortune of the father" with "pecuniary magnitude of the estate" used by Duff, J. (as he then was) in *Walker* v. *McDermott*. Lord Romer's interpretation of "proper maintenance" is in accord with the meaning attached to it by the Supreme Court of Canada in *Walker* v. *McDermott*. *Stout*, C.J. of New Zealand seems to have indicated much the same bent of mind in that portion of his judgment cited at p. 732 in the report of *Allardice* v. *Allardice*, [1911] A.C. 730.

As a matter of fact this Court in *McDermott* v. *Walker* expressed itself in equally apt language; for MACDONALD, J.A.

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(now C.J.B.C.) with whom MARTIN and GALLIHER, JJ.A. agreed, said at p. 199:

> This legislation was enacted, . . . , because in many instances hardship and injustice arose. A husband might disinherit a wife who shared with him the labour of accumulating property. . . . It is one of many instances . . . where testators unjustly deprive those entitled to their consideration from obtaining any or an adequate part of the estate leaving them in such necessitous circumstances that they require "maintenance" having regard to the size of the estate, the amount left and their accustomed manner of living.

This review of the decisions coupled with perusal of the statute itself, leaves it beyond doubt that there are, generally speaking, at least two kinds of relief intended by the Testator's Family Maintenance Act. First, there is a form of "maintenance and support" which is a purely personal allowance to the applicant wife, husband or child. Relief of this nature is analogous to alimony, and is within the purview of section 15. It is of its very essence a payment out of the income of the estate, as distinct from a share in the *corpus* of the estate. Such relief necessarily ceases with the death of the recipient, except as to arrears which may be owing: *vide* caption II. hereof.

Secondly, there is a form of "proper maintenance" which is as effectively a share of the estate as if it were so bequeathed in the will itself: *vide* sections 5, 6, 8 and 16. It is a distribution of the capital or *corpus* of the estate. It is final in its character and cannot be subject to periodical revision under section 15. For the Court cannot very well give an applicant the whole or a portion of the *corpus* of the estate, and a few years later ask him to give it back after he has spent it or alienated it. Relief of this kind arises most frequently in cases of disinheritance such as this case and *Walker* v. *McDermott*. It was given in the *Bosch* case also where the two applicants received a substantial increase in their shares of the estate.

The foregoing review brings us to the next consideration.

V. Was the husband entitled to apply for relief under the Testator's Family Maintenance Act?

That question requires an affirmative answer, because: (1) The husband was completely disinherited by his wife of an estate of some $18,000. He was the only person surviving whose claim may be recognized by the Testator's Family Maintenance

Act. And furthermore if his wife had died intestate he would have taken her entire estate by operation of law: *vide* section 114 (1), Administration Act, Cap. 5, R.S.B.C. 1936; (2) He was unable to do manual labour and his health prevented him from earning a living at any work which involved heart or nervous strain; (3) He was deprived of the home in which he had been living with his wife for at least three years before her death; (4) There is no finding that he was in receipt of any regular income of any kind from wage, salary, business or investment; (5) He contributed in a very substantial manner to the upbuilding and preservation of the great bulk of the estate which his wife left. In fact all her real estate to the sworn net value of $12,934 was transferred to her by him between 1929 and 1936: *vide* exhibits 10 and 62. To Dr. Ransom an old friend, she said of her husband after her return from Reno where she had gone through the form of divorcing him:

> I had to come back; I cannot do without him; he has got the head.

This must mean she regarded her husband's judgment and business experience as indispensable; (6) The evidence discloses that the only property he possessed was an interest in unimproved rural lands of speculative value, which he held on agreement for sale from his wife, and upon which he still owed her estate some $4,300 in principal and interest at the end of 1940. It appears also that the principal owing had not been reduced in three years; that his only means of paying that sum and the annual taxes and necessary improvements thereon was by sale of lands in small parcels.

They were married in 1911. He joined the Canadian forces shortly after the outbreak of war in 1914 and attained the rank of Sergeant Major. After some eighteen months' service he contracted pneumonia, was discharged and eventually received a monthly pension of $3.75. In 1917 they came to Vancouver. He invested and lost $1,000 in a lumber mill. The next year with $300 he had, and $600 she had (a portion of which she had saved out of separation allowance and assigned pay while he was in the army) they went into the business of raising goats. They worked hard and did very well. They acquired considerable rural lands, and ultimately sold the goat ranch in 1929 for some $10,000. The husband was an expert in the breeding and

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quality of goats, having judged at the Vancouver Exhibition and the International World's Fair, San Francisco.

I do not think it is in doubt that their financial success in raising goats—from which the bulk of their capital sprung—was due largely to his specialized knowledge. In so far as the investment of their capital in real estate is concerned, it is to be noted that when they were married in 1911, his occupation was stated as "real estate" (Exhibit 1). All real estate was held in his name as was their bank account, but it is common ground she was entitled to half of everything they built up together. In 1929 he began gambling on the Vancouver Stock Exchange, resulting in his bankruptcy on 29th July, 1931 (he was discharged from bankruptcy in the autumn of 1936). On 2nd April, 1931, they entered into an agreement for division of property and a settlement of accounts. Shortly thereafter she left for the United States, apparently with the intention of divorcing him, and taking a course in chiropractic, in which she had become interested. She obtained a divorce from him in Reno, Nevada, in June, 1931. She remarried in the United States in April, 1932, but left her new husband after two days, and returned to Barker in Vancouver later in that year, and subsequently obtained a Mexican divorce from the second husband. About that time Barker was periodically in Shaughnessy Military Hospital. In 1933 she built a house on the home property (building permit $1,000), and when it was completed Barker lived there with her until her death in February, 1937. According to the evidence of Dr. Sherman Ransom a veterinary surgeon who knew the Barkers well in their goat-breeding days, a change in Mrs. Barker's mental and physical condition became noticeable in 1923, and the evidence generally is that her ill-health became progressively worse until her death. During the last three years before her death, according to the evidence of neighbours Barker appeared to be the only one who could comfort her.

The learned trial judge did not find that the considerations mentioned in this caption disentitled the husband to the estate of his wife, but he did find that such considerations should not be recognized for two reasons: (1) because of the husband's conduct

or character, and (2) because he had potential assets in realty agreements. He held:

> Upon the evidence I am satisfied that the wife had just cause for disinheriting her husband.

The real and only question before this Court is the correctness of the finding of the learned judge that the wife was justified in disinheriting the husband of that share of her estate which he would have taken had she died intestate.

VI. Consideration of reasons alleged to justify disinheritance of the husband.

There is no suggestion of adultery, but the respondents relied on section 4 of the Testator's Family Maintenance Act which provides:

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

The learned judge gave effect to that section on the main ground that in November, 1929 (nearly eight years before her death), the husband had forged his wife's signature to a share certificate, sold it for $1,300 and retained the proceeds. The husband submitted two answers, either of which I think is sufficient.

The first answer is that the "character or conduct" must relate to a state of affairs existing at the death of the wife in 1937. For the statute speaks of character or conduct which "is such." It does not say "which at any time has been such." A statute of this character can hardly contemplate an inquisition into the life of the husband beginning with their marriage in 1911, and because he may have been guilty of an isolated act ten or twenty years ago and long since forgiven or forgotten, that it can be used now as a bar against him receiving his proper share of an estate: *vide Burns* v. *Burns* (1937), 52 B.C. 4, a decision of ROBERTSON, J. upon section 127 (1) of the Administration Act, *supra,* affirmed in the Court of Appeal (unreported) and upheld by the Judicial Committee, [1938] 3 W.W.R. 477.

In the second place the evidence does not support the finding of forgery. The learned judge says:

> In 1930 while Mrs. Barker was in the East a letter was sent to her New Westminster address containing a share certificate in her favour for 15 shares of Union Carbide and Carbon Corporation stock. The certificate was unendorsed. Barker got his hands on it. It was endorsed with a simulation

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of Mrs. Barker's signature (Exhibit 14). The signature was a forgery. Barker did not admit the forgery as his at the hearing. I am satisfied upon the evidence that the forgery was Barker's. He sold the shares during his wife's absence without authority and appropriated the proceeds to his own use. Mrs. Barker charitably did not prosecute him.

This invites analysis: There is no evidence (a) "that a letter was sent to her New Westminster address" containing the share certificate, or (b) that "Barker got his hands on it" with the sinister implications thereby conveyed. On the contrary, the husband's evidence that his wife sent him the certificate with authority to use it, is corroborated in writing by his deceased wife on two occasions.

In a property agreement between the husband and wife dated 2nd April, 1931, executed by both of them, clause 3 thereof reads:

> The second party [the appellant] will deliver to the first party [the wife] 15 shares of Union Carbide and Carbon Company stock in return for 15 shares of the same stock heretofore delivered by the first party to the second party.

This is direct written evidence corroborating the husband's testimony that the certificate was delivered to him. Furthermore, in a written memorandum which she gave her solicitor, Mr. *David Whiteside,* later delivered to a subsequent solicitor, Mr. *H. J. Sullivan,* his wife wrote:

> In Jan. 1930 delivered to the plaintiff [*i.e.*, the appellant] 15 shares of the capital stock of U.C.C. which the plaintiff then sold for $1,300 and the plaintiff retained the proceeds of sale as a loan.

In answer to a question by the learned trial judge, Mr. *Sullivan* said he could not recall any conversation in connection with these shares. Mr. *Whiteside* gave no evidence upon this question. It was stated to the Court by counsel for the heirs that Mr. *W. D. Gillespie* who acted as the wife's solicitor in 1929 and 1930 could not recollect anything being said about the share certificate being forged. In the circumstances, I cannot see how a prosecution of the husband on a forgery charge could have been successful. In my view there would be no case to go to the jury. However, even if the husband did endorse and use the certificate without her authority, there is ample evidence she forgave him for it, and did not regard it as "character or conduct" on his part justifying disinheritance. I have already referred to the corroborative evidence in that respect.

In addition thereto, after a temporary separation the wife returned to him and they lived together for at least the last three years of her life. Moreover, her securities to the value of $4,900 (Exhibit 10) were then held in a safety-deposit box in the Westminster Trust Company in the husband's name, and he had the key. She must have trusted him implicitly. That was not the conduct of a person who had any thought that the appellant might forge her name, make false declarations or convert her securities to his own use. It negatives the picture of the husband which is sought to be painted of him in the evidence, which the learned judge himself describes as "unnecessarily lengthy and intricate." The evidence does indicate that in her last years when she was sick in body and mind, she turned for comfort, not to her sister and family in New York State, but to the husband with whom she had shared the joys and sorrows of life.

The learned judge also seemed to think that the husband could have no equitable claim to share in his wife's estate unless he was without means of support. As already pointed out in caption IV, when that interpretation of the statute was adopted by this Court in *Walker* v. *McDermott,* it was rejected by the Supreme Court of Canada. The learned judge said:

> I am not satisfied that Barker is without means—on the contrary he has at least potential assets in realty agreements.

There is no finding he was in receipt of any regular income from wage, salary, business or investment. "Potential assets" imply that the present liquid value, if it exists at all, is doubtful. But when these "potential assets" are not income-producing, and require the outlay of substantial annual sums for taxes and improvements by a man without stated income, and depending on intermittent sales thereof, their potential value becomes removed from the realm of the practical and exists largely in the optimism of the owner.

The evidence discloses the husband held under agreement to purchase from his wife unimproved rural lands of a theoretical gross value of some $22,000. They do not produce any income and are unproductive in their present state. On the appeal, counsel for the executor of the wife informed the Court that as at the end of 1940 the lands were subject to the following liabilities: due Mrs. Barker's estate for principal and interest

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$4,300; repayment for advances to pay taxes (1937-8-9) $3,000; necessary expenditures for ditches and roads $4,000; 1940 taxes $1,000; a total of $12,300. The only source of revenue disclosed was from periodical sales of small parcels to persons who would pay small payments per month over a period of years.

The husband and wife built up their estates together—and see Exhibit 15. Each depended on the other. Their properties and interests combined to a degree that division now would seriously jeopardize the potential value of the husband's unimproved lands held under agreement for sale from his wife. His theoretical estate of $22,000 could disappear over night if the lands were sold for taxes, or if his wife's executor sought successfully to rescind the agreements for sale because of failure to pay the $4,300 principal and interest owing thereon at the end of 1940. It occurs to one that these lands in the circumstances could be described as liabilities quite as truly as "potential assets."

It was said the Court of Appeal should not interfere with the discretion exercised by the learned judge, particularly in view of the wide discretionary powers given the judge of first instance in section 3 of the statute. In *Wing Lee* v. *D. C. Lew,* [1925] A.C. 819, Lord Buckmaster speaking for the Judicial Committee, said at p. 823 in regard to the exercise of discretionary powers:

> It none the less follows that the discretion being judicial must be based on sound principles and cannot be arbitrarily exercised.

And *vide* also *Murdoch* v. *Attorney-General of British Columbia* (1939), 54 B.C. 496, at 501. But, with respect, the learned judge departed from correct principles in his interpretation of the "conduct or character" section, and also erred in assuming that the appellant could not obtain relief unless he was without means of support.

Then it was said the findings of fact of the learned trial judge should not be disturbed. Two of his principal findings of fact which relate to the husband's forgery and means of support cannot be supported, if due weight is attached to the relevant evidence to which I have already referred. The factual findings in this respect must be rejected as well as the correctness of the principles by which they were applied. In any event, as Davis, J. (with whom Sir Lyman Duff, C.J.C. agreed) said in *McCann* v. *Behnke,* [1940] 4 D.L.R. 272, at 273:

It is well established, of course, that in respect of a finding of a trial judge as distinct from a verdict of a jury, an appellate Court has to consider whether it on the evidence would have come to the same conclusion even though there be findings based on credibility of witnesses. And *vide* also the reference to *Allardice* v. *Allardice,* [1911] A.C. 730, in this aspect, in the judgment of McGillivray, J.A. in *In re Anderson Estate,* [1934] 1 W.W.R. 430, at 439.

VII. What constitutes an equitable share in the estate.

From what has been said it follows the wife did not have just cause for disinheriting her husband. The next enquiry is to what share of her estate was he entitled. The statute requires that such provision shall be made as the Court thinks "adequate, just, and equitable in the circumstances." What is the standard or the yardstick by which the Court shall determine if a provision is adequate, just, and equitable? The words of the statute "in the opinion of the judge before whom the application is made" should not be read too literally, for then we would revert to the time when equity was interpreted by the length of the "Chancellor's foot" and of which Lord Camden was prompted to write:

> The discretion of the judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable.

However, there is a standard for the guidance of the judge. It is the standard set up by law for the distribution of intestate estates. By section 114 (1) of the Administration Act, *supra,* if the wife had died intestate, by operation of law the husband would have taken her entire estate. It is true the Testator's Family Maintenance Act does not apply to intestate estates. But the policy of the law of this Province as to what constitutes "proper maintenance" is reflected in the statutory provision applicable to intestate estates. It is true a husband may go through the form of making a will disinheriting his wife. But of what is he disinheriting her? It must necessarily be that interest in his estate which would vest in her if he should die intestate. In other words, he is solemnly seeking by a dying act to deprive her of that interest in his estate which the policy of our law declares should justly vest in her on his death. As the law stood before the Testator's Family Maintenance Act a

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testator was at liberty to substitute his private policy for the public policy of the State. He could totally disregard all considerations of reason and justice. The Testator's Family Maintenance Act was enacted, *inter alia,* to remedy such injustices; *vide* what was said by MACDONALD, J.A. (now C.J.B.C.) in *McDermott* v. *Walker* as cited in caption IV. hereof. Since that statute was passed the Court on proper application will review the will of the testator, and if it is found just and equitable to do so, will give directions which have the effect of altering the inequitable will.

The intestacy provisions of the Administration Act, *supra,* provide a convenient and recognized standard for determining whether adequate provision has been made for the husband. It appears there (section 114 (1)) that if his wife had died intestate, the husband would have taken her whole estate since they had no children and it was less than $20,000. It is indicative of the policy of the law of this Province. It is the norm by which the action of the testatrix may be judged. Generally speaking, it is regarded as a proper distribution of the estate of a childless husband or wife. But there may be special circumstances which justify the testatrix in bequeathing a lesser amount than the policy of the law has thus indicated. It has been shown in caption VI. hereof that such circumstances do not exist here.

If an intestacy had occurred he would have received her entire estate, and that is what I think he was entitled to, in the absence of grounds which would have justified his wife giving him less than the policy of our law indicates as proper. That conclusion seems to be indicated as well by the governing considerations pointed to in *McDermott* v. *Walker, viz.,* disinheritance of the husband, his means and circumstances, the size and nature of the wife's estate, the lack of children who would properly have an interest, and the part he played in the building up and preservation of the wife's estate.

In the circumstances I see no grounds for depriving the husband of that share in the estate of his wife which the policy of our law has indicated to be adequate, just, and equitable if she had not made a will. If he had died first, the same would have applied to her. The Testator's Family Maintenance Act excludes

others than wives, husbands or children from consideration, and the policy of the law in the case of intestacy does not recognize the respondent nephews or nieces at all in cases where, as here, the estate is less than $20,000.

In coming to this conclusion it should be said that the evidence does not disclose the respondent nieces and nephews in New York State had any special claim upon the wife's consideration. It is in evidence their mother received $20,000 from her father's estate and $11,000 from her husband's estate, while they themselves received $5,000 each from their father's estate. If the testatrix had not left them anything in her will they could not have applied under the Testator's Family Maintenance Act since its provisions do not extend to nieces and nephews.

I would, therefore, allow the appeal.

MCDONALD, J.A.: The appellant, widower of the above-named testatrix Ethelwynne A. Barker, petitioned under the Testator's Family Maintenance Act for variation of her will. His petition was dismissed by MANSON, J. After his appeal had been heard and judgment reserved he died before judgment was rendered; and the question now arises whether his personal representative can revive the proceedings and ask for a decision of the appeal.

In my view it is not necessary to decide whether the proceedings constituted an *actio personalis* analogous to those that perish with the party according to the old common-law rule; the problem is whether the peculiar and anomalous powers given by the Act are such that they can or should be exercised in favour of anyone other than the petitioner himself.

As pointed out in argument it may be noted that section 13 of the Act does contemplate proceedings being taken by an executor "on behalf of any person entitled to apply." This provision is not found in the statute of New Zealand whence our Act originally came. The very wording of section 13 contemplates an executor applying on behalf of a living person, someone "entitled to apply." Under section 3 those entitled to apply are wife, husband or children. I have no doubt that section 13 contemplates the executor of the testatrix applying on behalf of her husband or children, not the executor of the husband or

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children applying. This is confirmed by the wording of section 3, which clearly contemplates a living person's applying (by himself or through another). This procedure as possibly suggested by the Families' Compensation Act, under section 4 of which the executor of a person killed sues on behalf of that person's dependants. The executor anxious to wind up an estate and knowing that proceedings under the Act were probable, might well wish to take proceedings himself to bring matters to a head before delay became embarrassing. I think, therefore, that section 13 does not apply to the present case.

That being so I am not at all sure that this case is not disposed of by the wording of section 3 which is the main section conferring on the Courts power to vary a will. That section allows relief to be given

on the application by or on behalf of the wife, or of the husband, or of a child or children,

and it enables relief to be given

for the wife, husband, or children.

There is nothing to suggest that it may be given for their dependants or to their representatives.

It seems, however, advisable to consider the question on broader lines as well. The long title of the Act shows that it is an Act to secure adequate and proper maintenance for the persons entitled to apply and under section 3 the Court is to give for that purpose what is "adequate, just, and equitable in the circumstances."

The peculiar nature of these powers is fairly obvious; though the terms "just" and "equitable" are used they cannot be used in the technical sense, for no standard is provided, and "justice" and "equity" in the legal sense presuppose some standard. Obviously the statute uses these terms in a popular and looser sense; the Court is to apply moral or ethical standards. The Court is to be governed by the applicant's needs and moral claims and not by anything resembling legal rights. So, clearly its powers under the Act are no ordinary judicial powers. The questions naturally arise: How can the Court be asked to meet the needs of a person who no longer needs anything? How can the Court properly provide for maintenance of a person who can no longer be maintained? Appellant's counsel no doubt felt the

force of these objections, and offered several ways of evading them. He said the Court ought not to consider the present situation but the situation when judgment was reserved, or even the situation when the petition was dismissed, and should do now what was then right, *nunc pro tunc*. It is true that there is authority for a Court's making a judgment *nunc pro tunc* in certain cases where a party has died after judgment was reserved: see *e.g., Turner* v. *London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561. But in that case the action was of the usual type, when the right involved was a transmitted right, not one merely personal to the dead man. I do not think any case can be cited where such procedure was adopted where the action was one that died with the claimant. On the contrary we have authority in *In re Keystone Knitting Mills' Trade Mark,* [1929] 1 Ch. 92, to show that a judgment cannot be antedated so as to preserve to a party substantive rights that would otherwise have lapsed. The *Turner* case really decides only that where the cause of action survives the plaintiff, and judgment has been reserved before his death, a Court may spare the executors the trouble of a formal application for revivor.

The case of *Wing Lee* v. *D. C. Lew,* [1925] A.C. 819 can be distinguished in that there the deceased did not die before judgment. He had obtained a judgment, of which he had been deprived by the error of the Court of Appeal. The executor, therefore, was not maintaining a mere claim for damages; he was seeking to have restored a judgment of which the deceased had been wrongly deprived.

Perhaps the strongest case in favour of the appellant's representative is *United Collieries, Limited* v. *Simpson,* [1909] A.C. 383, wherein it was held that the right of the dependant of a deceased workman to claim compensation under the Workmen's Compensation Act was transmitted to the executor. That case, however, is quite distinguishable. In the first place, several of the law lords held that the right to compensation was in fact a statutory debt and emphasized the fact that it was not discretionary but that the amount was fixed by the Act. Then again it was pointed out that the statute expressly declared that the employer should be "liable" to the dependant and that the claim

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for compensation was based on legal right and liability. Both these elements are absent here. The appellant could not suggest any legal right or liability. He made a plea for a bounty; a plea based on his moral deserts and his need for maintenance.

Our Act which gives power to make a discretionary award according to moral deserts and need for maintenance, seems to find its closest analogy in the jurisdiction to grant alimony to a wife. Actually the position of a petitioner under this Act is not so strong because a wife has a legal right to maintenance by a living husband whereas under this Act maintenance by the estate of a deceased person, even a husband, is in the nature of a bounty. However, the analogy of the alimony decisions is, I think, entirely against the representative of the appellant in this case. There is no instance in which an executor of a wife has successfully applied for alimony which she could have obtained if she had lived. Her executor has been allowed to tax her costs; but only where she had an order for costs, taxation being merely a way of fixing the amount according to a fixed scale. Moreover, this ruling turns on the fact that the money to pay costs had been paid into Court and on an express statute of 1870 which is not in force here: *Hawks* v. *Hawks* (1876), 1 P.D. 137. No costs can be recovered where no money has been paid in, so as to give the Court jurisdiction *in rem*: *Coleman* v. *Coleman and Simpson,* [1920] P. 71, at p. 74.

It has been held that the executor of a spouse who had obtained an order *nisi* for divorce before death cannot apply to have the order made absolute, this being a personal right—*Stanhope* v. *Stanhope* (1886), 11 P.D. 103. (The remarks in this case on *Grant* v. *Grant and Bowles and Pattison* (1862), 2 Sw. & Tr. 522, are also of interest.)

Again, it has been held that the executor of a deceased wife who had an order for alimony cannot enforce payment of the arrears; and refusal has been put on the ground that the alimony is ordered for her maintenance, of which there can no longer be any question after her death: *Stones* v. *Cooke* (1835), 8 Sim. 321*n*. This is not as strong a case as that in favour of the executor because here no order has ever been made for maintenance.

Now I come to a case that seems to be even more analogous to the present one. In *Thomson* v. *Thomson,* [1896] P. 263, the husband who had obtained a decree for divorce but who had no children living died during the suit and then his executor applied to vary the marriage settlements. Under the statute applicable, variation was authorized for the benefit of husband and children. The Court held no such proceedings lay by the executor, because variation could only be made for the maintenance of husband or children, and were no longer competent when none of these persons was living. This was affirmed on appeal and Lindley, L.J. said (p. 272):

> Sect. 45 enables the Court to settle property of a guilty wife "for the benefit of the innocent party and the children of the marriage, or any or either of them." The latter enactment enables the Court to order settled property to be applied "either for the benefit of the children of the marriage or of their respective parents." Both enactments are intended only to authorize the Court to act for the benefit of living persons. The present application seeks an order only for the benefit of the estate of a deceased person, and is not within those enactments.

The House of Lords had on similar reasoning made an analogous ruling denying a deceased wife's executor any right to recover arrears of pin-money: *Howard* v. *Digby* (1834), 2 Cl. & F. 634.

Counsel for appellant's executor has sought to distinguish the cases that hold a personal benefit not to be transmissible on the ground that the benefit under our Act is pecuniary, and that an action concerning property is not within the rule about an *actio personalis.* But I think such argument is answered by the cases I have just cited, particularly *Thomson* v. *Thomson.* One of the cases cited by counsel was *Peebles* v. *Oswaldtwistle Urban District,* [1897] 1 Q.B. 625, a case in which an executor was allowed to continue proceedings begun by his testator for a *mandamus* to abate a nuisance to property. There, however, it may be noted that the action was not for the personal benefit of the testator but for the benefit of his property and moreover his successor in title could have maintained such proceedings anew so that there was no point in refusing to allow them to be continued. Another argument presented was that the benefits under this Act could not be intended to cease with the petitioner's death because MANSON, J. might have awarded him a lump sum which death could hardly have deprived him of. I agree with the latter

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proposition, because such an award if he gave more than a life interest in a sum would vest a right of property, but the appellant had nothing vested in him when he died. He had had a right to ask for a bounty but no bounty had been awarded him. He, alone, for the reasons I have given, had a right to ask and that right died with him.

It follows from the above that I would dismiss the appeal.

Appeal allowed, McDonald, J.A. dissenting.

Solicitors for appellant: *Wismer, Alexander & Fraser.*

Solicitors for respondent Westminster Trust Company: *Sullivan & McQuarrie.*

Solicitor for respondent beneficiaries: *J. A. McGeer.*

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May 21, 22; Sept. 16.

THE KING v. THE JUNIOR JUDGE OF THE COUNTY COURT OF NANAIMO AND McLEAN.

Mandamus—County Court—Appeal from conviction by magistrate—Motion to quash — Magistrate's notes — Sustained on ground of insufficient evidence to convict—Mandamus refused—Decision on merits—Right of appeal—Criminal Code, Secs. 285, Subsec. 6 and 752, Subsec. 3.

On conviction of accused by a police magistrate for dangerous driving, he appealed to the judge of the county court. On the hearing of the appeal counsel for accused moved to quash the conviction on the ground that the evidence as disclosed by the magistrate's notes did not justify the conviction. The judge looked at the depositions, refused Crown counsel the right to call witnesses, and quashed the conviction on the ground above mentioned. An application by the Attorney-General pursuant to section 130 of the County Courts Act for an order by way of *mandamus* requiring the judge to hear and adjudicate upon the appeal, was dismissed. On appeal to the Court of Appeal the preliminary objection was raised that no appeal lies on the ground that these proceedings arise out of a criminal cause or matter.

Held (McDONALD, J.A. dissenting), that the Court had jurisdiction to entertain the appeal.

Held, on the merits, affirming the decision of ROBERTSON, J., that hearing and granting the application to quash is a hearing and determination on the merits, and *mandamus* does not lie.

APPEAL by the Crown from an order of ROBERTSON, J. of the 18th of April, 1941, made pursuant to section 130 of the County

Courts Act, dismissing the application of the Attorney-General of British Columbia for a mandatory order requiring the junior judge of the County Court of Nanaimo to enter continuances and hear the appeal of one George D. McLean from his conviction by the police magistrate of the city of Alberni for dangerous driving, contrary to section 285, subsection 6 of the Criminal Code. McLean was convicted on summary conviction under Part XV. of the Code and appealed to the county court. On the hearing of the appeal counsel for the Crown admitted that all the steps preliminary to bringing the appeal had been complied with. Counsel for accused moved to quash the conviction on the ground that the evidence as shown by the depositions taken before the magistrate did not justify the conviction. Counsel for the Crown opposed on the grounds that the learned county court judge could not consider the depositions as there was no evidence before the Court that the personal presence of the witnesses could not be obtained, as required by section 752, subsection 2 of the Criminal Code, and that the Crown witnesses were present and ready and willing to give their evidence, further that the provisions of the Code required the learned judge to hear and determine the appeal on the merits and he had no jurisdiction to quash the motion at that stage. The learned judge looked at the evidence in the depositions, refused counsel for the Crown the right to call witnesses, and granted the motion to quash on the ground that the evidence as shown by the depositions was not sufficient to warrant a conviction.

The appeal was argued at Vancouver on the 21st and 22nd of May, 1941, before MCQUARRIE, SLOAN and MCDONALD, JJ.A.

Pepler, K.C., D.A.-G., for appellant: This is an application under section 130 of the County Courts Act. Accused was convicted of dangerous driving. The application was for a mandatory order that the county court judge should hear the appeal. It was held that *mandamus* did not lie. We say the appeal was not heard at all.

Gould, for respondent McLean on the preliminary objection: No appeal lies to this Court: see Short and Mellor's Crown Office Practice, 2nd Ed., 483; *Attorney-General for Ontario* v. *Daly*, [1924] A.C. 1011, at p. 1014; *Ex parte Schofield*, [1891]

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2 Q.B. 428, at p. 432. There is no jurisdiction to hear an appeal from the Crown side. *Habeas corpus* is in a category by itself. There is no statutory authority for appeal to this Court. There is no inherent jurisdiction. That no appeal lies see *The Queen* v. *Tyler and International Commercial Company,* [1891] 2 Q.B. 588; *The Queen* v. *Fletcher* (1876), 2 Q.B.D. 43; *Ex parte Alice Woodhall* (1888), 20 Q.B.D. 832, at pp. 838-9. It is a criminal matter. He is applying for *mandamus* and section 130 of the County Courts Act deals only with civil matters: see Short and Mellor's Crown Office Practice, 2nd Ed., pp. 214-5; *Re Brighton Sewers Act* (1882), 9 Q.B.D. 723. That no appeal lies from the Crown side see *The Attorney-General* v. *Sillem* (1864), 33 L.J. Ex. 209. There must be statutory authority for appeal to this Court: see *Rex* v. *Carroll* (1909), 14 B.C. 116; *In re Tiderington* (1912), 17 B.C. 81, at p. 86; *In re Kwong Yick Tai* (1915), 21 B.C. 127; *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176; *Rex* v. *McAdam* (1925), 35 B.C. 168; *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541.

Pepler, contra: We submit that *mandamus* is a civil remedy: see *The King* v. *Meehan (No. 1)* (1902), 5 Can. C.C. 307, at p. 309. *Attorney-General for Ontario* v. *Daly,* [1924] A.C. 1011, is in our favour. It is a civil process in a criminal matter: *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541. The whole proceedings were civil.

Gould, in reply: The confusion is that we have got into *habeas corpus* cases which do not apply: see *Rex* v. *Wong Tun* (1916), 26 Can. C.C. 8; *Rex* v. *Dwyer* (1938), 70 Can. C.C. 264, at p. 271.

Cur. adv. vult.

Pepler, on the merits: The sections of the Code relating to appeals are 749 to 754, and in effect provide for a new trial. Once the formalities relating to entry of the appeal have been observed the appeal becomes a trial *de novo*: see *Rex* v. *Gregg* (1913), 22 Can. C.C. 51, at p. 54; *Rex* v. *Holaychuk* (1929), 51 Can. C.C. 98, at p. 99. It was admitted the "conditions precedent" were complied with at the hearing, and the Crown was ready with the witnesses to prove its case. This was refused

and the learned county court judge read the magistrate's notes of the evidence, and because of the insufficiency of these notes he quashed the conviction. The magistrate has no stenographer and he cannot take full notes, and in the absence of legal training errors creep in the notes. In Paley on Convictions, 9th Ed., 709, the procedure is set out. Depositions taken below cannot be read in evidence unless the conditions in section 752, subsection 3 of the Code are complied with: see *Rex* v. *Hornstein* (1912), 19 Can. C.C. 127. The learned judge usurped the functions of a superior Court judge, and in such a case *mandamus* will lie: see *Rex* v. *Spence* (1919), 31 Can. C.C. 365. The learned judge declined to exercise his jurisdiction and he exceeded his jurisdiction. A mandatory order then lies to compel him to do so: see Halsbury's Laws of England, 2nd Ed., Vol. 10, pp. 756-7; *Rex* v. *Pochrebny* (1930), 38 Man. L.R. 593. The case was not decided on the merits: see *Rex* v. *Board of Education,* [1910] 2 K.B. 165, at p. 179. The case was decided on a preliminary matter: see *Regina* v. *Brown* (1857), 7 El. & Bl. 757; *McKenna* v. *Powell* (1870), 20 U.C.C.P. 394. That there was excess of jurisdiction see *The Queen* v. *Mayor of Monmouth* (1870), L.R. 5 Q.B. 251; *Rex* v. *Olney* (1926), 37 B.C. 329; 46 Can. C.C. 196. The cases relied on by the learned judge below are clearly distinguishable except *Rex ex rel. Curry* v. *Bower,* [1923] 1 W.W.R. 1104, in which the learned judge held that a judge on appeal from a summary conviction could allow the appeal on the ground that there was no evidence to convict, but this is not borne out by the cases cited. Orders made under section 130 of the County Courts Act are civil and not criminal. As to costs, the Crown Costs Act applies: see *Rex* v. *McLane* (1927), 38 B.C. 306.

Gould: The quashing of a conviction on reading the depositions is a hearing on the merits: see *The Queen* v. *Justices of Middlesex* (1877), 2 Q.B.D. 516; *Strang* v. *Gellatly* (1904), 8 Can. C.C. 17. *Rex* v. *Olney* (1926), 37 B.C. 329, was decided at once. The case at Bar took over an hour in argument and many cases were cited. If he only made a judicial mistake *mandamus* would not lie, but we submit that he made no mistake. The case of *Rex* v. *Pochrebny,* [1930] 1 W.W.R. 139 and 688, is

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distinguishable: see also *Rex* v. *Lebrecque* (1940), 75 Can. C.C. 117. That this is a hearing on the merits see *Rex* v. *County Judge of Frontenac* (1912), 25 Can. C.C. 230; *Rex* v. *Wong Tun* (1916), 26 Can. C.C. 8; *Re Gross,* [1930] 4 D.L.R. 299; *Rex* v. *Stacpoole, Re Zegil,* [1934] 4 D.L.R. 666; *In re Corbett* (1859), 4 H. & N. 452. The learned county court judge was right in law. The depositions were properly before the Court: see *Rex* v. *Koogo* (1911), 19 Can. C.C. 56; *Rex ex rel. Curry* v. *Bower,* [1923] 1 W.W.R. 1104; *Rex* v. *Rondeau* (1903), 9 Can. C.C. 523, at p. 526. As to costs, if I show statutory authority I am entitled to costs: see *Watson* v. *Howard* (1924), 34 B.C. 449. By the inherent jurisdiction of this Court costs may be awarded when the appeal is dismissed for lack of jurisdiction.

Pepler, in reply, referred to *Re Rex* v. *Daly et al.* (1924), 55 O.L.R. 156, at p. 162; 94 L.J.P.C. 21.

Cur. adv. vult.

16th September, 1941.

MCQUARRIE, J.A.: The facts are set out in the judgment of my brother MCDONALD. As to the preliminary objection that there is no appeal to this Court from the refusal of a Supreme Court judge to grant a *mandamus* in a criminal matter I am of opinion that an appeal lies. In that connection I would refer to section 6 (*d*) (iii) of the Court of Appeal Act, R.S.B.C. 1936, Cap. 57, and *Attorney-General for Ontario* v. *Daly,* [1924] A.C. 1011; [1924] 3 D.L.R. 667; [1924] 3 W.W.R. 235, which I think should be followed here. The case as presented to us was narrowed down to some extent by admissions of counsel. Counsel for the Crown admitted that if the decision of the learned county court judge were one on the merits the Crown is out of Court. Counsel for the respondent admitted that if the said judge had refused to hear the appeal a *mandamus* would lie.

It was contended on the one hand for the Crown that there was no hearing at all and on behalf of the respondent that there was a hearing and the county court judge delivered his judgment therein. It is common ground that all the statutory formalities precedent to the appeal were complied with and no question of the jurisdiction of the learned county court judge to hear the

appeal was raised. The motion to dismiss the appeal arose after the hearing had commenced and was consequently a part of the proceedings. It is true that on such an appeal there should be a hearing *de novo*. If I had been in the position of the county court judge I would have dismissed the motion and allowed the hearing to proceed, but can it be held that because the trial judge declined to hear the evidence which the Crown had ready to produce, there was no hearing at all? That is the deciding feature of this appeal although there were other points raised, particularly the question of whether the trial judge should have referred to the depositions. I am afraid that a decision in favour of the Crown would point the way to a review by this Court of many appeals to county court judges in a manner never anticipated. In effect that would render nugatory section 752 of the Criminal Code which provides as follows:

When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order.

2. Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

3. Any evidence taken before the justice at the hearing below, certified by the justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined if the Court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts.

The arguments on both sides were interesting and helpful. In addition I have enjoyed the privilege of perusing the judgment of my brother McDONALD. I agree that the appeal should be dismissed.

SLOAN, J.A.: One George D. McLean was convicted under Part XV. of the Criminal Code by the police magistrate at the city of Alberni of dangerous driving, contrary to section 285, subsection 6 of the said Code.

From this conviction he appealed to the County Court of Nanaimo. When the appeal was called for hearing before HANNA, Co. J., Crown counsel admitted all conditions precedent to the hearing of the appeal had been properly fulfilled by the appellant. Appellant's counsel thereupon moved to quash the convic-

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tion on the ground that the evidence appearing in the notes of the trial magistrate could not support it. This motion was opposed by Crown counsel. The learned county court judge ruled that the evidence recorded in the magistrate's notes was properly before him, refused counsel for the Crown the right to call his witnesses and quashed the conviction. The following memorandum was endorsed upon the conviction pursuant to section 751, subsection 4 of the Code:

> Order made quashing conviction on grounds of insufficient evidence in case below as set out in magistrate's notes and that fine and security by accused be returned to him and accused driver's licence be restored and without costs.

Dissatisfied with this determination of the appeal by HANNA, Co. J. the Attorney-General launched *mandamus* proceedings in the Supreme Court to compel him to enter a continuance and to hear the appeal upon the evidence to be adduced by the Crown. This application was refused by ROBERTSON, J. and the Attorney-General now appeals to this Court.

Upon the appeal coming on for hearing counsel for the respondent took the objection *in limine* that this Court was without jurisdiction to entertain it, contending that, under the circumstances, the *mandamus* proceedings herein were of a criminal character and that there is no statutory authority conferring jurisdiction upon this Court to hear appeals of this nature. In my view, with deference, this submission cannot be supported and, unhappily, I find myself in disagreement with my brother MCDONALD on this branch of the appeal. In my view, with respect, *mandamus* proceedings to compel an inferior tribunal to exercise its proper functions remain civil in their nature notwithstanding that the matter in question in the inferior tribunal is of a criminal character. The writ is not coloured by the nature of the proceedings out of which the need of its compulsion arises.

This Court has held that to invoke the remedy of *habeas corpus* to release a prisoner suffering imprisonment following a conviction for a crime does not, in that proceeding, render the *habeas corpus* process criminal in its nature. *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541.

I can see no ground for saying that there is, in this regard, a

distinction between proceedings relating to the two remedies of *habeas corpus* and *mandamus*. To my mind *mandamus* proceedings fall within the reasoning of *Yuen Yick Jun's* case, *supra*. The relevant authorities, English and Canadian, were exhaustively reviewed and considered (and the English authorities distinguished) in the dissenting judgment of MARTIN, J.A. (later C.J.B.C.) in *Rex* v. *McAdam* (1925), 35 B.C. 168 and by my brother O'HALLORAN in delivering his judgment (in which MARTIN, C.J.B.C. and I concurred) in *Rex* v. *Yuen Yick Jun, supra,* wherein this Court, at the request of the Attorney-General of Canada and the Attorney-General for the Province (see pp. 544 and 554), reviewed and refused to follow the majority judgment in *Rex* v. *McAdam, supra*. I can add nothing of value to those judgments.

I must add, however, that bearing directly on the subject of the nature of *mandamus* procedure in Canada, high and binding authority is, I believe, found in *The King* v. *Meehan (No. 1)* (1902), 5 Can. C.C. 307; *Re Rex* v. *Daly et al.* (1924), 55 O.L.R. 156 (affirmed [1924] A.C. 1011) and *Re Rex* v. *Speirs* (1924), 55 O.L.R. 290.

In *The King* v. *Meehan (No. 1), supra,* Street and Britton, JJ., sitting as a Divisional Court of the High Court of Justice of Ontario, held that

> an application for a *mandamus* against a magistrate is a civil and not a criminal proceeding, although the act which it is proposed the justice shall be ordered to do is the taking of an information for an offence against the criminal law.

In *Re Rex* v. *Daly et al., supra,* an application was made to Middleton, J. for a mandatory order compelling the judge of the County Court Judge's Criminal Court of the county of York to proceed to try the applicants upon certain criminal charges—a jurisdiction which the said county court judge had refused to exercise. Upon the application counsel for the Attorney-General of Ontario took the objection that Middleton, J. had no jurisdiction to grant the writ. In dealing with that objection Middleton, J. said (at pp. 163-4 of 55 O.L.R.):

> Mr. McCarthy took objection that I had not power to grant a *mandamus* because the Criminal Code provides that rules may be made respecting, *inter alia*, the granting of *mandamus*, and, no rules having been made, I have no power. I do not think that this is so. The rules contemplated by the Code

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are rules of procedure only, and do not confer jurisdiction. If the jurisdiction to award *mandamus* is vested in the Supreme Court as part of its criminal jurisdiction, inherited from the jurisdiction in England by virtue of sec. 10 of the Criminal Code, then that jurisdiction, in the absence of rules, may be exercised in any way consistent with the due administration of justice. I am, however, of opinion that, even though the matter arises out of the administration of the criminal law, the jurisdiction to award a *mandamus* so as to secure to one charged with an offence his due trial in accordance with the law, is purely civil. It is part of the jurisdiction of this Court, derived from the law of England under the various Acts constituting our civil courts, and conferring upon them, among other things, the old jurisdiction of the Court of King's Bench. This being so, our rules of practice and procedure supply an adequate remedy.

An appeal was taken from the ruling of Middleton, J. upon this point (and upon other grounds not relevant to the present discussion) which came on before Mulock, C.J.O., Magee, Hodgins, Ferguson and Smith, JJ.A. With reference to the objection of the Crown, Hodgins, J.A. said at p. 167:

> I agree with Middleton, J., that *mandamus* from the Supreme Court of Ontario will lie to the County Court Judge's Criminal Court.
>
> While the application is made in what appears to be a criminal cause or matter, the right to a *mandamus* is not interfered with by anything in the Criminal Code.

By that language I think he intended to agree with the observation of Middleton, J., quoted above, and to indicate his view that nothing in the Code (*viz.*: the provision for the promulgation of procedural rules regulating the practice in relation to *mandamus* applications arising out of criminal proceedings) could change the basic nature of the writ nor interfere with the exercise of the civil jurisdiction of the Court to grant the writ according to the civil practice.

Smith, J.A. said at p. 168:

> I am also of opinion that the objection to the jurisdiction to make the order appealed from is not well-founded.

Magee, J.A. said at p. 178:

> I agree that the Supreme Court has power to grant a mandatory order to the County Court Judge's Criminal Court.

It thus appears that the majority of the Court supported Middleton, J. in their judgments while the then Chief Justice of Ontario and Ferguson, J.A. did not express any opinion upon it. I would expect, however, that if they had thought that Middleton, J. had acted without jurisdiction they would not have considered the merits of the appeal. I construe their silence,

under the circumstances, as supporting the view of Middleton, J. and as a concurrence with the remaining members of their Court on this aspect of the matter.

The Attorney-General of Ontario then applied for special leave to appeal to the Privy Council, which was granted. Upon the appeal Viscount Cave said (at p. 1013 *et seq.* of [1924] A.C.) in delivering the judgment of the Board:

> The petition of the Attorney-General for Ontario to His Majesty in Council upon which the special leave to appeal was granted was based upon two grounds—namely, first, that the Supreme Court had no power by *mandamus* to compel the judge of the County Court Judge's Criminal Court to try the respondents on the charges in question and that the civil jurisdiction of the Court had been wrongly invoked in a criminal matter; and secondly,

(here the second point, not of interest herein, was set out by his Lordship). He then continued:

> It is evident that the first of the two questions raised by the petition involved a consideration of the relation of the civil law and procedure of the Province of Ontario to the criminal law and procedure applicable throughout the Dominion of Canada, . . . ; and it was on that ground (as clearly appears from the shorthand notes) that the Board advised His Majesty to grant special leave to appeal, . . .
>
> Their Lordships have now been put in possession of all the circumstances of the case and have been informed of the arguments put before the Ontario Courts, and they are satisfied that in fact no serious question arises as to the jurisdiction of the Supreme Court to grant a *mandamus* in such a case as this. This Court is clothed by statute with all the powers formerly belonging to the Courts of Queen's Bench and Common Pleas of Upper Canada, which clearly included a power (as in England) to issue an order of *mandamus* to an inferior Court; and although it appears that no rules regulating the method in which that power is to be exercised have yet been made, that circumstance does not, in their Lordships' view, prevent the Supreme Court from making full use of its powers. It follows that, in their Lordships' opinion, there is no doubt whatever as to the power of the Supreme Court to grant a *mandamus*, and no question of any irregular intrusion by a civil Court in a criminal matter; and accordingly the first and effective ground of appeal put forward in the petition of appeal wholly fails.
>
> In these circumstances their Lordships have considered whether they should permit the appeal to proceed upon the second ground, and they have come to the conclusion that this should not be allowed. The leave to appeal was granted on the first ground only; and, that ground having proved to have no substance, the question reserved by the order giving leave to appeal, whether under the circumstances of the case an appeal should be entertained, arises for decision. In their Lordships' opinion this question should be answered in the negative. . . .

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I have quoted at some length from this judgment because to my mind it is decisive of the jurisdictional argument in this appeal.

It seems to me that the sole question considered and decided by their Lordships was whether the application for a writ of *mandamus* arising out of a criminal charge was one falling within the civil or criminal jurisdiction of the High Court of Ontario. Their Lordships found that the jurisdiction to grant the writ originated not in the criminal side but in the civil powers exercisable by the Ontario Court. I gather, too, that the provisions of (the present) section 576 of the Code—the rule-making section—were regarded as relating not to jurisdiction but to procedure only.

It has been suggested the judgment of their Lordships might be construed as holding that the jurisdiction of the Ontario Court was derived from the alternative source suggested by Middleton, J. in his judgment, *i.e.*, an inherited criminal jurisdiction which could still be exercised in the absence of any rules formulated under (the present) section 576 of the Code. I think not. If the proceedings before Middleton, J. were criminal in character they retained that character both in the Appeal Division in Ontario and in the Privy Council. Their Lordships, however, significantly noted (at p. 1015) that they did not feel obliged to consider "the question of the validity or effect" of the then section 1025 of the Code (now section 1024, subsection 4) which purported to abolish appeals to the Privy Council in criminal cases, thus making it abundantly clear that their Lordships considered they were, in deciding the only issue before them, determining a question of civil and not of criminal law.

In this Province, as in Ontario, the jurisdiction of the Supreme Court to entertain an application for the issuance of a writ of *mandamus,* and the jurisdiction of this Court to hear and determine an appeal from either the grant or refusal of the application below, begins, continues and ends in the civil power of the said respective Courts notwithstanding that the writ, if issued, would be directed to an inferior tribunal exercising a criminal jurisdiction.

The English authorities, which appear to hold to the contrary, are of no assistance herein for the reasons fully developed in

Rex v. *McAdam, supra* (MARTIN, J.A.), and *Rex* v. *Yuen Yick Jun, supra.*

It follows, therefore, in my opinion, with deference, that this Court has jurisdiction to enter upon the appeal and the preliminary objection must be overruled.

That brings me to a consideration of the merits of the appeal. After a close consideration of the authorities cited by ROBERTSON, J. and by my brother MCDONALD (and others) I have reached the conclusion, not without hesitation, that ROBERTSON, J. was right in the circumstances in refusing to make the order absolute below. I find myself in agreement with my brother MCDONALD in that regard and would dismiss the appeal.

MCDONALD, J.A.: Respondent McLean was convicted by the police magistrate of Alberni for dangerous driving contrary to section 285, subsection 6 of the Criminal Code. He appealed to HANNA, Co. J., pursuant to the provisions of Part XV. of the Code. When the appeal came on a motion was made to quash, on the ground that the evidence as disclosed by the magistrate's notes did not justify the conviction. Counsel for the Crown argued that the judge could not consider the depositions as section 752, subsection 3 of the Code did not apply, the Crown's witnesses being present in Court ready and willing to give their evidence. The judge, however, looked at the depositions, refused Crown counsel the right to call witnesses and quashed the conviction on the ground above mentioned.

The Attorney-General then launched an application pursuant to section 130 of the County Courts Act for an order by way of *mandamus* requiring the judge to hear and adjudicate upon the appeal according to law. The matter came before ROBERTSON, J., who, having issued a rule *nisi*, later discharged same, holding that the judge had in fact exercised jurisdiction and that hence *mandamus* did not lie. On the appeal from this judgment coming before us, counsel for respondent McLean objected that no appeal lies. His contention is that these proceedings arise out of a criminal cause or matter, that our jurisdiction in such matters is confined to hearing appeals from convictions and acquittals and that the refusal to grant a *mandamus* is neither.

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After much consideration and research I am of opinion that this objection is well-founded.

It was urged on behalf of the Crown that *mandamus* is a civil remedy and so covered by the Court of Appeal Act even where the writ is sought in relation to the trial of a criminal cause. The most authoritative test for determining what proceedings are criminal and what civil is that given in *Clifford and O'Sullivan*, [1921] 2 A.C. 570, a prohibition case. At p. 580 Viscount Cave said:

> . . . in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word "criminal." It must involve the consideration of some charge of crime, that is to say, of an offence against the public law . . . ; and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it . . . , but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction.

The judgment of Lord Sumner is also valuable, because though he dissented from the majority in the result, he agreed in general as to the test of criminal proceedings, differing only as to their application in that case, in that he considered that the offence was "against public law" which the majority did not. At pp. 586-7 he said:

> An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject matter dealt with on the application. The same is true of *certiorari* (*Reg.* v. *Fletcher* [(1876)], 2 Q.B.D. 43) and of *habeas corpus* (*Ex parte Woodhall* [(1888)] 20 Q.B.D. 832). . . . I think the real test is the character of the proceedings themselves which are the subject matter of the particular application, whatever it be, that constitutes the cause or matter referred to.

The decision in *Gaynor and Green* v. *United States of America* (1905), 36 S.C.R. 247, is very similar. There application had been made for a writ of prohibition to restrain an extradition commissioner from investigating a criminal charge, and the Supreme Court of Canada held that the application was a proceeding arising out of a criminal charge and that hence there was no appeal to that Court. Sedgewick, J., giving the judgment of the Court, at p. 250 said:

. . . it is indisputable that the charge made before the extradition commissioner was a criminal charge. So too, the warrant issued was a proceeding arising out of that charge. A motion made in court to prevent a magistrate from proceeding to investigate that charge is a motion to stop the further proceedings of the investigation of that criminal charge and it, therefore, necessarily follows, in construing the statute according to the canons requiring a literal construction, that the case before us is a case arising out of a criminal charge.

However, it is not necessary to reason generally from the analogy of prohibition cases. There are at least four decisions of the English Court of Appeal dealing directly with applications for *mandamus* to magistrates who had been dealing with summary criminal proceedings, and in each it was held that the *mandamus* proceedings themselves were criminal proceedings and so not appealable. I refer to *Ex parte Schofield,* [1891] 2 Q.B. 428, *The Queen* v. *Tyler and International Commercial Company, ib.* 588, *Reg.* v. *Young* (1891), 66 L.T. 16, and *Rex* v. *D'Eyncourt* (1901), 85 L.T. 501. In *Ex parte Schofield* an appeal was attempted from the refusal of a *mandamus* to require a magistrate to state a case after he had made an order for abating a nuisance. At p. 430 Lord Esher, M.R., said:

That the decision of the magistrate . . . , was a proceeding in a criminal cause or matter cannot be doubted, but it is said that the application for a *mandamus* is not a proceeding in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, because the *mandamus* is only asked for to compel the magistrate to state a case, and therefore that the application has no legal effect upon the magistrate's determination of the question which was before him. He was asked to state a case upon a point of law arising in a criminal cause or matter. He refused, and we are asked for a *mandamus* to compel him to state a case. We are therefore asked to compel him to take a step in a proceeding in a criminal cause or matter which would have the effect of causing his decision to be reviewed.

In my view the above effectually meets all arguments which the Crown can raise. Indeed, in the present case, there can be no doubt that the Crown asked ROBERTSON, J., to review the county court judge's decision directly, without any intervening machinery, such as a case stated. That was the sole purpose of the application, and any order made on the application would have been wholly ineffectual unless that end had been attained.

At p. 431 of the report just cited Lord Esher added:

I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises.

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It seems to me quite impossible to say that the refusal of a *mandamus* in the present case was not a judicial determination of a question raised with regard to proceedings whose subject matter was criminal.

I think the above decision would put the matter of the competence of this appeal beyond controversy were it not for the cases of *Re Rex* v. *Daly et al.* (1924), 55 O.L.R. 156; [1924] A.C. 1011, and *Re Rex* v. *Speirs* (1924), 55 O.L.R. 290. In the former case a very able judge, Middleton, J., expressed the view that (p. 164):

> . . . , even though the matter arises out of the administration of the criminal law, the jurisdiction to award a *mandamus* so as to secure to one charged with an offence his due trial in accordance with the law, is purely civil.

It is incredible to me that the learned judge should have thus ignored the contrary English authorities had they been known to him. From the fact that he made no attempt to distinguish them I must conclude that they were not cited to him. The *mandamus* was one issued to a county court judge directing him to proceed with a speedy trial, which he had considered should not come before him. I note that in the Appellate Division Hodgins, J.A. said (55 O.L.R. at 167):

> I agree with Middleton, J., that *mandamus* from the Supreme Court of Ontario will lie to the County Court Judge's Criminal Court. While the application is made in what appears to be a criminal cause or matter, the right to a *mandamus* is not interfered with by anything in the Criminal Code.

This passage, I think, implies that Hodgins, J.A., regarded the *mandamus* as a criminal proceeding, since it would have been regulated by the Code if this had contained any relevant provisions. So that his opinion is against that of Middleton, J., as quoted above. Though this case went to the Appellate Division and thence to the Privy Council, the competence of appeal was not discussed, except that the Privy Council said that they dismissed the appeal, without considering the point. I infer that it was never raised in the Appellate Division, from the absence of all reference, though the Court may simply have found it unnecessary to deal with it, since they dismissed the appeal on other grounds. Before Middleton, J., one main argument was on the power to grant *mandamus* at all, seeing that no Criminal Crown Office Rules had been promulgated for the Province.

Middleton, J., held that no rules were necessary in order to sanction the writ, and that conclusion really disposed of the case, it being then irrelevant whether *mandamus* was a civil or a criminal remedy. Thus the above passage from his judgment was, in effect, *obiter*.

In *Re Rex* v. *Speirs* (1924), 55 O.L.R. 290, a *mandamus* was applied for to compel a Division Court judge to hear an appeal from a magistrate, and the Crown, in opposing, argued that no *mandamus* lay "because the Code makes no provision for *mandamus* in such cases." This case was heard before *Re Rex* v. *Daly et al.* was heard by Middleton, J., though the decision in *Re Rex* v. *Speirs* was later, and this fact deprived Orde, J., who decided it, of the benefit of any argument on *Re Rex* v. *Daly et al.* He actually refused the *mandamus* but his reasons contain the following *obiter dicta* (p. 292):

> Mr. Kerr advances no other argument on this point than the fact that the Criminal Code makes no provision for such a remedy. But, as to be inferred from the judgment in *Re McLeod* v. *Amiro* (1912), 27 O.L.R. 232, and as held by my brother Middleton in *Re Rex* v. *Daly et al.* (1923), *ante* 156, and by the Appellate Division in the same case (1924), *ib.*, the jurisdiction of the Supreme Court of Ontario over inferior Courts by way of *mandamus* is not dependent upon the Code, but is a purely civil matter vested in the Supreme Court under the various Acts constituting our civil Courts. The inferior Court, though exercising jurisdiction over criminal matters, remains nevertheless a civil Court, subject, even while exercising criminal jurisdiction, to the power of the Supreme Court to compel it to exercise, and to prohibit it from exceeding, that jurisdiction.

With respect, I can see nothing in *Re McLeod* v. *Amiro, supra,* to justify the learned judge's inference from it. Again, as I have attempted to show, the Appellate Division did not in any way indicate in *Re Rex* v. *Daly et al.* that *mandamus* was "a purely civil matter"; indeed Hodgins, J.A., the only justice of appeal to touch on the point indicated a contrary view. I am unable to understand the statement in the last sentence quoted from Orde, J., that:

> . . . [an] inferior Court, though exercising jurisdiction over criminal matters, remains nevertheless a civil Court, . . .

If this statement were to be taken at its face value, then equally a county court judge, when trying criminal charges would remain a civil tribunal. But actually the Justices of Appeal and Viscount Cave in *Re Rex* v. *Daly et al., supra,* refer to the

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"County Court Judge's Criminal Court," and the Code itself uses that very term. Moreover the views expressed by Orde, J., seem to me to conflict with the English Court of Appeal's decisions I have cited and the House of Lords' views in *Clifford and O'Sullivan, supra.* I think, therefore, the above passage ought not to affect our decision in the instant case. Incidentally I note that our Crown Office Rules (Criminal) recognize that *mandamus* may be a criminal proceeding.

Although I have concluded that this appeal does not lie, I may well be mistaken in that view and shall therefore deal with the merits as if an appeal did lie. When we come to deal with the judgment appealed from I may say that I have been greatly assisted through reading the able and exhaustive article of Mr. *D. M. Gordon* entitled "The Observance of Law as a Condition of Jurisdiction," appearing in 47 L.Q.R. 386. In this article the learned commentator cites scores of cases, and it must be said that a perusal of these cases discloses a very wide cleavage in judicial opinion. I think, however, that the authorities which I am about to cite, and which are the decisions of able judges, have laid down what is really the law, and though Courts of authority "have chalk'd forth the way" it has not always been followed.

From the many cases which one may find as giving the guiding principle I cite the following:

In *Regina* v. *Bolton* (1841), 1 Q.B. 66, it was held that the test of jurisdiction is whether or not the inferior Court had power to enter upon the inquiry, not whether their conclusions in the course of it were true or false. *Per* Lord Denman, C.J., at p. 72:

> All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it.

The same principle is put in another way by Coleridge, J., in *Reg.* v. *Wilson* (1844), 6 Q.B. 620, at p. 629:

> If a Court has power to decide, and decides wrong, that is not an excess of jurisdiction.

So also in *The Queen* v. *Whitfield* (1885), 15 Q.B.D. 122, at p. 144, we find (*per* Sir J. Hannen):

> . . . the question of jurisdiction of justices depends not on the cor-

rectness of the order they may make, but on whether they had the right to enter upon the inquiry in the course of which they make the order sought to be impeached.

The decision in *Reg.* v. *Bradley* (1894), 70 L.T. 379 (a case of *certiorari*) is to the like effect and the matter I think is concluded by the decision of the Judicial Committee in *Rex* v. *Nat Bell Liquors, Ld.*, [1922] 2 A.C. 128 (also a case of *certiorari*). It would be difficult to find words on this point more precise than those of Lord Sumner at p. 154, where we find this:

> The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable at the commencement, not at the conclusion, of the inquiry.

I also find a very able presentation of the law by Riddell, J., in *Re McLeod* v. *Amiro* (1912), 27 O.L.R. 232 a *mandamus* case very much like the present.

There remains to consider the decision of the Court of Appeal for Manitoba in *Rex* v. *Pochrebny* (1930), 38 Man. L.R. 593, it being one of the objections of Crown counsel on this appeal that the learned judge below ignored that decision. Upon consideration I think that decision does not affect the instant case. There the county court judge declined to enter upon the hearing until the depositions taken before the magistrate were placed in his hands. The original judge and the Court of Appeal granted a *mandamus* to compel him to hear the case on the express ground that he "had declined jurisdiction." He had in fact actually indicated what he was going to do before the case came on at all.

I think it is clear that *mandamus* is a remedy to compel the exercise of jurisdiction by a tribunal that has refused to exercise it; and when we speak of an inferior Court having exceeded its jurisdiction we simply mean that there is a lack of jurisdiction *pro tanto*. When a Court has entered upon a case and has given a decision, however outrageous, it seems to me impossible to say it has refused jurisdiction. To take that course is simply to sit in appeal on a tribunal and to make *mandamus* another form of appeal. Although, as stated above, Courts have often taken that course, I think that on the weight of authority it cannot be justified. In order to justify awarding a *mandamus* to a county court judge who has given a judgment, however absurd, the Court must say that his judgment is no judgment, but a complete nullity. There is, however, very high authority to show that a

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judgment cannot be treated as a nullity merely because the tribunal below has held no proper hearing and has refused to hear or consider evidence. In my opinion the county court judge had jurisdiction to enter upon the hearing of this appeal; he did enter upon it; he was entirely wrong I think, in the course he took, for the plain intention of the Criminal Code is that he ought to have tried the case on the merits. Nevertheless, I have concluded that ROBERTSON, J., for the reasons given in his judgment and on the authorities above mentioned, was right in holding that he was powerless to compel the judge in those proceedings to do otherwise than he has done. I think it is clear from a perusal of the authorities that the same rule applies to *mandamus* in these cases as to prohibition and we have clear authority in the Supreme Court of Canada that where the inferior tribunal does not exceed its jurisdiction there is no power to prohibit. The matter is fully discussed in *Honan* v. *The Bar of Montreal* (1899), 30 S.C.R. 1. See particularly the remarks of Girouard, J. at p. 9:

> Even the rejection or refusal of legal evidence will not affect the jurisdiction of the tribunal.

In my view, with respect, the decisions cited by his Lordship amply bear out this conclusion.

It follows that I would dismiss the appeal.

Appeal dismissed, McDonald, J.A., dissenting on the preliminary objection.

Solicitor for appellant: *Eric Pepler.*
Solicitor for respondent McLean: *J. G. Gould.*

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Sept. 9, 24.

THE KING *EX REL.* YOUNG v. THE JUDGE OF THE COUNTY COURT OF WESTMINSTER, AND HEINRICH.

Criminal law—Appeal from dismissal on summary trial—Validity of notice of appeal—Mandamus refused—Granted on appeal—Crown Office Rule (Civil) 76—Can. Stats. 1929, Cap. 49, Sec. 4 (d).

On the information of an officer of the Royal Canadian Mounted Police the accused was charged with unlawful possession of a drug, and on being tried before two justices of the peace the charge was dismissed. The informant appealed to the County Court Judge's Criminal Court, and on the hearing counsel for accused raised the preliminary objection that

as the notice of appeal was served on the accused by the informant there was no jurisdiction to entertain the appeal. The objection was sustained and the appeal was dismissed. A motion to make absolute an order *nisi* for *mandamus* was dismissed on the same ground.

Held, on appeal, reversing the decision of MANSON, J., that service of the notice of appeal on accused by the informant in summary proceedings is not a ground for refusing to entertain the appeal, Crown Office Rule (Civil) 76 referred to.

In re Kennedy (1907), 3 E.L.R. 555; 17 Can. C.C. 342 and *Rex* v. *Kennedy*, [1933] 2 W.W.R. 213, not followed.

Rex ex rel. Bell v. *Cruit*, [1928] 2 W.W.R. 377, applied.

APPEAL by the Crown from the order of MANSON, J., dismissing the motion of the informant to make absolute the order *nisi* made by MORRISON, C.J.S.C., requiring the judge of the County Court of Westminster to enter continuances and hear the appeal of the informant from the dismissal by two justices of the peace of his information and complaint that one Peter Heinrich unlawfully had drugs in his possession, namely, portions of the opium poppy except seed, contrary to section 4 (*d*) of The Opium and Narcotic Drug Act, 1929. Heinrich was tried by two justices of the peace and the charge was dismissed. The informant C. J. Young appealed to the County Court of Westminster. Evidence was called by the appellant to prove that the provisions of section 750 of the Code had been complied with. The evidence disclosed, *inter alia*, that the notice of appeal had been personally served upon the respondent by the said C. J. Young, corporal of the Royal Canadian Mounted Police. Objection was taken that such service was invalid and that WHITESIDE, Co. J. had no right to hear the appeal. WHITESIDE, Co. J. upheld the objection and dismissed the appeal. The informant then instituted *mandamus* proceedings to compel the hearing of the appeal on the merits, obtained an order *nisi* and on its return moved that it be made absolute, which said motion was dismissed by MANSON, J. The informant appealed from said order.

The appeal was argued at Victoria on the 9th of September, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

D. J. McAlpine, for appellant: The only question is whether the service of a notice of appeal to the county court by the appellant complies with the provisions of section 750 (*b*). The

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section neither specifies nor restricts the person or persons by whom service may be effected. The learned judge followed *In re Kennedy* (1907), 17 Can. C.C. 342, and *Rex* v. *Kennedy*, [1933] 2 W.W.R. 213. Both these decisions are in direct conflict in principle with *Rex* v. *Trottier* (1913), 22 Can. C.C. 102. The facts in that case are similar to the case at Bar, as the respondent had in fact been served in time and was present and was represented by counsel in Court on the appeal. See also *Rex ex rel. Bell* v. *Cruit*, [1928] 2 W.W.R. 377. The *Trottier* case was followed in *Lamson* v. *District Court Judge* (1921), 36 Can. C.C. 326. It is submitted the *Kennedy* cases are no longer to be considered good law, and an informer is no longer disqualified from serving his own process and such service is not invalid. As to the duty of the Court of Criminal Appeal to review their own and other decisions when error has crept in see *Rex* v. *Yuen Yick Jun* (1937), 52 B.C. 158.

Sturdy, for respondent: Strict compliance with the Crown Office Rules (Civil) is required in order to make absolute the rule for *mandamus*. Even a defect in the style of cause is sufficient for refusing to make the order absolute for *mandamus*: see *The Queen* v. *The Justices of York* (1848), 6 N.B.R. 90; *Reg.* v. *Plymouth and Dartmoor Ry. Co.* (1889), 37 W.R. 334; *Curser* v. *Smith* (1728), 94 E.R. 41; *Rex* v. *Andover Rural District Council; Ex parte Thornhill* (1913), 77 J.P. 296; *Rex* v. *Master of the Crown Office* (1913), 29 T.L.R. 427; *Commissioners for Local Government Lands and Settlement* v. *Kaderbhai*, [1931] A.C. 652; *Reg.* v. *The Priors Ditton Inclosure Commissioners* (1840), 4 Jur. 193; *The Queen* v. *The Mayor of Peterborough* (1875), 44 L.J.Q.B. 85. *In re Kennedy* (1907), 17 Can. C.C. 342 was followed in the Court below, also *Rex* v. *Kennedy*, [1933] 2 W.W.R. 213. Criminal decisions in other Provinces should be followed: see *In re Harrison* (1918), 25 B.C. 545; *Rex* v. *Yohn* (1941), 56 B.C. 184, at 186. The cases of *Rex* v. *Kamak*, [1920] 2 W.W.R. 507; *Re Lawler and Edmonton* (1914), 7 W.W.R. 291; and *Rex* v. *Hong Lee* (1920), 28 B.C. 459, do not apply to service of notice of appeal. Defective service goes to the jurisdiction: see *Okrey* v. *Spangler*, [1925] 1 W.W.R. 518. A preliminary objection

should be raised at once: see *Pooley* v. *Driver* (1876), 5 Ch. D. 458.

McAlpine, replied.

Cur. adv. vult.

24th September, 1941.

MACDONALD, C.J.B.C.: An information and complaint was laid by C. J. Young of Abbotsford a member of the Royal Canadian Mounted Police, before a justice of the peace for the county of Westminster, charging the respondent Peter Heinrich with unlawful possession of a drug, to wit, portions of the opium poppy *(Papaver somniferum)* except seed, contrary to section 4 (*d*) of The Opium and Narcotic Drug Act, 1929, and amendments thereto. The magistrate dismissed the information and complaint whereupon the informant gave notice of intention to prosecute an appeal at the sittings of the County Court Judge's Criminal Court.

When the appeal was opened before WHITESIDE, Co. J. at Chilliwack, Mr. *Sturdy* for respondent objected that as the notice of appeal was served by the informant C. J. Young on respondent Heinrich the Court had no jurisdiction to entertain it. The learned county court judge agreed, whereupon an order *nisi* was obtained returnable before MANSON, J., directing the county court judge to proceed to hear and determine the appeal. MANSON, J. on the return of the motion agreed with WHITESIDE, Co. J. and dismissed the application: hence this appeal.

A decision of the Supreme Court of Prince Edward Island in *In re Kennedy* (1907), 17 Can. C.C. 342 was followed, where it was held that a summons served by a constable, himself the informant and prosecutor, was invalid and that this alleged defect in respect to the manner of service, deprived the magistrate of jurisdiction.

While procedure under relevant statutes providing that a summons should be served by a constable or other peace officer was referred to, the principle was laid down that by common law sheriffs and constables are not qualified to act in the execution of a process in which they have an interest: they cannot, it was held, perform official functions in a proceeding to which they are parties. Sullivan, C.J. who delivered the judgment of the Court, held that the prosecutor was not an indifferent party

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because, although not directly receiving any part of the fine, he would, if he succeeded, receive fees as a constable and as a witness; if, too, he was unsuccessful he would be liable to pay costs. Why these principles should be applied to the purely mechanical process—the performance of a physical act—I do not, with respect, understand. I would add that the learned county court judge and MANSON, J. were justified in following this decision; we have the right to review it.

In *Rex ex rel. Bell* v. *Cruit*, [1928] 2 W.W.R. 377, decided by the Saskatchewan Court of Appeal, the informant acted as prosecutor before a justice of the peace. He executed a search warrant at the home of the accused and arrested him. That, a more serious matter than effecting service, did not, it was held, affect jurisdiction.

There is no statuory provision anywhere preventing service of a summons by the informant. If it is not objectionable for a police officer to conduct a case as advocate and to execute warrants it should be less objectionable to perform the ministerial act of service. In outlying parts of the Province no one else may be readily available. If too it is urged that the informant might when performing this ministerial act, by discussion or otherwise, try to further his own interests he could also do so while having another serve the process. I cannot, with deference, conceive of any sound principle to support the decision referred to and therefore would allow the appeal. I would not give effect to the objection raised in respect to alleged non-compliance with Crown Office Rule 76: there was substantial compliance.

MCQUARRIE, J.A.: I agree with the Chief Justice that the appeal should be allowed.

SLOAN, J.A. agreed in allowing the appeal.

O'HALLORAN, J.A.: I would allow the appeal for the reasons given by my Lord the Chief Justice.

MCDONALD, J.A.: This being an appeal from the refusal of a *mandamus* in a criminal cause, I adhere to the opinion I expressed in *Rex* v. *Hanna* decided recently in this Court, to the effect that no such appeal lies. However, as my brothers MCQUARRIE and SLOAN took the contrary view I am obliged to

follow the majority judgment and deal with this appeal on its merits.

The appeal is from MANSON, J., who refused to award a *mandamus* commanding the county court judge to hear an appeal from two justices of the peace who had acquitted the respondent Heinrich on a charge laid under The Opium and Narcotic Drug Act, 1929. The decision of the county court judge was based on the preliminary point that the appeal had not been perfected by reason of an objection to the service of notice of appeal. The appellant before the county court judge was a constable who had laid the charge before the justices of the peace and he personally served the notice of appeal. It was successfully objected that this fact invalidated the service. In making this ruling the learned judge followed a decision of the Full Court of Prince Edward Island in *In re Kennedy* (1907), 3 E.L.R. 555; 17 Can. C.C. 342, which was followed and extended by Brown, C.J. in *Rex* v. *Kennedy,* [1933] 2 W.W.R. 213. MANSON, J., no doubt relied on the same authorities in refusing to make absolute an order for a *mandamus* to compel the county court judge to proceed with the hearing of the appeal.

With due respect, the decision of *In re Kennedy* seems to me wrong, in that it applies to a purely ministerial act principles rightly applicable only to those who act judicially or semi-judicially; and examination of the reasoning satisfies me that it was based on a misapprehension. The main basis is what purports to be a passage from 7 Bac. Abr. *tit.* "Sheriff" (M) 201 but proves to be a paraphrase rather than an accurate quotation though the variance is not material. The passage as it appears in Bacon, after stating that the sheriff ought to execute all process, excepts the case where he is "partial," stating that then the coroner should act

> . . . and in case all the coroners are partial or not indifferent, as every officer who hath any way to do with the administration of justice ought to be, then the *venire* shall be directed to two elisors named by the court, . . .

This passage occurs under the sub-heading "Of his Duty and Acts as a Ministerial Officer"; but it is fairly apparent that the heading is misleading; for one passage coming under it clearly refers to the sheriff as president of the county court (which he presided over till the nineteenth century) in which of course he

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would act judicially. Moreover the very passage of which part is quoted above refers to the execution of a *venire facias* or process for procuring jurors, and it is obvious that a sheriff in performing such function is not acting merely ministerially, since he has important discretions.

I think, then, that Bacon is no authority for the decision in *In re Kennedy*. That case also cites a passage from 25 A. & E. Encycl. of L., 2nd Ed., 670, to the effect that a constable cannot perform his official functions in a proceeding to which he is a party. The only authority cited is American, and so far as I can trace the decisions, I judge that they deal with the execution of a "process," that term being used to mean a document which does much more than summon a party or give him notice of a step being taken.

On principle, I can see nothing to justify the decision in *In re Kennedy*. The obvious reasons for requiring impartiality in a judicial officer have no relevancy to officers or others who act ministerially. The only way in which I can see that it matters if the person who serves documents is impartial is that his evidence of service, if disputed, may be less credible. But that is not a factor that can go to the legality of the act. It seems to me that if the supposed principle enunciated in *In re Kennedy* were carried to its logical conclusion, we should have to hold that a plaintiff's solicitor could never validly serve a writ of summons. Solicitors are officers of the Court, and the plaintiff's solicitor would not in the nature of things, be impartial; yet the validity of such a service cannot seriously be questioned.

Even if *In re Kennedy* were a sound decision, here it has been extended to lengths not warranted by the original ruling, though the case of *Rex* v. *Kennedy, supra,* is very similar to this. The summons in *In re Kennedy* was required by statute to be served by an officer; under the Code there is no such requirement for service of a notice of appeal; it could be served by anyone; the fact that the present appellant was a constable was an irrelevant coincidence; if he had been a private citizen, the passage from Bacon would have had no bearing, even if it meant what the Full Court thought it did. The appellant served the notice as appellant, not as constable; and if the present decision is to be justified, it must be taken to hold that no litigant can serve his own

papers. I do not understand that to be the law. It is certainly not true of civil proceedings, and the reasoning in *In re Kennedy* draws no distinction between civil and criminal causes.

The learned judges below have also extended the principle of *In re Kennedy* in another direction. In that case the defendant, who claimed never to have been legally served, was careful not to appear before the magistrate who summoned him, and it is interesting to note that the Court, which held the service invalid, conceded that if he had appeared before the magistrate, the supposed objection would have been cured. In the present case the respondent did appear in response to the notice of appeal that he attacked, and yet he invoked the reasoning of *In re Kennedy,* reasoning which his appearing turned against him. I cannot see how this inconsistency can be justified.

The reasoning of the Saskatchewan Court of Appeal in *Rex ex rel. Bell* v. *Cruit,* [1928] 2 W.W.R. 377 seems to support my views. There the Court held that a conviction could not be impeached because the informant, a constable, had executed a search warrant in person and had arrested the defendant. Unfortunately the judgments in that case made no mention of *In re Kennedy, supra.* If they had, possibly the present case might have been decided otherwise below.

However, a ruling that the notice of appeal was duly served does not dispose of this case; there are other serious questions: first, the question whether *mandamus* is a proper remedy for requiring the county court judge to retrace his steps, and second, the question whether the appellant had the proper material on which to obtain the remedy.

In the case of *Rex* v. *Hanna, supra,* we affirmed the old principle that *mandamus* is not a substitute for appeal, and must not be used to review a judicial decision being a remedy for compelling a tribunal to proceed, which has jurisdiction but refuses to exercise it. In the *Hanna* case there could be no question of refusal of jurisdiction; the county court judge undertook to try the appeal and he actually reversed the magistrate's decision, though in so doing he went completely astray in his methods. In the present case the county court judge held that the appeal was never before him, on grounds which I consider to be wrong; it was argued before him that the faulty service of notice of appeal

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prevented his jurisdiction accruing, and he accepted this argument, albeit reluctantly. His dismissal of the appeal was merely a formal way of refusing to interfere. There is abundant authority for saying that when a tribunal thus refuses to act because of a preliminary objection that is unfounded, it has declined jurisdiction, and *mandamus* will lie, at least where the refusal is based on mistake of law and the facts are not in dispute: see *Reg.* v. *Judge of Southampton County Court and Fisher and Son Lim.* (1891), 65 L.T. 320; *Rex* v. *Kamak,* [1920] 2 W.W.R. 507.

However, even assuming that *mandamus* lies, and that good grounds for it have been shown, I find myself still faced by the formidable objection raised by the respondent upon rule 76 of the Crown Office Rules (Civil), which also governs in criminal proceedings, by virtue of rule 1 of the Crown Office Rules (Criminal) "so far as applicable." This rule 76 reads:

> No order for the issuing of any writ of *mandamus* shall be granted unless at the time of moving an affidavit be produced by which some person shall depose upon oath that such motion is made at his instance as prosecutor.

The affidavit used on the motion for the writ in this case did not comply with this rule. Several decisions have been cited to show that Crown Office practice is very strict in matters of procedure. There are certainly statements to this effect, though no very satisfactory reasons for them have ever been given. Many of the decisions are old, rendered at a time when technicalities were rampant, and, in general, in cases where the applicant was himself attacking some proceeding on technical grounds. The applicant here was not raising any technical questions: he was trying to get his appeal heard on the merits; still if I were satisfied that this rule applies to him, I might find the decisions embarrassing.

However, I have come to the conclusion that the appellant escapes the force of this rule. It is a general principle of Crown Office practice, modified in England by more recent Crown Office Rules than ours (*Rex* v. *Amendt, infra*) though in general left untouched by our own, that restrictions and limitations do not touch the Crown unless named expressly and that a prosecutor shares the special exemption of the Crown, even in a private prosecution. This exemption applies even to a restrictive statute

and *a fortiori* to a restrictive regulation: see *Rex* v. *Amendt*, [1915] 2 K.B. 276. The most striking case on this point is *Rex* v. *Boultbee* (1836), 4 A. & E. 498, though there are a number of others to similar effect. The actual decision was that a statute taking away *certiorari* does not affect a prosecutor, because he has the benefit of the Crown's privileges and exemptions. The decision holds that this is none the less so where the prosecutor has become nominal defendant (under the peculiar Crown Office practice) by having an order for costs made against him on appeal to sessions from a conviction. All the members of the Queen's Bench declared that no distinction could be drawn between a private prosecution and one set in motion by Crown officials. Rule 76 then need not be considered as a binding rule. But we have to consider whether as a matter of good practice, we should still require the affidavit to state that the affiant prosecutes the *mandamus* proceedings, since it appears that the rule merely carries on the previous common-law practice: *The Queen* v. *The Mayor of Peterborough* (1875), 23 W.R. 343. However, in dealing with common-law practice, we can consider whether it serves any useful purpose in the particular case. The decision just cited and *Rex* v. *Andover Rural District Council; Ex parte Thornhill* (1913), 77 J.P. 296 (*per* Avory, J.) state that the purpose of this requirement is to fix on some one who can be mulcted in costs, if costs are granted. In the present case there could never be the slightest doubt as to who was moving; the notice of motion and the rule *nisi* made that perfectly clear, and compliance with the rule or the common-law practice would not have added any more certainty. Indeed, the rule itself, under modern practice, seems to be an anachronism, a survival from the early times when an *ex parte* motion was made without any written notice of motion at all. Even granting that the express rule must be observed by those to whom it applies, whatever its pointlessness, I hold for the reasons given that it does not apply here and that the analogous common-law procedure did not require observance under the circumstances.

I think it is worthy of note that here in the sworn information the informant appellant is described as

> . . . a member of the Royal Canadian Mounted Police acting for and on behalf of His Majesty the King, duly authorized for the purpose. . . .

and the first two statements are repeated in his affidavit. The

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order *nisi* and the order of MANSON, J. describe him as "informant acting for and on behalf of His Majesty the King." Moreover, the charge laid is unlawful possession of opium poppies, a charge which obviously has nothing to do with the informant's personal interests, but in which, in the words of Foster, J., in *Rex v. Burgess* (1754), 1 Ken. 135, at 137-8 "the King's right appears to be concerned." In these circumstances I do not think this would be described as a private prosecution, even if a distinction should be drawn between such a prosecution and others, which *Rex* v. *Boultbee, supra,* negatives.

Ordinarily, I should say, subsequent proceedings would be taken in the name of the Crown, not in the name of the informant. There is an exception, it seems, in the case of an appeal to the county court, but that is by virtue of the special provisions governing this particular type of appeal. When the application for *mandamus* was made in the Supreme Court, I should say that this could have been made in the name of the King, treating him as the litigant without reference to the informant. Actually it was made in the name of the informant; but as the orders show that he was treated as applying on the King's behalf, I think that the form of the motion is immaterial. If this is treated as a motion by the Crown, it seems obvious that rule 76 could have no application, since the King could not be required to comply with it.

For these reasons I think that none of the objections raised to the grant of *mandamus* is valid and that the writ should go, as a majority of the Court think that this appeal lies. I note that in *Rex* v. *Kamak,* [1920] 2 W.W.R. 507, the Alberta Court of Appeal allowed an appeal in a case like this; but it seems obvious from the report that no objection to the competency of the appeal was ever raised.

As a matter of good practice, though the point is purely formal, I point out that the order appealed from is not expressed in the traditional way. The established practice from an early time has been that an order refusing to make absolute an order *nisi* is worded, not that the motion is dismissed, but that "the order *nisi* be discharged": see Tidd's Forms, 1828, p. 177.

The Crown Costs Act does not apply to the Dominion, and as the respondent asked for costs below, I think he should pay the costs of this appeal and of the motion before MANSON, J.

Appeal allowed.

IN RE MUNICIPAL ACT AND GEORGE FREDERICK STRONG.

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Municipal law — Highway — Dedicated as such but not opened — Property owner—Access to his property—Application for consent of council to open highway at his own expense—Refused—Appeal to Supreme Court—R.S.B.C. 1936, Cap. 199, Sec. 323 (3).

S., owning a property within the district of West Vancouver, and desiring to obtain access thereto by opening a roadway at his own expense for a distance of 300 feet on 15th Street, applied to the council of the corporation for its consent. This was refused, and he appealed to the Supreme Court under section 323 (3) of the Municipal Act, upon the ground that such consent had been unreasonably withheld.

Held, that in view of its language and in particular of its opening words, the section was intended to apply only to such persons who under some other statute already had (or might thereafter acquire) rights of one kind or another on or over streets within a municipality. A property owner merely as such has not, and never has had, any right to construct works of any description upon streets of a municipality. This section does not apply to the case of the appellant and he has no right of appeal under it.

APPEAL to the Supreme Court under section 323 (3) of the Municipal Act from the refusal of the council of the corporation of the district of West Vancouver to consent to the appellant opening a roadway at his own expense in order to obtain access to a certain property owned by him within the municipality. Heard by SIDNEY SMITH, J. in Chambers at Vancouver on the 5th, 6th and 8th of December, 1941.

Cowan, for appellant.
Hossie, K.C., and *Robson,* for district of West Vancouver.

Cur. adv. vult.

10th December, 1941.

SIDNEY SMITH, J.: The appellant purchased property within the district of West Vancouver. He desires to obtain access thereto by opening a roadway, at his own expense, for a distance of some 300 feet southerly along 15th Street. This street has been dedicated as such but, in its relevant portion, has not yet been opened. The appellant applied to the council of the corpora-

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tion of the said district for its consent. This was refused. He now brings this appeal under section 323 (3) of the Municipal Act upon the ground that such consent has been unreasonably withheld.

Under section 322 of the said Act the possession of every public road, etc., in a municipality shall be vested in the municipality.

Section 323 is as follows:

323. (1.) Notwithstanding the provisions of any public or private Act, no person shall, except as provided in subsection (2), undertake any construction or work on or over any public road, street, bridge, or other highway in any municipality except with the written consent of the Council of such municipality.

(2.) The provisions of subsection (1) shall not apply to any person in respect of the repair and maintenance of such works lawfully constructed or operated by such person in or upon any public road, street, bridge, or other highway in a municipality.

(3.) If any person making application for the consent of the Council of a municipality for the carrying-out of any work, undertaking, or construction, as provided in subsection (1), is of the opinion that such consent has been unreasonably withheld, he may appeal to a Judge of the Supreme Court, or a County Court Judge, who may, in his discretion, issue an order directing that the applicant be permitted to carry out the work, undertaking, or construction under such conditions as may be prescribed in such order.

The preliminary objection is taken that this section does not apply to the case of the appellant and that therefore he can have no right of appeal under it.

The section made its first appearance in the statutes of 1926-27. Apart from this it has no background, and there appears to be no authority upon it. In view of its language and in particular of its opening words I think that it was intended to apply only to such persons who under some other statute already had (or might thereafter acquire) rights of one kind or another on or over streets within a municipality.

A property-owner merely as such has not, and never has had, any right to construct works of any description upon the streets of a municipality. But at the time of the passing of the section in question there were (and still are) a number of companies who by various Provincial statutes, public or private, had obtained authority to do various kinds of construction work upon such streets. It was submitted that the purpose of the section was to control such companies in the exercise of their

statutory rights by requiring them, before proceeding with any works, to obtain written consent of the municipality.

I do not doubt that this was the intention of the Legislature, and I think it was carried out in the language of the section. The preliminary objection must therefore be sustained.

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IN RE MUNICIPAL ACT AND STRONG

Preliminary objection sustained.

REX *EX REL.* PALLEN v. LEWIS.

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Sept. 9, 24.

Criminal law — Unlawfully practising dentistry — Conviction — Notice of appeal—Proof of filing.

Refd to: R. ex rel. Armstrong v. Wheeler 83. C.C.C. 105

Folld Nat. Health Ass. v. Blank. [1946] 4 DLR. 221

The accused was acquitted by a police magistrate on a charge of unlawfully practising dentistry. On appeal to the county court judge who had before him as part of the record in the case, the original notice of appeal bearing the registrar's stamp which showed that the notice had been filed in time, it was objected that no formal proof had been given that the notice of appeal had been filed in time. It was held that the notice being in Court speaks for itself and was sufficient proof of the filing. The appeal was allowed and accused convicted.

Held, on appeal, affirming the decision of ELLIS, Co. J., that the Court has at all times power to look at its own records and to take notice of their contents without further formal proof of the filing.

APPEAL by accused from his conviction by ELLIS, Co. J. on the 13th of May, 1941, for unlawfully practising dentistry in British Columbia.

The appeal was argued at Victoria on the 9th of September, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

D. J. McAlpine, for appellant: There was no notice of intention to appeal at all. On the hearing before the county court judge objection was taken *in limine.* The rules must be strictly complied with as to his intention to appeal. This is a condition precedent to the hearing of the appeal. Section 78 (*b*) of the Summary Convictions Act must be complied with. The filing must be within ten days: see *The King* v. *The Justices of*

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Oxfordshire (1813), 1 M. & S. 446; *Craven* v. *Smith* (1869), 38 L.J. Ex. 90.

Maitland, K.C., for respondent: The section calls for service of intention to appeal. The notice must be filed within ten days of this intention, and it is on the record that this was done. The learned judge accepted the record as proof of filing. This is a question of fact and does not come up here.

McAlpine, replied.

Cur. adv. vult.

24th September, 1941.

MACDONALD, C.J.B.C.: We would dismiss this appeal. The only point calling for consideration was whether or not filing of notice of intention to appeal was established. We procured the notice itself from the registrar and found it stamped with the date of filing well within the time limit. The judge may take notice of proof afforded by the records of the Court.

MCQUARRIE and SLOAN, JJ.A. concurred in dismissing the appeal.

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

MCDONALD, J.A.: The appellant on the 3rd of April, 1941, was acquitted by magistrate McQueen of a charge of unlawfully practising dentistry. The Crown appealed to the county court judge who allowed the appeal and found the accused guilty. The appellant seeks before us a reversal of that decision. The simple point involved is whether or not proper legal proof was given before the county court judge that the notice of appeal had been filed in time. It is objected that the registrar was not called to prove the filing and the date thereof. The answer is that the county court judge actually had before him, as part of the record in the case, the original notice of appeal bearing the registrar's stamp which showed that the document had been filed on April 10th, 1941.

When the objection was taken before ELLIS, Co. J. that no formal proof had been given, the learned judge said "It is in the

Court and it speaks for itself," to which counsel replied "You simply have before you the document." I think it is clear on authority that there was sufficient proof of the filing. In *The Queen* v. *Jones* (1839), 8 D.P.C. 80, at 81, Coleridge, J., said:

> I must take notice of proceedings that are on the files of the Court.

In *Craven* v. *Smith* (1869), L.R. 4 Ex. 146, it was distinctly held that:

> The Court has at all times power to look at its own records, and to take notice of their contents, although they may not be formally brought before the Court by affidavit.

In my opinion these decisions conclude the matter and the appeal should be dismissed.

Appeal dismissed.

REX v. KEIWITZ.

Criminal law—Evidence—Charge of receiving stolen goods—Admissibility of evidence of receiving other property—Evidence that the property was stolen—Instructions to jury—Criminal Code, Secs. 399 and 993.

The accused was charged with receiving an oilskin slicker, knowing it to have been stolen. Evidence was admitted under protest regarding three other coats found in accused's second-hand store at the same time, and accused was convicted.

Held, on appeal, reversing the decision of MANSON, J., that evidence that accused had received other property from the same person is only admissible if it is proved that such other property was also stolen, and there being no such evidence its admission was fatal to the conviction.

On objection that there was no proof of the coat in question having been stolen, an attempt was made to prove this by calling a police officer who gave evidence that the man who sold accused the slicker had pleaded guilty to stealing it when the accused was present in Court, and it was held that such evidence was not admissible merely because accused was present at the trial and had no opportunity to contradict the statement.

In instructing the jury on a charge of receiving, the judge should leave the question "Did the accused receive the goods in such circumstances that he must then have known them to have been stolen?" If the accused offers an explanation of his possession of the goods the jury should be instructed to acquit the accused if they are satisfied that his explanation is consistent with his innocence.

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APPEAL from the conviction by MANSON, J. and the verdict of a jury at the Spring Assize at New Westminster on the 19th of May, 1941, on a charge of unlawfully receiving one oilskin slicker belonging to T. Takeda, and therefore stolen, then well knowing the same to have been stolen. Mrs. Takeda had a second-hand clothing store and the slicker in question was hanging up outside the store. When she went out to take it in in the evening she found it was gone. On the 2nd of December, 1940, the slicker was purchased by the accused from a man named Fischer who subsequently pleaded guilty to a charge of having stolen the slicker. The defence was that accused did not know the slicker was stolen. On the 3rd of December, when a detective called at his store, accused made a report to him as to his purchases on the previous day, which included the slicker in question.

The appeal was argued at Victoria on the 22nd of September, 1941, before MACDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

McGivern, for appellant: The slicker in question was worth $3.50. There was improperly admitted evidence as to three other slickers which the detective took, and the learned judge failed to warn the jury that only one slicker was being dealt with in the case. The learned judge erred in allowing in evidence of conversations between detective Allen and the accused. He was not warned, and what he said was not voluntary. Evidence of Fischer pleading guilty was improperly allowed to go before the jury. Throughout the trial there was intimation that four coats were stolen: see Archbold's Criminal Pleading, Evidence & Practice, 28th Ed., 753; *Rex* v. *Girod* (1906), 22 T.L.R. 720; *Rex* v. *Horsenail* (1919), 14 Cr. App. R. 57. Admitting evidence of Fischer through the mouth of Allen is not evidence against accused. It should have been taken from the jury: see *Reg.* v. *Kelly* (1900), 64 J.P. 84. As to the conversation between Allen and accused see *Sankey* v. *Regem,* [1927] 4 D.L.R. 245; *Rex* v. *Kooten,* [1926] 4 D.L.R. 771; *Rex* v. *Nowell* (1938), 54 B.C. 165. There is no evidence that the slicker was stolen: see *Rex* v. *Reynolds* (1927), 20 Cr. App. R. 125.

Jackson, K.C., for the Crown: You must prove that the goods were stolen, but that can be proven by surrounding circumstances: see *Rex* v. *Cook* (1906), 11 Can. C.C. 32; *Rex* v. *Pomeroy* (1936), 51 B.C. 161; *Rex* v. *Fitzpatrick* (1923), 32 B.C. 289; *Rex* v. *Kolberg* (1935), 51 B.C. 535; *Rex* v. *Davis* (1940), 55 B.C. 552; *Rex* v. *Sbarra* (1918), 13 Cr. App. R. 118; *Rex* v. *Fuschillo*, [1940] 2 All E.R. 489.

McGivern, in reply, referred to *Rex* v. *Girod* (1906), 22 T.L.R. 720.

Cur. adv. vult.

On the 4th of November, 1941, the judgment of the Court was delivered by

MCDONALD, J.A.: The appellant was convicted before MANSON, J. and a jury and sentenced to three years' imprisonment for that

> on the 4th day of December, 1940, he unlawfully did receive one oilskin slicker belonging to T. Takeda, and theretofore stolen, then well knowing the same to have been stolen.

On his appeal several substantial points of objection are raised, and while I am convinced that the conviction cannot stand, I must discuss these several points with a view to deciding what order we ought to make. We cannot in this case, I think, safely rely on the very useful rule laid down by Lord Mansfield in *Rex* v. *Jarvis* (1757), 1 Burr. 148, at p. 152:

> It [is] needless to enter into many reasons for quashing this conviction, when one alone is fully sufficient.

The force of the first objection raised seems so obvious that it is difficult to understand how the error crept in. As stated, the charge was receiving one slicker. However, evidence was admitted, over the protest of counsel for the accused, regarding three other coats found in the appellant's second-hand store at about the same time. Presumably this evidence was admitted under section 993 of the Criminal Code, for it is plain from the record that this section was in the minds of Crown counsel and of the learned judge. The fact that three days' notice had not been given was brushed aside by Crown counsel's statement that the same evidence had been admitted at the preliminary hearing. Although I do not give it as a ground of my decision, I think this

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is clearly no answer to the requirements of the statute. The section was passed not to assist, but as against the accused, and must surely be complied with before the evidence is admitted. In any event, what is perfectly clear is, that when evidence is to be given as to other stolen goods, found in the possession of the accused person, it must be proven that the goods so found had been, in fact, stolen. There is not a tittle of evidence to prove any such thing. What the Crown appears to have gone on, is that these three coats were purchased from the same man, Fischer, from whom was purchased the coat in respect of which the charge was laid. Notwithstanding such lack of evidence several references were made to "the stuff," "them," and the learned judge made the following statement in his charge to the jury:

> . . . it is admitted that this Exhibit I was one of the slickers that was bought from Fischer. Out of the mouth of Allen, I think—police officer—it was proved that Fischer was arrested and pleaded guilty to stealing these coats which he sold to the accused.

There was no such evidence. If authority be required for holding that the admission of this evidence is fatal to the conviction, authority is not wanting. The governing rule with regard to the admission of inadmissible evidence, in a criminal case, is contained in *Allen* v. *Regem* (1911), 44 S.C.R. 331, at p. 341; 18 Can. C.C. 1, at p. 11:

> . . . the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong.

That the evidence was clearly inadmissible is laid down in so many words by the Court of Criminal Appeal in *Rex* v. *Girod* (1906), 22 T.L.R. 720, where this very point was decided. That case was followed in *Rex* v. *Ballard* (1916), 12 Cr. App. R. 1. It may not be out of place to point out that even when such evidence is properly admitted, and the other goods found are proven to have been stolen, it is essential that the judge should warn the jury (as in this case, for instance) that they are not trying a charge in respect of the other three coats: *Rex* v. *Horsenail* (1919), 14 Cr. App. R. 57.

A further objection is that it was not proven by legal evidence

that the coat in question, itself, had been stolen. An attempt was made to prove this by calling a police officer who gave evidence that Fischer had pleaded guilty to stealing the coat in question, and that during the hearing of Fischer's case in the police court the appellant was present. I assume the idea was that such a statement, being made in the presence of the appellant, and not being then and there denied by him, may be taken as evidence binding him. It is rather difficult to see just what the appellant could have done under the circumstances. He was, one supposes, a spectator at Fischer's trial, and I can scarcely imagine a spectator in the police court, rising in the midst of a trial, to protest against a statement being made by an accused person or by anyone else. It is a well-known rule of evidence that no one shall be taken, from his silence, to admit the truth of a statement made in his presence unless it is made on an occasion when a reply from him might be properly expected. The evidence of Mrs. Takeda and her daughter as to the identity of the coat produced was too uncertain to hang a verdict on. In my opinion, therefore, the theft of the coat in question was never legally proven, and this again is fatal to the conviction.

It is also necessary to point out that in a charge, which does not err on the side of brevity, in that it contains an elaborate disquisition on the rules relating to *onus,* reasonable doubt, circumstantial evidence and so on, we find no word to meet the requirements so often laid down in cases of receiving stolen goods, knowing them to have been stolen. These cases were referred to in a recent judgment of this Court: *Rex* v. *Davis* (1940), 55 B.C. 552; and the rule is perhaps most concisely stated by Avory, J. in *Rex* v. *Ketteringham* (1926), 19 Cr. App. R. 159, at p. 160:

> The question which should have been left to the jury was simply: "Did the appellant receive the goods in such circumstances that he must then have known them to have been stolen?" The question, however, which was left was whether the jury thought that the account given by the appellant's son in evidence of the manner in which he became possessed of the goods could be accepted. The jury should have been told not only that they could acquit, but that they ought to acquit, the appellant if they were satisfied that his explanation was consistent with his innocence.

This rule was adopted and explained by the Supreme Court of Canada in *Richler* v. *Regem,* [1939] S.C.R. 101.

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It is evident, from what I have said, that, notwithstanding some of the objections mentioned, we might have ordered a new trial, had there been any legal evidence before the jury to support the verdict. In the absence of such evidence, I think we have no choice but to quash the conviction.

Conviction quashed.

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REX v. REEVES.

Criminal law—Rape—Consent—Charge to jury—Corroboration—Non-direction and misdirection—New trial.

On a charge of rape it is the duty of the trial judge to warn the jury of the danger of conviction upon the uncorroborated testimony of the prosecutrix, and this rule applies equally whether or not there is evidence corroborative of her testimony.

A charge is wrong in law in directing the jury that corroboration may be found in her complaint and other facts tending only to support the credibility of the prosecutrix. Evidence of a complaint by a prosecutrix is not corroboration of her evidence against the prisoner. It entirely lacks the essential quality of coming from an independent quarter.

There is error in telling the jury to "look for corroboration" without instructing them in what sense that word is used in cases of this nature. The jury should be told that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirmed in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

APPEAL from the conviction by MORRISON, C.J.S.C. and the verdict of a jury at the Fall Assize at Vancouver on the 15th of September, 1941, on a charge of rape.

The appeal was argued at Vancouver on the 17th and 21st of November, 1941, before MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.

The accused, in person.
Swencisky, for the Crown.

Cur. adv. vult.

27th November, 1941.

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McQUARRIE, J.A.: I agree that the appeal should be allowed and a new trial ordered.

SLOAN, J.A.: The appellant herein was convicted of rape at the Vancouver Assize in September last, after a trial before MORRISON, C.J.S.C. and jury and sentenced to two years' imprisonment. From that conviction he appealed, alleging, *inter alia,* that "on the law, as interpreted by the trial judge, the jury could not properly convict." He was not represented by counsel on the appeal but, bearing in mind the observations of MARTIN, J.A. (later C.J.B.C.) in *Rex* v. *De Bortoli* (1927), 38 B.C. 388, at 392, wherein he said in relation to undefended prisoners:

> . . . the theory of our jurisprudence is that the "Bench" in effect acts as counsel for him, and is vigilant to see that nothing is done that would prejudice him.

(and see *Rex* v. *Munroe* (1939), 54 B.C. 481, at pp. 483, 484 and 490), I carefully scrutinized the whole of the learned trial judge's charge to the jury with the result that in my view, with respect, the conviction must be quashed and a new trial ordered. My principal reason for reaching this conclusion is that the learned trial judge failed to give an adequate direction upon the law relating to corroboration. It is settled that, in cases of this nature, it is the duty of the learned trial judge to warn the jury of the danger of convicting upon the uncorroborated testimony of the prosecutrix. *Rex* v. *Ellerton* (1927), 49 Can. C.C. 94; *Rex* v. *Auger* (1929), 52 Can. C.C. 2; *Rex* v. *Mudge* (1929), *ib.* 402; *Rex* v. *Galsky* (1930), 53 Can. C.C. 219 and *Rex* v. *Winfield* (1939), 27 Cr. App. R. 139. That rule applies equally whether or not there is evidence, corroborative of her testimony—*Rex* v. *Nowell* (1938), 54 B.C. 165. This last-mentioned case also restates the requirements of the proper instruction to be given to a jury when it is necessary to direct them on the law in cases wherein testimony of an accomplice is in question and applies, of course, with equal force to cases of sexual offences.

The only reference to corroboration in the charge of the learned trial judge herein appears in the following excerpt therefrom:

> Look for corroboration; corroboration in the sense that it is used in this

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case simply means strengthening the evidence as to credibility, the extent to which you can believe what a witness says. Is there any evidence before you here which would strengthen her own evidence as to whether she is telling the truth or not, and that corroboration must be independent material evidence which, as I say, tends to strengthen the rest of it. One of the things you look for in this case is, did she complain, and if so, how soon after the act complained of. You heard the evidence that she stopped those people. It depends on the surrounding circumstances how long a period should elapse, before that evidence is shut out. With a person of mature age, and where these allegations are put forth about being assaulted, the first question is, "When did you complain?" Usually it is when they go home; however that may be, the first person they meet to whom you think they should confide, the mother, friends or someone in the street. Sometimes two or three days may elapse, under different circumstances. That would not be so in this case. Then again sometimes a Court considers leniently where a girl says she was afraid to tell. If she delayed two or three days, it is excused. Gentlemen, all that is corroboration of her conduct, and it is for you to say whether, having regard to her mentality, as sworn to, she acted as a person who thought they were imposed upon would act, always remembering how you saw her in the box there. . . . .

In my view, with deference, the charge on this aspect of it is erroneous in law in that there was non-direction amounting to misdirection because of the failure of the learned trial judge to warn the jury of the danger of convicting on the uncorroborated testimony of the prosecutrix.

With deference, the said charge is also wrong in law in directing the jury, in effect, that corroboration may be found in her complaint and other facts tending only to support the credibility of the prosecutrix. *Rex* v. *Ellerton, supra.* The learned trial judge ought to have instructed the jury that such complaint and the particulars of it should not be regarded as corroboration in the relevant sense of the word but could be considered only

for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her:

Hawkins, J. in *Rex* v. *Lillyman,* [1896] 2 Q.B. 167, at 177 and see *Rex* v. *Hill* (1928), 49 Can. C.C. 161. I would also refer to *Rex* v. *Evans* (1924), 18 Cr. App. R. 123, at 124, wherein Lord Hewart, L.C.J. shortly stated the law as follows:

It has been pointed out again and again in these cases that evidence of a complaint by the prosecutrix is not corroboration of her evidence against the

prisoner. It entirely lacks the essential quality of coming from an independent quarter.

The learned judge also erred, with respect, in telling the jury to "look for corroboration" without instructing them in what sense that word is used in cases of this nature. In my view, under the circumstances of this case, he ought to have told the jury, as pointed out by Lord Reading, C.J., in *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81, at p. 91 that

> . . . evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

There is another feature of the charge upon which I would, with respect, comment. It is contained in the following excerpt:

> Rape is the act of a man having carnal knowledge of a woman who is not his wife, without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.
>
> Then there is a section of carnally knowing idiots and imbeciles, insane people, the deaf and dumb or feeble-minded people. It is for you to say whether the victim in this case or this girl is or is not feeble-minded.

I presume the learned trial judge had in mind section 219 of the Code when making his reference to carnal knowledge of idiots and such like. I find some difficulty in understanding why the jury was asked to say "whether the victim in this case or the girl is or is not feeble-minded." True there was evidence that the prosecutrix is a "high grade mental defective" but the accused was not charged under said section 219 and, in my opinion, the offence of carnally knowing a feeble-minded person, contrary to section 219, is not a lesser or cognate offence included within the charge of rape. The essential ingredients of the two offences are dissimilar. See, *e.g.*, *Rex* v. *Walebek* (1913), 21 Can. C.C. 130. The point is, however, that the jury might very well have reached the erroneous conclusion from this branch of the charge that carnally knowing a feeble-minded girl was, by itself, rape.

In the result I think there has occurred a substantial wrong or miscarriage of justice within section 1014, subsection 2 of the Code. I cannot say that the jury, if properly instructed, must inevitably have returned the same verdict. My view on this

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finds strong support in some of the remarks of the learned trial judge when sentencing the accused. He said:

> Now I cannot overlook the evidence. There is no doubt, and that is what I referred to this morning, that there is an unnecessary incurring of expenditure of public money in these cases. This man should never have been on the evidence adduced or elicited in the police court or before the Attorney-General's Department, indicted for rape, and that is the unfortunate thing. It must have affected the jury. On the evidence, if it were permissible to be tried before me alone, I would not have found him guilty of rape, which is a most serious offence and would not be overlooked lightly if he had committed the offence. . . . What I want to emphasize is I am not dealing with the crime of rape at all. He just took advantage of the opportunity which offered itself. . . .

It follows I would allow the appeal, quash the conviction and order a new trial.

O'HALLORAN, J.A.: I would quash the conviction and direct a new trial for the reasons given by my learned brother SLOAN.

Appeal allowed; new trial ordered.

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KENNEDY v. MACKENZIE.

Practice—Mortgage—Default—Motion for extension of time for redemption—Heard by local judge of the Supreme Court in Chambers—Order XXXII., r. 6; Order LXXB—R.S.B.C. 1936, Cap. 56, Sec. 18.

The defendant loaned the plaintiff $7,500 secured by a first mortgage on the plaintiff's lands near Vernon, B.C. He had stipulated as a condition that the plaintiff should deposit an executed conveyance in escrow, to be delivered to him if the mortgage money was not repaid within one year. The plaintiff defaulted in payment and commenced an action in the Supreme Court for a declaration that the conveyance was void as against his equity of redemption, and also for a declaration that he was entitled to redeem the lands. In his statement of defence the defendant admitted the essential facts in the statement of claim and stated his willingness to permit the plaintiff to redeem. On motion for judgment before SWANSON, Co. J. sitting in Court as a local judge of the Supreme Court, under Order XXXII., r. 6, upon the admissions of fact, it was ordered that the conveyance aforesaid be declared void and that if the plaintiff did not pay into Court within nine months from the date of the registrar's certificate the amount found due, the respondent should stand absolutely debarred and foreclosed from all interest in the lands.

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Ref. d to
Prudential Ins Co of America
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9 DLR (3d) 219
(Alta SC)

Shortly before the expiration of the redemption period the plaintiff took out a notice that "the Court will be moved before His Honour Judge W. C. KELLEY as local judge thereof, . . . , by counsel on behalf of the plaintiff for an order extending the period fixed for redemption . . . by His Honour Judge JOHN D. SWANSON on the 9th day of January, 1941." The motion was heard by the local judge in Chambers on October 24th, 1941. Although the motion was a Court motion, he elected to treat it as a Chamber matter or refer it to himself in Chambers. The learned judge extended the period of redemption for one year, and the formal order then made and subsequently entered was entitled "In Chambers."

Held, on appeal, reversing the decision of KELLEY, Co. J.. that as jurisdiction is lacking the impugned order should be quashed and the appeal allowed.

APPEAL by defendant from the order of KELLEY, Co. J. of the 24th of October, 1941, sitting as a local judge of the Supreme Court whereby he ordered that the period of redemption fixed for redemption under a decree for redemption in this action, bearing date January 9th, 1941, be extended for a period of one year from October 24th, 1941.

The appeal was argued at Vancouver on the 5th of December, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

McAlpine, K.C., for appellant: The learned county court judge, sitting as a local judge of the Supreme Court, has no jurisdiction in Court: see *In re Hicks; Ex parte North-Eastern Rail Co.* (1894), 63 L.J. Ch. 568; *Re Evan Evans* (1886), 54 L.T. 527. This was a notice of motion but the learned judge can only sit in Chambers as a local judge of the Supreme Court. He cannot deal with the motion. He attempted to change the motion into a Chamber application. An application for extension of time is by notice of motion. If he had jurisdiction he wrongfully exercised his discretion. It should be on terms, namely, that arrears of interest and taxes be paid: see *Brewin* v. *Austin* (1838), 2 Keen 211; *Eyre* v. *Hanson* (1840), 2 Beav. 478; *Geldrd* v. *Hornby* (1841), 1 Hare 251; *Holford* v. *Yate* (1855), 1 K. & J. 677; *Everson* v. *Hodgson*, [1921] 1 W.W.R. 825; Halsbury's Laws of England, 2nd Ed., Vol. 23, p. 485, sec. 715.

J. A. McLennan, for respondent: This is an action in the Supreme Court. The plaintiff moves for judgment on admissions of fact under Order XXXII., r. 6. The learned judge as

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a local judge of the Supreme Court has jurisdiction to hear the motion. Jurisdiction is conferred on the local judge by section 18 of the Supreme Court Act as set out in Order LXXB of the Supreme Court Rules. There is ample security for payment of the debt, and an extension of time for payment should be granted in the circumstances of the case: see *Idington* v. *The Trusts & Guarantee Co. Ltd,* [1917] 2 W.W.R. 154. He had the power to grant extension in the first place, and he still has that power.

McAlpine, replied.

The judgment of the Court was delivered by

O'HALLORAN, J.A.: This appeal relates to the jurisdiction of a county court judge sitting in Chambers as a local judge of the Supreme Court, to vary a Court order which had fixed the mortgage redemption period and had ordered the respondent should be absolutely foreclosed if he defaulted in payment within that period.

The governing facts need to be known. The appellant had loaned the respondent a sum of money secured by a first mortgage on lands and premises of speculative value near Vernon. He had stipulated as a condition that the respondent should deposit an executed conveyance in escrow, to be delivered to him if the mortgage money was not repaid within one year. The respondent defaulted in payment and commenced an action in the Supreme Court for a declaration that the conveyance was void as against his equity of redemption, and also for a declaration that he was entitled to redeem the lands and premises. In his statement of defence the appellant admitted the essential facts in the statement of claim and stated his willingness to permit the respondent to redeem.

The appellant then moved for judgment under Order XXXII., r. 6, upon the admissions of fact. The motion was heard on 9th January, 1941, before His Honour the late Judge SWANSON sitting in Court as a local judge of the Supreme Court. It was then ordered that if the respondent did not pay into Court within nine months from the date of the registrar's certificate the amount therein found due, the respondent should

thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption

in and to the lands described, with consequential directions as to delivery of possession of the lands, dismissal of the action and costs. The jurisdiction to make that order is set out on its face, for it is expressed to be made pursuant to Order XXXII., r. 6, upon a motion for judgment upon admissions of fact in the statement of defence.

That is in compliance with the ancient rule hereafter referred to, that nothing is within the jurisdiction of an inferior Court but that which is so expressly alleged. The registrar's certificate was dated 27th January, 1941. But on 14th October, 1941, and shortly before the expiration of the redemption period, the solicitor for the respondent took out a notice of motion reading:

TAKE NOTICE that the Court will be moved before His Honour Judge W. C. KELLEY, as local judge thereof, . . . , by counsel on behalf of the plaintiff, for an order extending the period fixed for redemption . . . by His Honour Judge JOHN D. SWANSON on the 9th day of January, 1941. . . .

The motion was heard by the local judge in Chambers on 24th October. The learned county judge extended the period of redemption for one year, by invoking the jurisdiction he seemed to think a local judge possesses when sitting in Chambers. Although the notice of motion was plainly a Court motion, he elected to treat it as a Chamber matter or to refer it to himself in Chambers. The formal order then made and subsequently entered on 18th November is entitled "In Chambers." Its phraseology and his signature thereto clearly indicate he attempted to exercise jurisdiction by hearing the motion in Chambers and not in Court. The order is a Chamber order and does not leave room for the doubt which arose in *Wakefield* v. *Turner* (1898), 6 B.C. 216 as to whether it was made in Chambers or in Court.

Between the date of the order on 24th October and its entry on 18th November, the appellant took out a notice of motion on 1st November to reopen the hearing of the previous motion and refer it to a judge of the Supreme Court pursuant to Order LXXB, r. 3, on the ground the learned county judge was without jurisdiction to entertain it as a local judge. But the learned county judge treated this motion as a Chamber matter also and dismissed it sitting in Chambers, as appears from the order then taken out and entered 18th November. It is clear

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the question of his jurisdiction was raised squarely before the local judge, and it is equally clear he asserted that jurisdiction in Chambers.

The jurisdiction of a county judge to do certain things as a local judge of the Supreme Court is purely statutory. It does not make him a superior Court, or a judge of a superior Court while he is so acting. The constitutional set-up of Canada does not give a Provincial Legislature that power. He is a judge of a Court of inferior jurisdiction endowed by the Provincial Legislature with certain superadded powers. An example is furnished by the jurisdiction a county judge may exercise under the Mechanics' Lien Act, Cap. 170, R.S.B.C. 1936. The powers there conferred upon him as a designated judicial officer may be exercised in addition to the jurisdiction he already possesses as a county judge, *vide Martin* v. *Russell et al.* (1892), 2 B.C. 98.

This distinction is of some significance since his jurisdiction cannot be presumed as it is in the case of a Supreme Court Judge, for as an inferior Court he comes within the ancient rule in *Peacock* v. *Bell and Kendal* (1667), 1 Wms. Saund. 73; 85 E.R. 85, at 87-8 approved by Baron Parke in *Gosset* v. *Howard* (1847), 10 Q.B. 411, at 453; that

> nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged.

And *vide* also *Camosun Commercial Co. v. Garetson & Bloster* (1914), 20 B.C. 448 and *In re Nowell and Carlson* (1919), 26 B.C. 459. The jurisdiction of a county judge to act as a local judge of the Supreme Court is contained in Order LXXB as amended on 26th September, 1931; *vide* 1931 B.C. Gazette, p. 2143, and also 44 B.C. Order LXXB is pursuant to section 18 of the Supreme Court Act, Cap. 56, R.S.B.C. 1936.

Rule 1 thereof reads:

> Every local judge of the Supreme Court of British Columbia shall be and hereby is empowered and required to do all such things and transact all such business and exercise all such authority and jurisdiction in respect of all actions, causes, or matters, instituted in any Registry of the Supreme Court within the territorial limits of his jurisdiction as Judge of the County Court, as by virtue of any law or by the rules of the Supreme Court are now done, transacted, or exercised by any Judge of the Supreme Court sitting in Chambers, and in addition shall be and hereby is empowered to do all such things and to exercise all such jurisdiction as a Judge of the Supreme Court

sitting in Court or in Chambers can make, do, and exercise upon motions for judgment made under Order 27, Rules 11 and 12, and Order 32, Rule 6.

The above rule purports to confer two powers: (1) The powers which a Supreme Court Judge may exercise while sitting in Chambers, and in addition (2) the powers a Supreme Court Judge may exercise in Court or in Chambers upon motions for judgment in default of defence under Order XXVII., rr. 11 and 12, and upon motions for judgment on admissions of fact under Order XXXII., r. 6. It is to be observed a local judge is not given jurisdiction to sit in Court, except in the two cited instances. The plain effect of it is that in the absence of express authority in the Supreme Court Rules he has no jurisdiction to give judgment in any proceedings where there are contested facts. For example, he has no jurisdiction to hear a trial in the Supreme Court—*vide Brigman* v. *McKenzie* (1897), 6 B.C. 56.

Order LV. sets out in some detail what a Supreme Court judge may do in Chambers, but the only part of it relied on to support the jurisdiction exercised here is rule 1 (18) reading:

Such other matters as the Judge may think fit to dispose of at Chambers.

I think it clear this general clause does not assist the respondent, since it can only refer to classes of business other than those mentioned in the preceding seventeen subsections, and does not permit the judge to direct that any particular matter shall be disposed of in Chambers: *vide* Kekewich, J. in *In re Hicks. Ex parte North-Eastern Rail Co.* (1894), 63 L.J. Ch. 568, at 569, and also *Re Evan Evans* (1886), 54 L.T. 527.

That such is the proper construction is confirmed by the specific rule 5A of the same order, which concerns

. . . foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, . . . ,

the matters now in question, but referred to there under proceedings by originating summons which has no application here. But in my view there is a more compelling ground to exclude the present subject-matter from Chambers and to prevent a local judge while acting as a Supreme Court Judge from "thinking it fit to dispose of at Chambers," to use the language of Order LV., r. 1 (18), *supra*. It is that under the true construction of Order LXXB, the narrow jurisdiction of a local judge to act in Court thereby confines his discretion as to what he may do in Chambers

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under Order LV., r. 1 (18) in a way that a Supreme Court Judge is not limited.

It may easily be that a Supreme Court Judge may properly think fit in special circumstances to exercise in Chambers a jurisdiction which he may exercise unquestionably in Court. In so doing he is not exercising in Chambers a jurisdiction which he does not possess in Court. A local judge, however, is not in that position. In assessing his statutory Chambers jurisdiction one must be careful to observe if what is done, is within those things specifically provided for in the Supreme Court Rules. As pointed out before, he is not a superior Court Judge whose jurisdiction is presumed, but he is an inferior Court Judge whose jurisdiction must be expressly alleged. If the power is not expressly contained in the Supreme Court Rules, and support for it is sought in a general clause such as Order LV., r. 1 (18), *supra,* it must then be ascertained whether what is done is in its essence a Court matter.

If it is, he has no jurisdiction in Chambers for the very reason that he has none in Court. For it would be an absurdity indeed, that having no jurisdiction in Court over a Court matter, he should be able to usurp jurisdiction over it by the expedient of invoking his powers to act generally in Chambers. Order LXXB is to be construed according to its "cause and necessity" and "consonant to reason and good discretion," and its terms and phraseology must be subordinated to those considerations: *vide Stradling* v. *Morgan* (1560), 1 Plow. 199; 75 E.R. 305, at 315. Outside the more populous centres of Vancouver and Victoria, county judges are nominated local judges of the Supreme Court.

They are given express powers in specified matters, which they may dispose of finally in Chambers without waiting for the civil assizes held by Supreme Court Judges on circuit. But there are certain general powers in Chambers given them also, to enable parties to actions and proceedings to complete all steps preliminary and intermediate to the final hearing before a Supreme Court Judge when he arrives on the biannual circuit. Generally stated, that is the "cause and necessity" of local judges in this Province. And it is not "consonant to reason and

good discretion" that Order LXXB should be construed to empower local judges to decide contested proceedings summarily in Chambers or to hold trials in Chambers, when the power to hold trials has been denied them, and their power to hear any proceedings in Court has been restricted to the giving of judgments in undefended cases and upon admissions of fact.

What occurred before the local judge was really a trial of the substantial issue between the parties, *viz.*, whether the redemption period should be extended, and if so, the period and terms of such extension. Not only was affidavit evidence presented, but the respondent called an oral witness as well. The motion did not concern the working out of some term of the previous order. It concerned a new issue which was not before SWANSON, Co. J. In asking for an extension of the redemption period, it asked for a substantial variation of one of the essential terms of the order of SWANSON, Co. J. The motion was discussed before us as a continuation of the proceedings before SWANSON, Co. J. as a local judge sitting in Court under the "liberty to apply" contained in his order, or as a substantive motion to vary that order on fresh evidence. In neither case may the statutory jurisdiction exercised by SWANSON, Co. J. as a local judge be invoked to support the order under review.

If regarded as a continuation of the proceedings, then obviously it would have to be continued in Court and not in Chambers. But it could not be a continuation in any event, because the essential facts relating to the new issue it interjected into the proceedings, were not admitted but were in dispute, thereby ousting the jurisdiction in Court under Order XXXII., r. 6. If regarded as a substantive motion to vary the order of SWANSON, Co. J. it would still have to be a Court motion since judgment had been given by the Court when SWANSON, Co. J. made the order sitting in Court. I am at a loss to understand how the order of SWANSON, Co. J., sitting in Court, could be added to or detracted from, except by another Court order. I am equally at a loss to understand how the impugned order could be made by a local judge sitting in Court since it does not come within Orders XXVII. or XXXII., *supra*.

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There remains the last point that under Order LXXB the order of SWANSON, Co. J. could have been made in Chambers as well as in Court. If that were so, of course the above jurisdictional objections would vanish. Order XXXII., r. 6, on which SWANSON, Co. J. acted, recites the application may be made to a "Court or a Judge." Order XXVII., r. 11 also reads "Court or a Judge." Assuming for the moment (but not so deciding, for see Order XLI., r. 3) that "judge" means a judge in Chambers, and not a judge in Court, the impugned order would seem to be supported. But in *Re Land Registry Act. Lomis* v. *Abbott* (1915), 22 B.C. 330 it was held by MACDONALD, J. and with respect I think correctly, that all judgments under Order XXVII., r. 11 are required to be given in Court. There is no need to repeat here the cogent reasoning which brought him to that conclusion. It was pointed out there, what my learned brother MCDONALD with the advantage of many years' experience as a trial and Chamber Judge, stated also during the argument, that while a Supreme Court Judge sitting physically in Chambers may for convenience deal with motions for judgment in default of defence, he at the time nevertheless acts as a judge in Court and not in Chambers.

While the supporting phraseology in Order XXXII., r. 6 is not quite so literal and apposite as it is in Order XXVII., r. 11, it would indeed be an anomaly, if a motion for judgment where no statement of defence is filed should be required to be in Court, while a similar motion where a statement of defence has been filed, should not require to be made in Court. If the existence of such an anomaly were seriously pressed it is definitely excluded by Order XL., r. 1. A motion for judgment is essentially a Court matter. It disposes finally of the triable issues between the parties, and as such is not a step in the proceedings or an interlocutory matter leading toward judgment. This is true, even though certain matters arising therein require time to be worked out, or the equitable jurisdiction of the Court may be invoked to give time for certain things to be done before the order may become finally effective.

In *Re Land Registry Act. Lomis* v. *Abbott, supra,* an application under the Land Registry Act to direct the registrar of titles

to register an absolute order for foreclosure granted by a local judge was refused because it was founded upon an order *nisi* made in Chambers by the same local judge. Order LXXB did not at that time confer power on the local judge to give judgment in Court upon motions for judgment in undefended actions or on admissions of fact. But that does not affect the applicability of the decision to the Chamber order appealed from, since the exclusion of Order XXXII., r. 6 left the local judge in the instant case with no more jurisdiction than the local judge had in *Re Land Registry Act. Lomis* v. *Abbott.*

The order appealed from is in reality an order *nisi* made by a local judge in Chambers. It purports to displace the Court order of SWANSON, Co. J. as it contains in substitution thereof all the directions for taking of accounts, fixing the period of redemption, final foreclosure and delivery of possession, but with a greater degree of finality, since it does not give "liberty to apply." In the motion for final foreclosure it would logically be the order *nisi* upon which such final order would be founded. As such it is open to all the objections given effect to in *Re Land Registry Act. Lomis* v. *Abbott, supra,* notwithstanding the amendment of Order LXXB in 1931.

Finally, if contrary to the above conclusions, the latter part of Order LXXB, r. 1 could be construed to give a local judge express jurisdiction in Chambers over uncontested proceedings, that construction by necessary implication would exclude the power to give judgment in contested proceedings, which it was argued sprang from the general Chamber power in the first part of Order LXXB, r. 1. Therefore, once it is found (as it has been) that the impugned order is not within Order XXXII., r. 6, it must follow that it cannot be supported by resorting to the general Chamber jurisdiction in the first part of Order LXXB, r. 1. From whatever viewpoint it may be regarded, jurisdiction is lacking.

The impugned order should be quashed accordingly and the appeal allowed.

Impugned order quashed and appeal allowed.

Solicitor for appellant: *Gordon Lindsay.*

Solicitor for respondent: *C. W. Morrow.*

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Nov. 20, 24;
Dec. 12.

THE CITY OF VANCOUVER v. CHOW CHEE.

Taxation—Indian Reserve—Lands—Lease within Reserve to Chinaman—Taxation of lessee's interest—Exemptions—Construction of statutes—B.N.A. Act, Sec. 125—R.S.C. 1927, Cap. 98—B.C. Stats. 1921 (Second Session), Cap. 55; 1937, Cap. 82, Sec. 5.

Musqueam Indian Reserve No. 2 is situate within the boundaries of the city of Vancouver. Andrew Charlie, an Indian who held five acres of land within the Reserve, entered into a written agreement with the defendant whereby he would surrender the five acres to the Department of Indian Affairs for the purpose of the granting by the Department to the defendant a permit to occupy and cultivate the five acres from the 1st of April, 1936, until the 31st of March, 1937, at a rental of $250 a year, to be paid to the Department on behalf of Andrew Charlie. The defendant entered into possession and raised agricultural products for sale. Under the Vancouver Incorporation Act, 1921, as amended by section 5 of the Vancouver Incorporation Act, 1921, Amendment Act, 1937, the city assessed the interest of the defendant, and in 1939 levied a tax against him in the sum of $34.75. The tax not having been paid, the city brought action in December, 1940, for the amount of the taxes with interest and costs. It was held on the trial that the Vancouver Incorporation Act, 1921, and the 1937 amendment authorizing the taxation of interests in Dominion lands held by persons occupying them under permits of the Department of Indian Affairs are not in contravention of the provisions of section 125 of the British North America Act, 1867, and are *intra vires* of the Provincial Legislature. For the purpose of the collection of taxes so levied the Provincial Legislature may authorize their recovery by personal action against persons so occupying such lands.

Held, on appeal, affirming the decision of ELLIS, Co. J., that the land is occupied by a Chinaman under an agreement made with an Indian of the Reserve through the Indian Department, and hence the occupant by virtue of the Vancouver Incorporation Act, 1921, and the 1937 amendment of said Act, may be assessed and taxed. The land itself is not subject to the tax nor to any lien in respect thereof. As to the validity of the Provincial statute the matter is concluded by the decision on which the learned trial judge relied, *Smith* v. *Vermilion Hills Rural Council*, [1916] 2 A.C. 569.

APPEAL by defendant from the decision of ELLIS, Co. J. of the 14th of June, 1941, in an action by the city of Vancouver to recover the sum of $34.75 and interest, being the amount of rates and taxes due the city from the defendant. The Musqueam Indian Reserve No. 2 is an Indian Reserve at the mouth of the North Arm of the Fraser River and within the boundaries of the

city of Vancouver, and has an area of about 392 acres. The title to said lands being in His Majesty the King in the right of the Dominion of Canada, and is subject to and administered under and in accordance with the provisions of the Indian Act. Andrew Charlie, an Indian belonging to the band occupying certain land on the Reserve, executed a document which was also executed and renewed by or on behalf of the Superintendent General of Indian Affairs in accordance with the provisions of the Indian Act, whereby Andrew Charlie agreed to surrender five acres of his land to the Department of Indian Affairs for the purpose of the granting by the Department of Indian Affairs to Chow Chee (a Chinaman) a permit to occupy and cultivate said five acres for a period from April 1st, 1936, to March 31st, 1937, on a rental to be paid to the Department of Indian Affairs on behalf of Andrew Charlie of $45 per acre, and an additional $25 for the use of the houses. Acting under the Vancouver Incorporation Act, 1921, as amended by section 5 of the Vancouver Incorporation Act, 1921, Amendment Act, 1937, the city assessor in the year 1938 and in the year 1939 for the first time levied a tax on persons other than Indians occupying land on the Reserve, and in particular assessed the right or interest of the defendant in the lands referred to and levied a tax against the defendant in the sum of $34.75. The taxes claimed were settled, imposed and levied by a by-law of the city passed during said year. The defendant uses the land rented by him as a truck-gardener. He does not hold the land for a commercial purpose and the Reserve is not occupied by any one in an official capacity. The rent is received by the Department, and after deducting a certain percentage is sent to Andrew Charlie.

The appeal was argued at Vancouver on the 20th and 24th of November, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Mellish, for appellant: The question is whether the city has the right to levy a tax on the Indian Reserve. Both the Province and the Dominion were notified of this appeal. It is submitted that certain sections of the Act are *ultra vires* of the Province. The Reserve was allotted to the Indians in 1879. South Van-

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couver was incorporated in 1892 and Point Grey in 1897. They were amalgamated in 1899. Under the Indian Act from early times the Indians and Indian lands were within the jurisdiction of the Dominion and were for the benefit of the Indians. The Indians have their own government. Although the Reserve is within the geographical boundaries of the city the band occupies the field that would otherwise be occupied by the city. The Dominion Government holds the land for the benefit of the Indians. The land in question in this case is surrendered to Chow Chee who pays rent, the rent is delivered to the Department and the Department pays it to the Indian who was the owner. The city's Incorporation Act was passed in 1921 and amended in 1937. Chow Chee is a farmer and does not come within the words "commercial purposes." Under the Act costs are limited to $10.

P. J. McIntyre, on the same side: They base their authority on the amendment in the Vancouver Incorporation Act, 1921, Amendment Act, 1937, Cap. 82. Section 5 amends section 46 of the 1921 Act. The property can only be taxed if held for "commercial purposes." The Provincial Government has no authority to give the city the right to tax Indian lands: see section 91 (24) of the British North America Act, 1867, as to the class of subjects allotted to the Dominion. Under section 4 of the Indian Act the Minister of Mines has control and management of the lands and property of the Indians, and under sections 102, 103 and 104 Indian lands are not liable to taxation. In relation to overlapping rights the Dominion prevails: see *Attorney-General for Canada* v. *Attorney-General for British Columbia,* [1930] A.C. 111, at p. 118; *Madden* v. *Nelson and Fort Sheppard Railway,* [1899] A.C. 626. Indians and Indian lands are withdrawn from the Provincial Government: see Clement's Canadian Constitution, 3rd Ed., 679; *Rex* v. *Hill* (1907), 15 O.L.R. 406; *Rex* v. *Cooper* (1925), 35 B.C. 457; *Rex* v. *Edward Jim* (1915), 22 B.C. 106; *Re Kane,* [1940] 1 D.L.R. 390; *Smith* v. *Vermilion Hills Rural Council,* [1916] 2 A.C. 569; *City of Montreal* v. *Attorney-General for Canada,* [1923] A.C. 136, at p. 138; *City of Halifax* v. *Fairbanks' Estate,* [1928] A.C. 117. The right to tax is limited to property used for "commercial pur-

poses." Unless he comes under subsection (3*a*) of section 46 as enacted by Cap. 82, Sec. 5, B.C. Stats. 1937, there is no assessment. It must be an interest in rateable land. This man was not using the land for "commercial purposes." He was a farmer and farming is not included in that term. The costs are limited to $10 under the County Courts Act: see *Kirkland* v. *Brown* (1908), 13 B.C. 350; *Shipway* v. *Logan* (1915), 21 B.C. 595; *Reigate Corporation* v. *Wilkinson,* [1920] W.N. 150; *B. Wood & Son* v. *Sherman* (1917), 24 B.C. 376.

McTaggart, K.C. (*J. B. Roberts,* with him), for respondent: There has been the power to tax since 1921. By the amendment of 1937 the situation was cleared. The new section is merely ancillary to the others. That we have the right to tax see *Smith* v. *Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563, at p. 575. The word "commercial" only goes to the *quantum*: see *The Attorney-General of Canada* v. *Bailie and City of Montreal* (1919), 57 D.L.R. 553; [1923] A.C. 136. It is a taxation on the interest of the tenant. They can tax an interest of an individual. We are taxing him *in personam.* There is no lien or charge on the land. Section 47 of the Vancouver Incorporation Act, 1921, covers our case. As to costs, there are ordinary judgments and special judgments and this is a special judgment for which we are entitled to the costs.

McIntyre, replied.

Cur. adv. vult.

12th December, 1941.

SLOAN, J.A.: I am in agreement with the conclusion reached by the learned trial judge and would dismiss the appeal.

O'HALLORAN, J.A.: The appellant Chinese truck-gardener rents and occupies lands which form part of an Indian Reserve. In my view the fact that the occupied lands form part of an Indian Reserve does not exclude the application of *City of Montreal* v. *Attorney-General for Canada,* [1923] A.C. 136, which this Court (MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.) followed on 28th April, 1939, in the

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unreported decision of *Canadian Soaps Limited* v. *Vancouver Board of Assessment Appeals.*

I would dismiss the appeal.

MCDONALD, J.A.: In this appeal I am in full agreement with the conclusion reached by ELLIS, Co. J. In his reasons for judgment he states the facts fully and applies the appropriate law. There is very little that I can usefully add to his judgment, but in view of the argument presented to us I shall try to make the matter a little more simple.

Under the Vancouver Incorporation Act, 1921, certain lands within the city are exempt from taxation, and one exemption is land held by His Majesty in trust for a band of Indians and occupied officially or unoccupied. That does not apply to the land in question for it is occupied, though not officially. It is occupied by a Chinaman under an agreement made with an Indian of the Reserve through the Indian Department, and hence the occupant by virtue of the said Act may be assessed and taxed. The land itself is not subject to the tax, nor to any lien in respect thereof.

Now coming to the amendment of 1937, about which so much has been said, this amendment relates only to the method of assessment of an occupant of land held for commercial purposes, and hence to the *quantum* of the tax. As pointed out in the plaint the appellant was duly assessed for the year 1939, and no appeal was taken against the said assessment, but the same was duly passed and confirmed by the Court of Revision, and rates and taxes were duly imposed and levied thereon by the respondent.

These facts are not in dispute, and the question of the amount of the tax was not before the trial judge nor is it before us. That question was already settled by the Court of Revision. The complaint that the learned judge in his reasons made no reference to the amendment of 1937 is thus explained.

As to the valdity of the Provincial statute, I agree with the learned judge that the matter is concluded by the decision on which he relied, *Smith* v. *Rural Municipality of Vermilion Hills* (1914), 49 S.C.R. 563; [1916] 2 A.C. 569.

To the contention that the lands in question would necessarily bring a lower rental, if the occupant is subject to taxation, than

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they would otherwise bring, and that hence the rights of an Indian would be prejudiced, the simple answer is that, even if this were material (and I think it is not), the agreement for occupation had been made, and the rental fixed, long before the assessment had been made, or the tax levied.

I am of opinion to dismiss the appeal with costs here and below.

Appeal dismissed.

Solicitor for appellant: *A. J. B. Mellish.*
Solicitor for respondent: *A. E. Lord.*

SKELDING v. DALY AND SMITH v. STUBBERT.

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Nov. 14, 17.

Court of appeal—Both appeals heard by three members of the Court—Judgments reserved—Chief Justice dies before delivery of judgments—Jurisdiction of two remaining judges in each appeal.

The appeals in these cases were heard by three judges, presided over by the late Chief Justice MACDONALD, and judgment was reserved in each case. The Chief Justice died before judgment was delivered. Argument was heard on whether the remaining two judges in each appeal if in agreement could deliver the judgments of the Court.

Held, O'HALLORAN, J.A. dissenting, that the remaining members of the Court in each appeal did not have jurisdiction to deliver judgment, and the appeals would have to be reheard.

MOTION for judgment. The appeal in *Skelding* v. *Daly* was argued before MACDONALD, C.J.B.C., O'HALLORAN and MCDONALD, JJ.A., and in *Smith* v. *Stubbert* before MACDONALD, C.J.B.C., MCQUARRIE and MCDONALD, JJ.A. Judgment was reserved in both cases, and Chief Justice MACDONALD died before judgment was delivered in either case. Argument was heard as to what disposition should be made of these appeals. Heard at Vancouver on the 14th of November, 1941, by MCQUARRIE, SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Coady, K.C., for appellant Daly and respondent Stubbert.
Bray, for respondent Skelding.
Jeremy, for appellants Smith and Anderson.
G. E. Housser, for appellant Gray.

Cur. adv. vult.

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SMITH v. STUBBERT

17th November, 1941.

McQUARRIE, J.A. (oral): In *Skelding* v. *Daly* and *Smith* v. *Stubbert* I would state as follows:

The death of the late Chief Justice has left us with a question of some nicety in relation to the delivery of several reserved judgments in cases in which he presided over a Court consisting of himself and two other members of the Bench.

In order to assist us in the determination of that question we invited interested counsel to address us upon the point. Consequent upon that invitation, the jurisdiction of the two surviving judges to deliver whatever judgment they may have agreed upon, notwithstanding the absence of consent by both sides, has been supported and denied by counsel with submissions of almost equal force. It is common ground, however, that if the two remaining judges have jurisdiction in the absence of consent to deliver the judgment of the Court which heard the appeals, the circumstances of each case must determine whether or not that power should be exercised.

Under the circumstances herein we are of opinion—that is, the majority are of opinion—that the appeals now under consideration should be reheard; and having reached that conclusion we find it unnecessary to determine any question relating to the jurisdiction of the two surviving judges to deliver an agreed judgment, as the same result would follow whatever opinion we might form on that issue.

We direct that these cases be placed on the list. That will be the judgment of the majority composed of Mr. Justice SLOAN, Mr. Justice McDONALD, and myself. Mr. Justice O'HALLORAN is dissenting and will hand down his reasons later on.

SLOAN, J.A. agreed with McQUARRIE, J.A.

O'HALLORAN, J.A.: In my view the surviving members of a Court composed of the statutory quorum of three, are competent if in agreement, to give the majority judgment of the Court as effectually as if the third member had lived and dissented.

When our Court of Appeal Act was enacted in 1907 there was not copied into it the bald language for decision by majority

contained in the Supreme Court Act as re-enacted by section 104, Cap. 15, B.C. Stats. 1903-04 under which the old Full Court acted. That section read in part:

> . . . but in the absence of any judge from illness or any other cause, judgment may be delivered by a majority of the judges who were present at the hearing. . . .

But if the jurisdiction of the surviving members of a statutory quorum to deliver a majority judgment of that quorum is denied because the cited language was not copied into our Court of Appeal Act, then the same reasoning must necessarily deny the jurisdiction of the Court to give a majority judgment in any case whatever. That would lead to absurdity for this Court has been delivering majority judgments since its inception in 1909.

I see no escape from the conclusion that wherever is found the jurisdiction to deliver a majority judgment in any case whatever, there also is found the jurisdiction to deliver a majority judgment in the instant appeals. Although as stated, the precise language under which the old Full Court acted was not copied into our Court of Appeal Act, yet I find no difficulty in concluding the jurisdiction is vested in and transferred to the present Court of Appeal expressly as well as by necessary implication.

In the first place section 6 of the Court of Appeal Act invests the present Court with all the jurisdiction and powers as well as all the appellate jurisdiction and appellate powers, statutory and otherwise and howsoever arising or conferred, which the old Full Court had. If this section does not carry forward the jurisdiction to deliver a majority judgment in any case whatever, then we would have the absurd result that the majority decisions of this Court for a period of over thirty years must now be regarded as nullities.

The Court of Appeal Act is to be construed according to its "cause and necessity" and "according to that which is consonant to reason and good discretion": *vide Stradling* v. *Morgan* (1560), 1 Plow. 199, at 205; 75 E.R. 305, at 315, recently applied by Sir Lyman P. Duff, C.J. in *National Trust Co.* v. *Christian Community,* [1941] 3 D.L.R. 529. Section 6 makes it plain that the "cause and necessity" of the Act was to transfer to and vest in the Court of Appeal all jurisdiction and powers and all

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the appellate jurisdiction possessed by the old Full Court, and *vide* sections 12 and 35 as well. It is not "consonant to reason and good discretion" to require an appeal to be reheard when the opinion of the deceased judge if it had been given, could not affect the result reached by the surviving majority of the Court as constituted on the hearing of the appeal.

We must hold that all the jurisdiction and powers of the old Full Court in this respect have been transferred to and vested in the Court of Appeal, as section 6 expressly says. We then have the guiding authority of the Supreme Court of Canada. That Court acting under comparable, if not similar jurisdiction, contained in sections 27, 28 and 29 of Cap. 139, R.S.C. 1906, delivered judgment in five reported cases where as in the present appeals, death had left the Court as constituted on the hearing of the appeals, with one less than the statutory quorum.

Gwynne, J. the fifth member of the statutory quorum of five, had died on 7th January, 1902, after judgment had been reserved. The cases are *Oland* v. *McNeil; Howley* v. *Wright; The King* v. *Likely; Peters* v. *Worrall* and *Skinner* v. *Farquharson,* all to be found in (1902), 32 S.C.R. at pp. 23, 40, 47, 52 and 58 respectively. *It is true that under section 31 of Cap. 139, R.S.C. 1906, four judges of the Supreme Court of Canada could form a quorum to hold the Court "where the parties consented to be heard before a Court so composed." But if that jurisdictional section had been invoked, if it could have been invoked, one would naturally expect it to have been referred to in the official report of the five decisions I have mentioned, as was done for example in *City of Montreal* v. *City of Ste. Cunegonde* (1902), 32 S.C.R. 135, where it is noted at p. 137 "the appeal was, by consent, heard by four judges."

In the second place the bald language relating to majority decision above cited, and which was not copied into the Court of

*NOTE—Since writing the foregoing I find the same course was pursued in *Canadian Westinghouse Co.* v. *Can. Pac. Ry. Co.*, [1925], S.C.R. 579. At p. 583, Duff, J. (as he then was) is reported as delivering the "judgment of the majority of the Court" in a case where the death of Sir Louis Davies, C.J. left the Court without the statutory quorum, and one of the four survivors was dissenting.—C. H. O'H., J.A.

Appeal Act is tautological and unnecessary in view of the provision in section 25 (which also appeared in the Supreme Court Act under which the old Full Court acted)

> . . . it shall not be necessary for all the judges who have heard the argument in any case to be present at the delivery of judgment, and any judge who has heard the case and is absent at the delivery of judgment may hand his opinion in writing to any judge present at the delivery of judgment, to be read or announced in open Court and then to be left with the registrar of the Court.

It seems to me that this section must mean there is jurisdiction to deliver a majority judgment even if the third member of the statutory quorum is not present and does not hand in his opinion. This conclusion appears to be unavoidable unless the section is read to compel an absent judge to hand in his opinion to a sitting judge before judgment can be delivered; that is to say, that the word "may" is to be interpreted as "must." But that construction is not permissible if we are to be guided by previous decisions of this Court. *Tai Sing Co.* v. *Chim Cam* (1916), 23 B.C. 8 and *Yukon Gold Co.* v. *Boyle Concessions* (1916), *ib.* 103, were both heard by a Bench of five judges. Judgment was delivered on 4th April, 1916, five days before the death of IRVING, J.A. but without any opinion being handed in by him. Clearly that could not have been done if "may" had been deprived of its permissive meaning.

Again *Re Succession Duty Act and Boyd* (1916), 23 B.C. 77, was heard by a Bench of five judges who reserved judgment on 12th January, 1916. But although IRVING, J.A. died on 9th April, judgment was delivered on 2nd June, the appeal being dismissed on an equal division of the four surviving members. That judgment could not have been delivered if section 25, *supra,* had rendered mandatory the handing in of IRVING, J.A.'s opinion. *Chesworth* v. *Canadian Northern Pacific Ry. Co.* (1940), 54 B.C. 529 is a recent instance, if I read correctly what the late Chief Justice MACDONALD said there at p. 539. These decisions leave no room for doubt that "may" in section 25 is to be construed as "may or may not" as Lord Esher defined it in *Attorney-General* v. *Emerson* (1889), 24 Q.B.D. 56, at p. 58 and *vide* also *In re Bjornstad and the Ouse Shipping Co.,* [1924] 2 K.B. 673

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(C.A.) and *St. Eugene de Guigues* v. *C.P.R.*, [1937] 3 D.L.R. 532, Sir Lyman P. Duff, C.J. at p. 533.

It is true that when a judge's opinion has been handed in and announced in open Court it must be left (*viz.*, filed) with the registrar: *vide Ferrera* v. *National Surety Co.* (1916), 23 B.C. 122 and also at p. 15. But I think it is plain from reading what was said there, that the compulsion to file an opinion with the registrar does not arise unless and until the opinion has been handed in and announced in open Court. That is the only interpretation consistent with the other decisions of this Court to which reference has just been made.

Furthermore, even if "may" in section 25 were capable of an alternative construction of "must" then "may" is to be chosen because as Lord Shaw said in *Shannon Realties, Lim.* v. *Town of St. Michel* (1923), 93 L.J., P.C. 81, at p. 84:

> . . . where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

That was said in respect to municipal assessment and taxation. How much more important it is when applied to the highest Court in the Province. Particularly so when denial of the efficacy of a majority judgment in the present appeals would throw doubt upon the jurisdiction of the Court of Appeal to give a majority judgment under any circumstances.

But the view has been pressed nevertheless, that no judgment can be given because the death of one member after reservation of judgment, has left the Court without the statutory quorum. And it has been said that the four surviving members in the *Tai Sing, Boyle* and *Boyd* cases, *supra,* had jurisdiction to deliver a majority judgment because there was still a statutory quorum of three in existence. This resolves itself into a contention that if one judge of a statutory quorum dies after judgment has been reserved there is therefore no longer a Court in existence; in other words, the Court as originally constituted has become *functus.*

But as the judgment of the statutory quorum depends not on unanimity but upon majority, it must follow that if the opinions

of the surviving members form a majority judgment of the Court as originally constituted, it is a majority judgment of the Court, notwithstanding the death of the third member. To contend a Court of Appeal becomes *functus* in such circumstances is to deny the competence of decision by majority.

Finally once it has been established as it has been, that the jurisdiction of the old Full Court to give a majority decision has been vested in and transferred to the present Court of Appeal it can no longer be argued that the Court ceases to be a Court in the present circumstances. For the jurisdiction of the surviving majority to give the majority judgment of the Court as originally constituted then undeniably exists, as exemplified in the five decisions of the Supreme Court of Canada already referred to. The Supreme Court acting under comparable if not similar jurisdiction, did not become *functus* in similar circumstances, but the survivors gave judgment as the judgment of the Court, notwithstanding the Court was left without the statutory quorum.

Having found jurisdiction exists, it remains to say whether it should be exercised. It then becomes a matter of judicial discretion in the exercise of which the Court should be guided by the principle expressed by Moss, J.A. in *Gunn* v. *Harper* (1902), 3 O.L.R. 693, at p. 696:

> . . . the reservation of judgment is for the convenience of the Court, and should not be permitted to operate to the prejudice of any of the parties.

It is plainly prejudicial to the parties to require them to incur the delay and expense to be occasioned by the rehearing of these civil appeals where there is a majority judgment of the Court as originally constituted, and where the opinion of the deceased member, even if he had been alive and had disagreed with it, could not have altered the result.

It may be remarked that *Skinner* v. *Farquharson, supra,* was itself a rehearing, for when King, J., who sat on the original hearing died before judgment, the Court ordered a rehearing (*vide* p. 59). But as already stated that was not done when Gwynne, J. died after the second hearing. It is obvious I think that the rehearing was not dictated by any jurisdictional consideration since the course adopted on the second hearing plainly indicates exercise of the jurisdiction. Whether or no on the first

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occasion the rehearing was occasioned by an equal division of opinion is not disclosed, but it is noted that Sedgewick, J. dissented on the second hearing and stated in his judgment at p. 61 that Gwynne, J. had been of the same view. What occurred suggests the inference that the rehearing was directed on the first occasion because of some circumstance which in the opinion of the survivors pointed to a rehearing in order that justice should not be denied.

In the *Boyd* case, *supra,* in this Court, the appeal was dismissed upon an equal division of the four surviving members, which then spelt dismissal. Although IRVING, J.A. had not handed in his opinion, which might have altered the result, yet the Court apparently did not regard that circumstance as sufficient to justify a rehearing of the appeal. The *Boyd* case was affirmed in the Supreme Court of Canada (1917), 54 S.C.R. 532, but the fact that IRVING, J.A. did not deliver judgment, or that his judgment might have altered the result in this Court, was not referred to. The *Yukon Gold* case, *supra,* was also affirmed in the Supreme Court of Canada (1917), 50 D.L.R. 742.

Once jurisdiction is present, it goes without saying that the exercise of the discretion which then arises to give judgment or to direct a rehearing of the appeals, must be governed by the interests of justice. If it had appeared in any one of the instant appeals that a party thereto would suffer a denial of justice if judgment were delivered, then of course the question of rehearing would appear in another light. Counsel did not raise the question. Further consideration fails to disclose any ground therefor which could have a real and not an illusory basis. Any such ground would necessarily be confined to the exercise of a judicial discretion which was founded upon the existence of jurisdiction. If jurisdiction did not exist it would end the matter. For then no question of prejudice could be attributed to the exercise of judicial discretion, since in such circumstances there could not be a judicial discretion at all.

It was submitted alternatively by Mr. *Housser* that the question of majority decision is not one of jurisdiction, but one of practice and procedure. If that were so, then in the absence of

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statute or rule the Court itself, in control of its own procedure could rule for example, that all or certain of its decisions should be unanimous, or again for example that in a Court composed of five judges, there should be no judgment of the Court unless four out of the five were in agreement. That submission may be entitled to a great deal of respect. If it is sound, and *vide* section 12 of the Court of Appeal Act, then, of course, the only objection to the giving of judgment would be injustice to any party prejudiced thereby. But as already stated, no such prejudice exists or was claimed to exist.

I prefer to rest my opinion on the grounds stated, first that there is jurisdiction, and secondly that our consequent discretion should be exercised by giving the majority judgment of the Court as constituted on the hearing of the appeals affected.

McDONALD, J.A. agreed with McQUARRIE, J.A.

Motion refused, O'Halloran, J.A. dissenting.

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Nov. 5, 8, 12.

Criminal law—Charge of retaining stolen goods—Explanation of accused—Whether a reasonable one—Exclusive or joint control of goods.

A. having stolen an electric sewing-machine worth about $175 from a salesman's parked car, carried it to B.'s house (a second-hand dealer) and placed it on the verandah. He told B. that his wife had left him, that his home was broken up, and he was disposing of his furniture. B. refused to buy the machine but suggested that one Pitten, who lived a short distance away might be interested. B. then went to Pitten's house and repeated what A. had told him. Pitten and his wife then went to B.'s house and B. assisted A. to carry the machine into the house so that it might be seen in the light. After bargaining, A. sold the machine to Pitten for $12 and B. assisted A. to carry the machine to Pitten's house. B. was convicted of having retained in his possession a sewing-machine, knowing it to have been stolen.

Held, on appeal, reversing the decision of police magistrate Wood, that the offence imports a measure of control over the subject-matter. The appellant did not at any time have exclusive or joint control of the machine. The appeal is allowed and the conviction quashed.

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APPEAL by accused from his conviction by police magistrate Wood of Vancouver on a charge of having retained in his possession an electric sewing-machine, knowing it to have been stolen. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 5th and 8th of December, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Paul Murphy, for appellant: The learned magistrate applied the wrong test to the explanation of the appellant in finding it was untrue. The true test is whether the explanation was a reasonable one. The machine was stolen from the car of an agent of the Singer Company by Forget, who brought it to the accused's house and put it on the verandah at about 8.30 in the evening of the 11th of October, 1941. Forget said he had a row with his wife who left him, and he wanted to sell the sewing-machine. Parker was never in control of the machine. He merely suggested a purchaser and helped to carry the machine to the purchaser's house. Possession was not proved: see *Rex* v. *Watson* (1916), 85 L.J.K.B. 1142; *Reg.* v. *John Wiley* (1850), 4 Cox, C.C. 412, at p. 421. Parker's explanation was confirmed and was consistent with his innocence: see *Rex* v. *Kiewitz,* [1941] [*ante,* 85, at p. 89]; 3 W.W.R. 693, at p. 696; *Rex* v. *Searle* (1929), 51 Can. C.C. 128; *Rex* v. *Davis* (1940), 55 B.C. 552.

W. H. Campbell, for the Crown: The *Watson* case is distinguished, as in this case there is evidence of possession. Accused helped to carry the machine into his house and he helped to carry it to the purchaser's house. It is proved the goods were stolen in the evening of October 11th, 1941. The machine was worth $175 and it was sold for $12. The magistrate need not believe the explanation: see *Richler* v. *Regem,* [1939] S.C.R. 101, at p. 103; *Rex* v. *McKinnon* (1941), 56 B.C. 186; *Rex* v. *Pais* (1941), *ib.* 232.

Murphy, replied.

Cur. adv. vult

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

O'HALLORAN, J.A.: Parker and one Forget were convicted together under section 399 of the Criminal Code of unlawfully retaining a sewing-machine in their possession, knowing it to have been stolen. Parker now appeals.

The offence of retaining in one's possession, of its very nature necessarily imports a measure of control over the subject-matter. But in my view at least, the record does not disclose such control in the appellant. Physical possession is neither essential to nor conclusive of that control. But such manual handling of the machine by the appellant as occurred was jointly with and under the direction of Forget.

In particular, the evidence of Mr. and Mrs. Pitten—who bought the machine from Forget and not from the appellant, as the sales receipt confirms—points definitely to the conclusion that the control of the machine remained exclusively in Forget during their negotiations to purchase it.

Nor do objective facts appear in the record from which control by the appellant could legitimately be inferred prior to these sale negotiations. In my view the appellant cannot be held guilty as charged. I would quash the conviction and allow the appeal accordingly.

McDONALD, J.A.: The appellant was convicted before police magistrate Wood, of having retained in his possession an electric sewing-machine, knowing it to have been stolen. He was tried jointly with one Forget, who, it is admitted had stolen the machine from a salesman's parked car at about 8 o'clock in the evening. Forget carried the machine to the appellant's house and placed it on the verandah. The appellant is a second-hand dealer. Forget told the appellant that his wife had left him, that the home was broken up and that he was disposing of the furniture. He tried to sell the machine to appellant, but appellant refused to buy. He did however suggest that one Pitten, living a short distance up the street, had two daughters learning dress-

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making, and that Pitten might be interested. The appellant accordingly went to Pitten's house and repeated the story which Forget had told him. Pitten and his wife came to the appellant's house and the appellant assisted Forget to carry the machine into the house so that it might be seen in the light. After some bargaining, the machine was sold by Forget to Pitten for $12. The appellant assisted Forget to carry the machine to Pitten's house and Forget gave Pitten a receipt for the price.

The first question we have to decide is whether or not under these circumstances the appellant at any time had exclusive or joint control of the machine. I think he had not, and that the case falls fairly within the decision in *Reg* v. *John Wiley* (1850), 4 Cox, C.C. 412. That case was considered by twelve judges, of whom eight were for quashing the conviction and four for upholding. Briefly, the facts were as stated by Martin, B. at p. 417:

> Two men stole some fowls, which they put into a sack, and carried to the house of Wiley's father, for the purpose of selling them to Wiley. All three went together from the house to an outhouse; the bag was carried on the back of one of the thieves; and when the policeman went in, the sack was found lying on the floor, unopened, and the three men around it as if they were bargaining, but no words were heard. Now I am of opinion that Wiley, under those circumstances, never did receive those fowls. I entirely agree that the question arises upon the possession; there is no question of property here, for that remained in the original owner; but it seems to me that the two men had the stolen articles in their possession as vendors adversely to Wiley; and that they never intended to part with that possession unless some bargain was concluded for the purchase of them. Upon this ground I am of opinion that Wiley never did "receive" the goods in the ordinary and proper sense of that word.

In the present case I would say that the appellant is in the same position as Wiley was.

The matter was also dealt with in *Rex* v. *Watson* (1916), 85 L.J.K.B. 1142, but that case is somewhat complicated by a discussion regarding the Accessories and Abettors Act, 1861. There is, however, nothing in *Watson's* case to alter the effect of the decision in *Wiley's* case.

On this short ground I would allow the appeal and quash the conviction.

I think section 69 of the Criminal Code has no application here.

If appellant had been charged with receiving instead of retaining, the matter would have been quite different, for then section 402 of the Criminal Code would apply, in that the appellant did aid Forget in disposing of the machine. For obvious reasons, of course, section 402 cannot apply to a case of retaining.

It may appear to be gratuitous, but I think I should advert for a moment to the other question raised, as to whether or not the magistrate had misdirected himself on the question of the appellant's explanation. It would be a work of supererogation to again recite the reported cases which this Court and other Courts have examined within the last two years. It cannot, however, be too often said that, in these cases of receiving and retaining, judges and magistrates should make it clear that when an explanation is given the question is not whether they believe the explanation, but whether the explanation is a reasonable one. The fact that we were treated to so long an argument upon that question here may be taken to indicate that the magistrate did not in this case make it clear that he was properly directing himself.

Appeal allowed; conviction quashed.

SKELDING v. DALY *ET AL.*

Patent—Furnace—Sawdust burner and feed unit—Infringement—Damages —Quantum.

The plaintiff recovered judgment in an action for infringement of two patents, one covering an alleged new and useful invention of a hot-air furnace, and the other covering an alleged new and useful invention or device commonly known as a feed unit or sawdust burner. On appeal this judgment was varied, it being adjudged that only the second-mentioned invention had been infringed by the defendants. Pursuant to the Supreme Court judgment, an inquiry before the district registrar was proceeded with to ascertain what damages the plaintiff had sustained by reason of the infringement of the second-mentioned patent. The district registrar found that the defendant had manufactured 350 sawdust burners in infringement of the patent and assessed the damages at $2,975, which was affirmed by the trial judge.

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[illegible] C.C.C. 221

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Held, on appeal, varying the decision of MORRISON, C.J.S.C., that a principal contention before the registrar was that Daly, after the issue of the patent, made no burners as therein described, but if any were made they were made by one LeBlanc upon Daly's premises under an arrangement with LeBlanc, whereby LeBlanc leased a space in Daly's foundry for the purpose of manufacturing the burners in question. From what took place before him it would appear that the registrar, in reaching his conclusion, held that what was done by LeBlanc was really the act of Daly. No such issue was raised on the pleadings in the action. There was error in including the burners manufactured by LeBlanc and infringement should be found only in respect of four burners, and the damages should therefore be reduced to $34.

APPEAL by defendants P. T. Daly and Hi-Power Furnace & Stoker Co., from the decision of MORRISON, C.J.S.C. of the 4th of June, 1941. By judgment of the Supreme Court of the 7th of June, 1939, the defendants Daly and Hi-Power Furnace & Stoker Co. were held to have infringed two patents of invention, one covering an alleged new and useful invention of a hot-air furnace and the other covering an alleged new and useful invention commonly known as a feed unit or sawdust burner. On appeal the judgment was reversed as to the first patent but was sustained as to the second. The said judgment of the 7th of June, 1939, referred the matter of damages for the said infringement to the district registrar at Vancouver, who held that the defendants had manufactured 350 burners infringing the second above-mentioned patent. This finding was confirmed by the trial judge, and the above-mentioned defendants appealed.

The appeal was argued at Vancouver on the 7th of November, 1941, before MCQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Coady, K.C., for appellants: Infringement can only be found in regard to manufacture after August 10th, 1937, the date of the patent. The burden of proof is on the plaintiff to show what number of burners were manufactured by the defendants after that date: see *British Thomson-Houston Co. Ltd.* v. *Goodman (Leeds), Ltd. et al.* (1925), 42 R.P.C. 75. There is no evidence upon which the learned district registrar could reasonably find that the appellants manufactured 350 burners after the above-mentioned date. There is evidence that some burners were manufactured by LeBlanc but not 350. The finding was on a wrong

principle, namely, that the manufacturing by LeBlanc was manufacturing by Daly. Any manufacturing by Daly was done prior to February, 1937. It was held on the previous appeal that the burners manufactured by LeBlanc had nothing to do with Daly.

Bray, for respondent: These burners alleged to have been manufactured by LeBlanc were manufactured on the defendant's premises and LeBlanc admitted the arrangement between Daly and himself was what he termed "phoney." The evidence shows that for ten weeks from 30 to 40 of the burners came weekly from Daly's premises to LeBlanc's premises. Daly told Skelding he was making from 20 to 30 per week, as he thought Skelding's patent was invalid. The finding of the registrar and its confirmation by the Court should not be disturbed: see *Powell and Wife* v. *Streatham Manor Nursing Home,* [1935] A.C. 243; *Nemetz* v. *Telford* (1930), 43 B.C. 281; *Lawrence* v. *Tew,* [1939] 3 D.L.R. 273.

Coady, replied.

Cur. adv. vult.

12th December, 1941.

MCQUARRIE, J.A.: I agree that the appeal should be allowed in part and the damages reduced to $34 with costs as indicated in the judgment of my brother O'HALLORAN. I concur with the reasons stated by him.

O'HALLORAN, J.A.: Skelding obtained a declaration that Daly had infringed his sawdust burner patent 368050 granted on 10th August, 1937. That declaration was upheld in this Court, *vide Skelding* v. *Daly et al.* (1940), 55 B.C. 427, at 437. We are not now concerned with infringements of the hot-air furnace patent 283712 to which that appeal largely related, so that the subsequent affirmation of this Court's decision in that respect by the Supreme Court of Canada [1941] S.C.R. 184 does not affect the present appeal.

The Court below had referred to the registrar the ascertainment of damages for infringement of patent 368050. After a protracted hearing over some eight months, the registrar assessed the damages at $2,975. His finding was confirmed in the Court below and judgment entered accordingly. Daly now appeals

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therefrom. The principles of assessment as well as the *quantum* are involved. The appeal presents some unusual features. They demand analytical discussion in order that the facts may be truly reflected, the more so, since certain evidence directed to the question of damages, to be intelligible, seems necessarily to carry with it explanations and additions to the testimony given at the trial.

At the trial in May, 1939, McRae, a witness for Skelding, testified he had worked for Daly in October and November, 1937, grinding or drilling holes in a sawdust burner similar to Skelding's patent. However, some thirteen months later, in June, 1940, McRae testified before the registrar when called by Daly on the inquiry as to damages, that he had been mistaken as to the date. He then said he had worked for Daly in the fall of 1936 and for a short time in the spring of 1937, but not in the fall of 1937. This was confirmed from Daly's records by the latter's book-keeper Kane, from which it appeared that McRae had worked for Daly from September to December, 1936, and for two weeks and one day only in 1937, ending on 8th March, 1937, but at no later date in 1937. This variation is noted since Skelding's patent was not granted until 10th August, 1937. It is mentioned also because McRae's evidence was the only direct evidence at the trial of manufacture by Daly in infringement of Skelding's patent.

Again at the trial the witness Kane, Daly's book-keeper and shipping-clerk for some eleven years and who was also an experienced moulder and familiar with all phases of Daly's business in the foundry as well as in the office, corroborated the evidence of a Skelding witness Thomas, when the latter testified that subsequently to the grant of Skelding's patent on 10th August, 1937, *viz.*, on 22nd November, 1937, he (Thomas) had received from Daly for Carl LeBlanc one complete sawdust burner corresponding to Skelding's patent 368050. That question had been put to Daly. He said he could not answer without looking at his books. Kane was then called, produced Daly's books and corroborated what Thomas said in that respect. No attempt was made at the trial, as was made later on in the inquiry as to damages, to explain that evidence or detract from its conclusive nature by re-exam-

ination of Kane or by recalling Daly. That was evidence to support the finding of infringement by the learned trial judge. As already stated his finding was affirmed on appeal to this Court.

On the inquiry as to damages, Kane under press of more thorough examination and cross-examination, was given the opportunity of explaining and adding to the evidence he had given on the trial. This observation applies to other main witnesses also such as Skelding, Daly and Thomas. Kane testified that Daly had not made any burners after 10th August, 1937; that Daly had made fifteen burners in 1936 corresponding to Skelding's patent 368050 before that patent had issued; that they were then made for Skelding and LeBlanc who had later disagreed; and finally that the complete burner delivered to Thomas on 22nd November, 1937, was one of those fifteen and no charge had been made for it.

Faced with the new testimony of McRae and Kane with which he was obviously impressed, the registrar began to wonder wherein lay the infringement found by the trial Court and the Court of Appeal. During the cross-examination of Kane he observed:

> The point that is worrying me is, if there were no furnaces made by Daly or by the Hi-Power Furnace Company, wherein lies the infringement?

Beset with this problem he seems to have accepted the contention of Skelding's counsel that the Court of Appeal had decided that manufacture by LeBlanc on Daly's premises was manufacture by Daly, thereby constituting infringement by Daly.

Before pointing to the error in that conclusion, it should be observed in explanation of the reference to manufacture by LeBlanc, that one of Daly's defences at the trial was, that if any burners made at his plant were in breach of Skelding's patent, they were made by LeBlanc to whom he had rented a portion of his plant and sold raw material (as shown in Daly's books) during the time in question. That Daly had rented a portion of his plant to LeBlanc and that the latter had made sawdust burners there, was established in the trial evidence beyond dispute. On the inquiry as to damages, LeBlanc's separate manufacture of burners on Daly's premises was further confirmed by Daly, Kane and several other witnesses. Daly and Kane testified

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LeBlanc had employed two of Daly's regular men when they were not employed by Daly, and one of these men Nicholas Zehern gave similar evidence.

The decision of this Court in *Skelding* v. *Daly et al.* (1940), 55 B.C. 427 (MARTIN, C.J.B.C., MACDONALD and O'HALLORAN, JJ.A.) cannot be interpreted as a finding that Daly's infringement consisted in LeBlanc's manufacture of sawdust burners on Daly's premises. It was said in the majority judgment (which was in Skelding's favour) p. 437:

> Daly testified he had not made any sawdust burners since Skelding took his patterns back in February, 1937; that any burners made in his foundry after that date were made by one LeBlanc who had rented part of his foundry.

That excerpt shows on its face a clear distinction between manufacture by Daly himself (which he denied), and manufacture by LeBlanc on his premises (which he admitted).

This clear-cut distinction is preserved in the next observations (p. 437):

> Skelding alleged infringement of his later patent No. 368050 granted 10th August, 1937; . . . The weight of evidence supports the respondent [Skelding] in two respects. First: the evidence of McRae, Hassel and Thomas combined with the evidence of Daly's own book-keeper and shipping-clerk Kane leaves no alternative but to find that Daly did manufacture a certain number of burners subsequently to February, 1937. Secondly, the evidence of McRae, Thomas and Hassel indicates that the burners Daly manufactured subsequently to February, 1937, complied with the specification in Skelding's patent No. 368050.

The evidence of the witnesses there named, related at the trial to infringement by Daly himself as distinct from infringement by LeBlanc as Daly's *alter ego* by manufacture on Daly's premises. McRae testified he had worked for Daly in the making of the burners; Thomas gave evidence he had received four of them from Daly; Kane confirmed Thomas in that respect as to one burner at least. In addition Hassel, an engineer in air-conditioning and refrigeration, said that in October, 1937, he had received burners of the Skelding patent type from Daly and had installed them. The decision of the Court of Appeal is confined to infringement by Daly himself. It cannot be extended to include a decision on some other substantive issue, such as the "colourability" of the agreement between Daly and LeBlanc, which was not pleaded or raised as an issue at the trial or on the

first appeal. Neither the registrar nor the Court below were permitted therefore, to allow that issue to be interjected into the inquiry as to damages.

That such was the understanding of the dissenting Justice of Appeal (MARTIN, C.J.B.C.) is clear when he said at p. 432 in *Skelding* v. *Daly et al, supra*:

> I can only reach the conclusion upon the evidence before us that the burners in question were either made pursuant to the plaintiff's [Skelding's] leave or licence, or by the defendant LeBlanc, and therefore no action for infringement lies. . . .

Obviously, if the "colourability" of LeBlanc's manufacture had been in issue, reference thereto in that passage could not have been avoided. LeBlanc and his six companies were made party defendants by Skelding in his infringement suit, but LeBlanc did not enter a defence or appear at the trial either as witness or defendant. What further proceedings, if any, Skelding took against LeBlanc was not disclosed.

The statement of claim did not allege that the defendant LeBlanc was the defendant Daly's *alter ego* and that manufacture by LeBlanc on Daly's premises was in truth manufacture by Daly in the guise of LeBlanc; nor was a declaration to that effect sought against the defendants Daly and LeBlanc. The essence of such an allegation is deceit, *viz.*, that Daly knowing Skelding's patent had issued and was valid, had entered into an agreement with LeBlanc for the purpose of infringing Skelding's patent and deceiving Skelding in doing so. In the language of Sir George Jessel, M.R. in a patent case *Townsend* v. *Haworth* (1875), 48 L.J. Ch. 770*n*, at 772 (affirmed on appeal):

> . . . and of all allegations in the world allegations which impute fraud or intent to commit a wrong must be plain, clear and indubitable.

Furthermore, the registrar appears to have regarded Daly's rental of a portion of his plant and sale of raw materials to LeBlanc in the light of a permission from Daly to LeBlanc to make burners in infringement of Skelding's patent. He asked counsel for Skelding wherein lay the infringement and this occurred:

> *Bray*: Making on the premises.
>
> The Registrar: In the rental of the space to Daly? [LeBlanc is really meant].

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Bray: Yes, permitting them to be made, and that is what I was always arguing.

If that reasoning affected the registrar's conclusion it is answered in *Townsend* v. *Haworth, supra,* where Mellish, L.J. said at p. 773:

> Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even although the party who sells it knows that he is going to infringe it and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes, and actually infringe.

Townsend v. *Haworth* was followed and applied by the Court of Appeal in *Dunlop Pneumatic Tyre Co.* v. *David Moseley & Sons, Lim.* (1904), 73 L.J. Ch. 417.

As the new evidence of McRae and Kane on the inquiry swept away the basis for finding manufacture by Daly himself after 10th August, 1937, the registrar seems to have concluded that the infringement could not be supported unless manufacture was established, and hence he was led into the error of interpreting LeBlanc's manufacture on Daly's premises as the only evidence remaining to point to manufacture by Daly. But proof of manufacture by Daly after the grant of the patent on 10th August, 1937, is not at all essential to proof of infringement in this case. Delivery of the complete burner on 22nd November, 1937, as testified to by Thomas and confirmed by Kane is sufficient in itself to constitute infringement by Daly.

It is true the judgments of this Court (including that of MARTIN, C.J.B.C. dissenting) on the first appeal did stress manufacture by Daly himself. But that was on the record then before the Court, and in particular McRae's evidence (later corrected on the inquiry) of manufacture by Daly, to which the supporting evidence then consistently related. The pleadings did not particularize the infringement. The statement of claim alleged infringement in general terms, and the defendants did not ask for particulars. The learned trial judge confined himself to finding infringement in general terms without giving reasons or indicating the nature of the infringement.

On the first appeal to this Court the argument was primarily directed to infringing manufacture by Daly himself after 10th August, 1937, and it was based on McRae's direct and uncon-

tradicted evidence. There was then no need for the Court of Appeal to look beyond that evidence, for it was sufficient to sustain the finding below. However, if McRae's evidence had been corrected on that appeal, and the basis of Daly's infringement by his own manufacture swept away thereby, the Court would then have been under the necessity of considering the record further to ascertain if evidence of infringement existed apart from manufacture. In that event the evidence of Thomas and Kane as to delivery after 10th August, 1937, would have acquired a new and compelling significance as it pointed to infringement by Daly not arising by manufacture.

Even if events had so shaped themselves on the first appeal, the Court must necessarily have still sustained the finding in the Court below. That is the conclusion we must now find should have been reached on the inquiry and in the Court below when the registrar's finding was sought to be confirmed. The test of infringement is use of the article in any way prejudicial to the patentee, *vide Townsend* v. *Haworth, supra.* The deciding factor is that of actual or probable damage to the patentee by reason of the acts complained of. Whether pecuniary benefit has or has not resulted to the infringer does not enter into the determination of the question: *vide* Fox's Canadian Patent Law and Practice, 268.

Shortly stated any act which interferes with the full enjoyment of the monopoly granted to the patentee is an infringement. This appears to be the *ratio decidendi* of *Saccharin Corporation* v. *Anglo-Continental Chemical Works, Lim.* (1900), 70 L.J. Ch. 194, Buckley, J. at p. 196 and is so cited in Fox, *supra,* at p. 313. Even if Daly made no charge for the complete burner delivered Thomas on 22nd November, 1937, infringement is not thereby excluded. For the public is prohibited by the Patent Act from putting the invention into practice, and although a person may derive no profit pecuniary or otherwise from his interference with the monopoly of the patentee, it is none the less an infringement, *vide* Fox, *supra,* p. 313. Moreover a person may infringe a patent although he does not know he has infringed it, *vide* Fox, *supra,* at p. 269, citing *Young* v. *Rosenthal* (1884), 1 R.P.C. 29, at 39.

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The evidence at the trial as supplemented and corrected on the inquiry as to damages regarded as a whole, leads to no other proper conclusion now, than that any burners manufactured by Daly corresponding to Skelding's patent 368050 were manufactured by him before it was granted on 10th August, 1937. Skelding had obtained a number of patents for improvements in hot-air furnaces. Among them was a patent 312982 apparently relating to a sawdust burner (referred to as the "old burner"). He agreed to sell it to one McLaughlin who had it manufactured by Daly with Skelding's authority. When McLaughlin gave it up, Skelding agreed to sell it to Mrs. Hicks, mother of Carl LeBlanc. The latter also had it manufactured by Daly in 1935, 1936, and up to 23rd February, 1937, on patterns supplied Daly by Skelding. On 23rd February, 1937, Skelding took the patterns back from Daly.

According to Skelding's evidence he and Daly worked together during 1936 to improve this old burner. Skelding testified that in 1936 Daly was manufacturing for Skelding and LeBlanc the very burner for which Skelding obtained a patent on 10th August, 1937. Daly conceded this but said he had only made seven of these improved burners and further that he had not made any of them after 23rd February, 1937, that in fact he had refused to do so. Kane testified Daly made some fifteen of these improved burners in 1936 for LeBlanc and Skelding, and that Daly had eight or ten left when Skelding took back his patterns in February, 1937. Skelding testified he had an agreement with LeBlanc that the latter would not manufacture any of the new burners until the patent was granted; but LeBlanc and Skelding parted company in the latter part of March, 1937, and the patent was not granted until 10th August, 1937.

Daly testified, corroborated by Kane, that he had deviated from the old burner and made up the new burner in 1936, because LeBlanc was having trouble with the old burner and some improvement was needed. For his protection he brought Skelding up to look at it:

> . . . and I asked him if it was O.K., and he looked it over and said it was O.K.

When Skelding was asked

Do you recall Mr. Daly taking you up in the fall of 1936 to the Oak Street showroom to show you a burner he manufactured to get away from some of the difficulties of the old burner?

he did not say he protested to Daly or pointed out to him that manufacture and sale thereof would be a breach of confidence, as one would have thought he would if the improved burner had consisted of Skelding's own ideas, but he left the matter with this answer:

Yes, he took me up because he thought I was green enough not to know that it is the very burner I am summonsing him on in this matter. He made it with steel.

Daly must have been optimistic indeed to believe he could thus deceive an inventor like Skelding.

Skelding alleged no agreement with Daly or any breach of confidence by Daly such as he did in evidence against LeBlanc. Moreover, so far as the old patent was concerned, Skelding admitted it did not cover a burner at all but only the conical section of the hopper. After Skelding took his patterns back from Daly in February, 1937, and parted with LeBlanc in March, 1937, he strongly suspected both of them were manufacturing and selling the improved burner while his application for the patent was pending. However, in view of the *status* of the old patent he apparently considered he had no remedy until his new patent 368050 would be granted, which it was on the 10th of August, 1937. On the 23rd of September, 1937, he sued Daly and his operating company as well as LeBlanc and his six companies for infringements alleged to have occurred after the new patent issued.

It must be regarded as conclusive, I think, that the new burners made by Daly in 1936 were made for Skelding and LeBlanc as test improvements on Skelding's old burner. That conclusion is directed by the evidence of Daly and Kane; it is confirmed by their statement of refusal to manufacture them again for LeBlanc, after Skelding had taken back his patterns in February, 1937. Moreover, it is confirmed in Skelding's own evidence already cited, that in 1936 Daly was manufacturing for Skelding and LeBlanc the very burner for which he (Skelding) obtained a patent on 10th August, 1937. In these circumstances it is not a defence to the action for infringement, if Daly without Skeld-

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ing's permission disposed of any of the new burners after the latter's patent had issued on the 10th of August, 1937; *vide Clark* v. *Griffiths* (1885), 24 N.B.R. 567, at pp. 570-1, a decision of the Appellate Division of the Supreme Court of New Brunswick.

If Daly had made these new burners in 1936 for himself and not for Skelding as is found above, he might have successfully invoked section 56 of the Patent Act, Cap. 32, Can. Stats. 1935, and amending Acts, which provides it is not an infringement, after the grant of the patent to dispose of articles constructed before the issue of a patent, even if it is pending; *vide Schweyer Electric & Mfg. Co.* v. *N.Y. Central Railroad Co.*, [1934] Ex. C.R. 31, at pp. 65-66, affirmed generally [1935] S.C.R. 665. But Daly's claim to the benefit of that section was not acceded to when he put it forward to this Court in *Skelding* v. *Daly et al.*, *supra*. It is negatived by the evidence just referred to.

We come now to the *quantum* of damages. The registrar found there were at least 350 burners made by Daly infringing Skelding's patent No. 368050. He allowed Skelding damages on the basis of loss of a profit of $8.50 he would have made on each burner. That basis of damage is accepted by the parties and is not in dispute. Skelding was thus found entitled to $2,975 damages. We are without the assistance of an explanation from the registrar how he arrived at the number 350. Pursuant to the conclusions reached heretofore, burners made by LeBlanc at the portion of Daly's foundry he rented from Daly, cannot be included. With McRae's evidence corrected and confirmed as it has been, there is now no direct evidence of manufacture by Daly after 10th August, 1937, such as existed at the trial. But as has been pointed out, evidence of manufacture after 10th August, 1937, is not essential to proof of infringement. Evidence of delivery by Daly of burners corresponding in type to Skelding's patent, subsequently to the grant of that patent is sufficient; and it is with such evidence we are now concerned. Much hearsay evidence must be disregarded as it should have been stricken from the record.

Thomas, a sheet-metal worker, in his evidence at the trial, testified that after 10th August, 1937, he took delivery of four

burners corresponding to Skelding's patent, from Daly for Carl LeBlanc in whose employ he then was. The "one complete burner" on 22nd November, 1937, previously referred to, was one of them. On the inquiry as to damages, some thirteen months later, Thomas repeated this evidence, stating he received "four, five or six, I can't recall that. It is three years ago now." His evidence may be accepted at four, as he said at the trial when his recollection was more clear. That is the only direct evidence in the inquiry as to damages connecting Daly with the delivery or handling of sawdust burners infringing Skelding's patent No. 368050.

It is true Thomas testified he saw burners being made at Daly's foundry and helped to make several of them; and also that he once saw ten or twelve burners alongside Daly's moulding room. But that is consistent with their manufacture by LeBlanc at Daly's foundry. The same observation applies to Hassel's evidence; in September, 1937, he assembled for LeBlanc in whose employ he then was, some ten or twelve burners of this type at Daly's plant. He said the burners were manufactured by Daly's men as far as he knew, and he assisted in assembling them. But that is consistent with LeBlanc's manufacture and employment of two of Daly's moulders when not employed by Daly, as stated in the evidence of Daly, Kane, LeBlanc, Milne and Zehern one of Daly's moulders who then worked for LeBlanc.

Further reference is now made to the evidence of Thomas, the main witness for Skelding, whose enthusiasm seems to be reflected in the figure of 350 burners the registrar has found. At the trial Thomas gave evidence that while in the employ of LeBlanc in 1937, the latter "handled" during that period "say ten to fifteen or twenty" burners corresponding to Skelding's patent. But on his first appearance in the witness box at the inquiry, some thirteen months later, he stated that for a period of ten weeks from 10th August, 1937,

> the manufacturer used to bring in about 30 or 40 a week, at night time, and in the morning they would be gone out of the store again.

That would be about 350 as found by the registrar. However, strange to say, Thomas was unable to say who this mysterious

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"manufacturer" was who came so frequently to LeBlanc's premises. Nor was he able to say where the burners came from. On cross-examination with hearsay eliminated, his knowledge so far as it touched Daly, was limited to the four burners already mentioned.

Thomas was later recalled at the inquiry, when instead of delivery of 30 to 40 burners a week, he testified to 20 to 30 weekly, of which about 75 per cent. would correspond to Skelding's patent. This would be about 190 burners instead of 350 for which figure therefore no foundation exists at all. On this latter occasion Thomas again advanced his evidence a step further than he had at the trial or on his first appearance at the inquiry, for he swore he knew this large number of burners came from Daly's foundry, because he knew the handiwork. He said:

> You can tell Daly's burners from most any others we used to have, because every employer that makes a patent leaves his hand-mark and his finger-marks on, and I can say this man made some and this man made some others —the difference in the colour and finish and several things.

Asked to explain "finger-marks" he said:

> I see a handwriting. I see this gentleman's handwriting. I get acquainted with that handwriting, and I can tell which of you wrote anything even without your signature.

Under any circumstances that would be weak evidence to prove manufacture by Daly. But it is particularly weak here, since it is not supported by any other evidence, and manufacture by Daly after 10th August, 1937, is denied positively by Daly, Kane and Milne. Nor can that evidence successfully point to these burners having been manufactured by Daly before 10th August, 1937, and delivered afterward. For there is ample evidence that not more than fifteen of these burners were made by Daly, and none later than February, 1937.

At best this evidence of Thomas does not extend beyond identification of the craftsman who did the work, equivalent to saying he has stamped his initials upon his work. But it must depend in whose employ the craftsman was. If in Daly's employ such evidence points to Daly, if in LeBlanc's employ then it points to LeBlanc as the manufacturer. In this case the only thing which points to Daly is a "working hypothesis" built up by Skelding and Thomas. But the premises of this "working

hypothesis" are demolished by the positive evidence at the trial, accepted by the Court of Appeal in the previous appeal that LeBlanc rented a portion of Daly's foundry, bought raw material from Daly, employed two of his moulders and manufactured a certain number of burners there. On the inquiry, this was confirmed by the evidence of Daly, Kane, LeBlanc, Milne and Zehern, the latter one of the moulders so employed by LeBlanc.

There is another ground which dissipates the evidence of Thomas and deprives the finding of the registrar of any foundation. Even if the burners manufactured by LeBlanc at Daly's foundry could be included in the *quantum,* as the registrar did (but which cannot be done for reasons previously stated), the number could not be 350 but would be limited to 12. For that was the total number of burners LeBlanc manufactured there after 10th August, 1937, although he had made six there in June, 1937. That is the uncontradicted evidence of Daly, LeBlanc, Kane and Zehern. That number receives some confirmation in the evidence of Thomas and Hassel who, it will be remembered, said they saw ten to twelve of these burners at Daly's plant. It seems to receive similar confirmation from another Skelding witness Kacer, who said he saw "around a dozen" of these burners at Daly's plant "one winter month" in what year he was not certain, but thought it must be after 1936. Another Skelding witness Chatton, also saw "around a dozen" of these burners at Daly's plant in the "fall of 1937." In fact it receives very considerable support in the evidence Thomas gave previously at the trial and already referred to, that in 1937 LeBlanc "handled say ten to fifteen or twenty" of these burners.

If Daly had delivered 350 or any large number of burners to LeBlanc in the ten-week period after 10th August, 1937, it is hard to believe that an investigation of the books, records and business dealings of Daly and LeBlanc (both defendants) would not have disclosed some evidence of it. Daly's books were produced but did not disclose a record of more than the four burners mentioned. Further, if LeBlanc had manufactured 350 or any large number of burners at Daly's plant after 10th August, 1937, or had taken delivery of a large number he had made there

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previous to 10th August, 1937, it seems highly improbable it could have escaped detection. Books, records, business dealings, transportation, purchase of raw material, time for necessary manufacture, and other pertinent inquiries which would suggest themselves to one seeking to obtain evidence upon which a Court could act, would hardly have left so much to the imagination.

There is no direct evidence to implicate Daly beyond that relating to the four burners mentioned. Skelding's damages must be limited to that number. For he is entitled to damages only in respect of infringements proven: *vide* Fox, *supra*, p. 483, citing *British Thomson-Houston Co. Ltd.* v. *Goodman (Leeds), Ltd. et al.* (1925), 42 R.P.C. 75. Reviewing the evidence as a whole, there are no grounds upon which any tribunal could arrive at a conclusion by legitimate inference, that Daly had infringed Skelding's patent to any greater extent than the four burners mentioned. On the evidence available, any conclusion embracing more than that number, would be and is mere conjecture or guess, which are not permissible grounds upon which to base a finding.

The registrar's certificate should be limited to four burners at $8.50 each, or $34. The damages should be limited to $34 and the judgment below varied accordingly. To that extent the appeal is allowed.

The appellants are entitled to their costs of appeal and of the respective motions in the Court below to confirm and vary the registrar's certificate. As to the costs of the inquiry before the registrar, the most appropriate order is that each party tax his costs as if successful, and then the appellant be allowed one-third and the respondent two-thirds of the amount each shall so respectively tax. A general set off is directed.

MCDONALD, J.A.: In this action the plaintiff claimed that the defendants had infringed two of his patents, and it was so held by a judgment of the Supreme Court. On appeal this judgment was varied, it being adjudged that only the invention described in letters patent No. 368050 had been infringed by the defendants. As to that patent the judgment of the Supreme Court therefore stood, and pursuant to that judgment an inquiry

before the district registrar was proceeded with in order to ascertain what damages the plaintiff had sustained by reason of such infringement. The registrar duly made his report after several hearings and after examining various witnesses, and his report was confirmed by the trial judge, Chief Justice MORRISON. In that report he found that the defendant Daly had, after the issue of the letters patent in question on 10th August, 1937, manufactured 350 sawdust burners in infringement of the patent.

The defendant Daly now appeals to this Court contending that there was no evidence before the learned registrar upon which he could reasonably base his said finding. One principal contention before the registrar was that Daly, after the date mentioned, made no burners as described in the patent, but that if any burners were made they were made by one LeBlanc upon Daly's premises, under some arrangement with LeBlanc, whereby LeBlanc leased a small space in Daly's foundry for the purpose of manufacturing the burners in question. It is quite plain from what took place before the registrar, that in reaching his conclusion he held that what was done by LeBlanc was really the act of Daly. This matter is fully developed in the judgment of my brother O'HALLORAN. The difficulty as there pointed out is that no such issue was open on the pleadings in this action. I can see no answer to this objection. I do not go on anything that was said on the hearing of the previous appeal in this Court, as I do not think anything was said there which would conclude the matter one way or the other. I go entirely upon the pleadings in the action. If Skelding intended to make any such contention he was bound, I think, so to plead.

It follows from what I have said that the registrar erred, and ought to have found only in respect of four burners, so that his judgment ought to have been for $34.

I agree with my brother O'HALLORAN's disposition of the costs.

Appeal allowed in part.

Solicitor for appellants: *James M. Coady.*
Solicitor for respondent: *F. J. Bayfield.*

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41 WWR 383

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[1963] 3 CCC 198

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In Chambers
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Dec. 12, 15.

REX v. O'MALLEY.

Criminal law—Sale of lottery tickets—Conviction—Habeas corpus—Motion for discharge—Charge—Failure to state consideration—Criminal Code, Sec. 236 (b).

Accused was convicted on a charge that he "unlawfully did dispose of tickets in a scheme for the purpose of determining who were the winners of property proposed to be disposed of by a mode of chance." On motion for discharge on *habeas corpus*:—

Held, that the charge fails to state that such tickets were disposed of for consideration. This is a defect in a matter of substance in that an essential averment has been omitted and is fatal to the conviction.

MOTION for the discharge of accused on *habeas corpus* proceedings. Heard by SIDNEY SMITH, J. in Chambers at Vancouver on the 12th of December, 1941.

Marsden, for the application.
Dickie, for the Crown.

Cur. adv. vult.

15th December, 1941.

SIDNEY SMITH, J.: The warrant of commitment herein dated 18th November, 1941, shows that the prisoner was charged before the learned police magistrate in and for the city of Vancouver

> for that he the said Desmond O'Malley at the said city of Vancouver between the 1st day of August, A.D. 1941, and the 14th day of November, A.D. 1941, unlawfully did dispose of tickets in a scheme for the purpose of determining who were the winners of property proposed to be disposed of by a mode of chance.

The prisoner pleading guilty to the said offence was sentenced to imprisonment at Oakalla with hard labour for the term of one year together with a fine of $2,000 and in default of payment thereof to a further term of six months with hard labour.

Counsel for the prisoner submitted that the charge as laid does not disclose an offence. In my opinion the charge was intended to be brought under section 236 (*b*) of the Criminal Code being one of five distinct types of offences under subsection 1 thereof. It seems to me, however, that it fails to state one of the essential elements of a lottery, namely, consideration. *Rex* v. *Robinson* (1917), 29 Can. C.C. 153; *Rex* v. *Sam Chow* (1938), 52 B.C.

467. This is a defect in a matter of substance in that an essential averment has been omitted. I think this is fatal to the conviction. *Brodie* v. *Regem*, [1936] S.C.R. 188.

It follows that the conviction must be quashed and the prisoner discharged.

Conviction quashed.

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Contract — Services rendered deceased person — Promise to provide for claimant by will—Intestate—Quantum meruit—Right of children of deceased children of intestate's sister to inherit.

Disapproved Re Beaulieu [1951] 4 D.L.R. 687

McI. died intestate in 1940. The plaintiff M. rendered services to him, loaned him money, supplied him with food, and in other ways looked after him from 1892 until his death, on the understanding that the deceased would compensate him by his will for such services.

Held, that M. was entitled to recover compensation for his services from the deceased's estate on a *quantum meruit* basis for the six years preceding the deceased's death.

A sister of the deceased who had predeceased him had children, two of whom were deceased leaving issue.

Held, that such issue were entitled to inherit the interests which their parents would have taken.

APPLICATION on originating summons for the determination of questions arising out of the administration of the above estate. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. in Chambers at Victoria on the 13th of November, 1941.

Manzer, for Daniel Marsh and other next of kin.
Spinks, for grand-nephews and nieces.
Bainbridge, for Official Administrator.

Cur. adv. vult.

21st November, 1941.

ROBERTSON, J.: This is an originating summons for the determination of two questions arising in the administration of the above estate as follows:

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Robertson, J.

(a) The ascertainment of what sum if any should be paid by the estate of James McIver, deceased, to Daniel Marsh as a creditor of the said estate. (b) The ascertainment of the persons entitled to share in the distribution of the said estate as heirs-at-law and next of kin.

McIver died a bachelor and intestate at Oyster River, B.C., on the 7th of November, 1940. He had had two brothers and a sister. They predeceased him: his brother Daniel left no issue; his brother Joseph had nine children all of whom were living at the time of James McIver's death. His sister Mary had ten children, two of whom were dead, leaving issue, at his death. As to the first question it is admitted by all counsel that there is no dispute as to the facts which are set out in the affidavits of Marsh, his wife, Woodhous and Vass, all, filed on behalf of the claimant. This material shows that Marsh from 1892 until McIver's death had rendered services and loaned money to the deceased; had done work of various kinds for him; and had supplied him with food and in other ways had looked after him. He says he did this, relying on a promise, made by the deceased, as early as 1892 that "everything he owned would be mine if anything happened to him," and repeated in 1907. He does not rely on any express agreement to leave him his property in consideration of his loaning money to, and performing services for, him. He bases his claim upon a *quantum meriut*. I think the circumstances set out in the affidavits show that it was understood by Marsh and the deceased that compensation should be made by will. I think Marsh is entitled to recover on a *quantum meriut* for the six years preceding McIver's death. See *Walker* v. *Boughner* (1889), 18 Ont. 448, at 457; *McGugan* v. *Smith* (1892), 21 S.C.R. 263; *Murdoch* v. *West* (1895), 24 S.C.R. 305; *Mercantile Trust Co. of Canada Limited* v. *Campbell* (1918), 43 O.L.R. 57, at 63; *Cay and Hill* v. *Marcotte,* [1930] 1 W.W.R. 824.

As was to be expected, under the circumstances, Marsh's evidence as to what he did for the deceased is of a general and rather vague kind. Taking all the facts into consideration I think a fair allowance would be $750.

As to the second point the question is whether the children of

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Robertson, J.

the deceased children of Mary Marsh are entitled to share in the interest which their parents, respectively, would have taken. The matter seems settled by *In re Estate of David McKay, Deceased* (1927), 39 B.C. 51; *Carter* v. *Patrick* (1935), 49 B.C. 411. Mary Marsh's grand-children by her two deceased children are entitled to share in the estate. The question will be answered accordingly. Costs of all parties will be out of the estate.

Order accordingly.

WATKINS v. CAM-ROY MINING COMPANY LIMITED (N.P.L.) AND JOHN A. CAMPBELL AND GEORGE CAMPBELL.

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Placer-mining—Mining leases—Option to operate leases—Right to test and prospect ground—Notice of intention to operate—Purchase of machinery and plant on ground—Royalty.

The defendants John and George Campbell owned four mining leases on the Similkameen River and the defendant Cam-Roy Company owned a mining plant and machinery stationed on the ground of one of the leases. On the 3rd of March, 1941, the plaintiff entered into an agreement with the defendants to operate the leases on a royalty basis if satisfied by testing and prospecting that the ground contained sufficient values in gold and platinum. He was given 60 days for testing and prospecting the ground, and if he decided to exercise his option he was to give the defendants written notice of his intention to do so. It was further agreed that he would purchase the machinery on the ground from the Cam-Roy Company for $34,500, of which $3,000 was paid in cash, the balance to be paid in instalments as operating the properties progressed, and he was to immediately enter upon the lands and rebuild and relocate the mining equipment and commence operations, and the company agreed that if the plaintiff did not exercise his option it would reimburse him for the moneys spent in improving the mining plant up to $3,000. The plaintiff started testing and prospecting by putting down holes and repairing the mining equipment for operating on the 20th of March, 1941. The rebuilding of the plant was completed on the 13th of May, 1941, when the plaintiff commenced mining operations with the plant and shovel. This was continued until the 4th of June, 1941, when, owing to a dispute with the defendants, he stopped operations. In two clean-ups during his operations with the shovel he recovered $1,759.72. He never gave notice of his intention to exercise

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his option. Under a prior agreement the Campbells had staked and recorded eight leases on the Tulameen River, adjoining the Similkameen leases, for the plaintiff, for which the plaintiff had paid them $900, but the Campbells had not assigned the leases to the plaintiff. The plaintiff recovered judgment in an action against the Cam-Roy Company for $3,000 for moneys expended in improvements to the mining plant, and as against the Campbells for a declaration that he is entitled to an assignment from them for the eight remaining leases on the Tulameen River.

Held, on appeal, affirming the decision of KELLEY, Co. J. (MCDONALD, C.J.B.C. dissenting), that in the particular circumstances, Watkins's operation of the plant and equipment came within the "testing and prospecting" permitted by the agreement. It did not estop him from relying upon the fact that he had not given the appellants the written notice of election to operate which the agreement stipulated as an essential to his exercise of the option therein provided for. The agreement does not define what constitutes "testing and prospecting" the property with a view to its placer-mining operation. One must ascertain the real intention of the parties from a perusal of the whole contract. The agreement and the supporting evidence leads to the conclusion that "testing and prospecting" was something more than sinking holes to bed rock and washing the contents to measure the values, and must be read in the light of the provision therein that the plaintiff was bound to purchase the mining equipment for $34,500 and pay a minimum of $500 per month in royalty if he should exercise his option. It is a proper inference that it was intended he should operate the plant under operating conditions during the testing and prospecting period to enable him to decide whether the equipment he was purchasing was of the kind which would enable commercial operation of the ground to be worked, and whether commercial results could be averaged over a reasonable period.

APPEAL by defendants from the decision of KELLEY, Co. J. of the 18th of July, 1941, in an action to recover $3,000 expended by the plaintiff in the construction and improvement of the shovel and washing-plant of the defendant company, for a declaration that the plaintiff is entitled to an assignment from the defendants Campbell of eight placer-mining leases on the Tulameen River in British Columbia, and for an order permitting the plaintiff to remove from the premises of the defendant company all machinery, tools and mining equipment, the property of the plaintiff. Prior to March, 1941, the defendants Campbell owned four mining leases on the Similkameen River that had been worked under an arrangement with the Cam-Roy Mining Company Limited, and said company had installed cer-

tain mining machinery on one of the mining leases, the company retaining ownership in the plant, and the plaintiff had entered into an agreement with the Campbells whereby the Campbells were to stake eight leases on the Tulameen River close to the Similkameen leases for the plaintiff in payment for which the plaintiff paid the Campbells $900. By written agreement of the 3rd of March, 1941, between the plaintiff and the Campbells, the plaintiff obtained an option to operate the Similkameen group, and the plaintiff was given the right to enter upon the lands covered by the leases to test and prospect for gold. A period of 30 days, extended to 60 days, was allowed as a testing period, during which the plaintiff could decide whether he would exercise his option, and at the same time the plaintiff agreed with the Cam-Roy Company to purchase the mining-plant for $34,500, of which $3,000 was paid in cash, the balance to be paid by instalments provided he exercised his option, and it was further provided that if the plaintiff did not exercise his option the company should reimburse him in such sum not exceeding $3,000 as he might expend in improvements on the machinery and plant. It was further agreed that upon the option being exercised the plaintiff should pay from the monthly receipts $1,000 per month to the company on account of the purchase price of the machinery, and a royalty of 10 per cent. to the Campbells of the gross value of the gold gained, with a minimum payment of $500 per month. On the 20th of March, 1941, the plaintiff started testing and getting the machinery and plant into shape for working. On the 20th of May, 1941, the plaintiff completed his improvements on the plant and commenced operating with it, continuing until June 4th following, when a dispute arose as to whether he had exercised his option, and he stopped working. The plaintiff never gave notice in writing of his intention to exercise his option. On the trial it was held that the plaintiff had not exercised his option, that he was entitled to recover $3,000 from the defendant company for improvements made by him on the machinery and plant, and he was entitled to an assignment from the Campbells of the eight mining leases they had staked on the Tulameen River on his behalf.

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The appeal was argued at Vancouver on the 4th and 5th of November, 1941, before McQUARRIE, O'HALLORAN and MCDONALD, JJ.A.

Grossman, K.C., for appellants: Under the agreement of the 3rd of March, 1941, the plaintiff was given 30 days in which to test the property. This was extended to 60 days. He started testing by putting down holes on March 20th, 1941. The machinery with dredge was complete for work on the 14th of May, when he commenced operating and continued until the 4th of June. He never gave notice of exercising his option, but by operating with the dredge from May 14th on he exercised his option. This was not testing. The testing was finished on May 14th. When operating with the dredge he took out $1,759.32 of gold and platinum by June 4th, to which he is not entitled. The Campbells are entitled to $500 royalty and the company to $1,000, part payment on machinery and equipment. Under the agreement the Campbells are entitled to ten per cent. royalty on the Tulameen group of leases.

Kirby, for respondent: The case depends upon the construction of the agreement of March 3rd, 1941. We were testing the ground until stopped working on June 4th, and had not exercised our option. When testing the ground we are entitled to the gold we take out: see Anson on Contracts, 18th Ed., 149; *Phillips* v. *Brooks, Limited,* [1919] 2 K.B. 243.

Grossman, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 223, sec. 305.

Cur. adv. vult.

13th January, 1942.

MCDONALD, C.J.B.C.: This appeal involves the construction of a written agreement, regarding certain mining leases, on the Similkameen and Tulameen Rivers. The agreement is complicated in its terms and is not too precisely drafted. I think, however, that if we apply the established rules of construction, *viz.,* that words are to be taken in their ordinary meaning, unless there is ambiguity, in which case we may look at the surrounding facts and circumstances, then, with the assistance we have had

from counsel, we should be able to arrive at a reasonably satisfactory conclusion as to what the agreement means.

Prior to March 3rd, 1941, the appellants Campbell with their associates owned four mining leases on the Similkameen; these are referred to as the Similkameen leases. These leases were being worked under some sort of indefinite arrangement between the appellants Campbell and the appellant company, the terms of which arrangement need not concern us. During the same period, or prior thereto, the appellants Campbell had entered into an agreement with the respondent to stake for him eight leases on the Tulameen in the immediate vicinity of the Similkameen leases. The consideration for this agreement does not very clearly appear but the fact is that the appellants Campbell had received $900 on account for their services, and the staking had been done and the leases have been issued to the appellants Campbell and their nominees. It is common ground that these Tulameen leases are the property of the respondent, the only question being whether or not they are subject to the payment to the appellants Campbell of a 10 per cent. royalty, on the gold and other precious metals won in operating the property covered by the leases.

Under the above circumstances an agreement was entered into (Exhibit 6) on 3rd March, 1941, wherein the Cam-Roy Company is described as "the seller," John A. Campbell and his associates are described as "the sub-lessors" and the respondent is described as "the sub-lessee." The more often one peruses the agreement the more clearly it appears that what the parties intended is contained in the following observations:

(1) The sub-lessors granted to the respondent the sole right to enter upon the lands covered by all the leases and to test and prospect for gold. A period of 30 days, which might be, and actually was, extended to 60 days, was to be allowed as a testing period during which the respondent must decide whether or not to exercise his option to purchase the Similkameen leases. If this test was satisfactory, and he chose to exercise his option, then all the leases became his absolute property subject only to this: that in working the leases he must pay the sub-lessors 10

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per cent. of the value of the precious metals found on the lands covered by the leases on both rivers.

(2) A separate and distinct agreement was made between the Cam-Roy Company and the respondent whereby the former agreed to sell to the respondent its plant and machinery then upon the property for the price of $34,500 of which $3,000 was paid in cash and the remaining sum of $31,500 was to be paid in stated instalments as the work of operating the properties progressed.

(3) It stands out very clearly I think—in fact it is not, by the witnesses called, seriously contended otherwise—that there is a clear distinction between testing and operating. This distinction is maintained throughout the whole of the written agreement, although it does require a good deal of careful reading to observe that this is so.

(4) The amount of precious metals, that may be expected to be recovered in prospecting or testing, is so trifling that no agreement was made as to whose property it should be. On the other hand, when the operation of actually working a lease commences, then it becomes important to ascertain in what proportions the product is to be divided, and the agreement provides that, as to such product, the sub-lessors were to receive 10 per cent. of the gross value and the sub-lessee the remaining 90 per cent.

(5) The sub-lessee was given the right to enter upon the lands so soon as he thought fit, after the making of the agreement, and also the right to move from place to place, to replace, and to add to, the existing equipment as he saw fit. It is obvious, however, that if he did at his own expense add to the equipment, and if, thereafter he failed to exercise his option, then it was but fair that he should be reimbursed within limits for the moneys so expended, this for the reason that in such circumstances the appellants and not the respondent would have the benefit of such expenditure. It was accordingly provided that if the option should not be exercised, then the respondent should be reimbursed by the Cam-Roy Company in such sum not exceeding $3,000 as he might spend in improving the machinery and plant.

(6) As to payment to the company for its plant and to the appellants Campbell of their royalties it was provided that such

payments should be made from the proceeds of the precious metals produced, with the proviso, however, that on the 5th day after testing was completed and the operation commenced, and thereafter monthly, a minimum payment of $1,000 should be paid on account to the company, and a minimum payment of $500 should be paid to the appellants Campbell.

Pursuant to the agreement the respondent entered upon the property and began making tests. I can draw no other conclusion, from the uncontradicted evidence, than that those tests were completed at latest on the 14th day of May, 1941, on which date, if not earlier, the respondent by his conduct elected to exercise his option and commenced to operate under the leases. His conduct is inconsistent in my opinion with any other conclusion. It is objected that the contract provides that he must give written notice of his intention to exercise his option. No such notice was given, but it surely does not lie in the mouth of the respondent to say "Since I have given no notice, my rights, under my option, to make tests continue so long as I see fit, and by withholding written notice, I may extend the testing time indefinitely." This is exactly the position respondent took when the appellants claimed that the testing time had passed, and that he had, by his conduct, elected to exercise his option. Appellants contended, and I think rightly, that the option had been exercised, and that the company was therefore entitled, on May 19th, to its first payment of $1,000, and the appellants Campbell to their first payment of $500. When this demand was made the dispute arose. Respondent declined to pay and contended that he was still testing and not operating. The dispute continued until June 4th when respondent abandoned the property. He then commenced this action and obtained an injunction restraining appellants from going upon the property or working under the leases. That injunction continued in force until July 19th, when after the trial, in the judgment now appealed against, it was dissolved, with no mention made by the learned trial judge as to damages.

I am unable to discover either from the judgment or from the argument of respondent's counsel what was the learned judge's

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opinion as to the respective positions of the parties from the 14th day of May. I think no other position was possible than that the respondent was either testing or operating and yet I am unable to find any finding as to what the learned judge's opinion was on this all important point. If I should be right in my conclusions as to what the contract means, then I think it is clear upon the evidence that the judgment below is wrong. I would, therefore, allow the appeal, dismiss the respondent's claim against the company for $3,000 and give judgment for the company against the respondent for $1,000 and for the appellants Campbell for $500.

As to lease 1084 assigned by one Wallace to respondent's son, at respondent's request, there should be a reference to ascertain the damages sustained by the appellants Campbell on this account, unless within 30 days from the entry of this judgment the respondent shall obtain from his son an assignment of said lease to appellant John A. Campbell, such lease and assignment to remain in Court with the other leases until further order, and to be subject to the payment of a 10 per cent. royalty on the product obtained from its operation.

As to the remaining Tulameen leases, *viz.*, 1083 and 1085-1090 inclusive, there should be a declaration that the respondent is the owner thereof, but subject to the right of the appellants Campbell to a 10 per cent. royalty.

Further there should be a reference to ascertain the damages sustained by the appellants by reason of the injunction, pursuant to the undertaking given by counsel when the injunction order was issued.

The appellants should have their costs here and below.

MCQUARRIE, J.A.: I have read the reasons for judgment of my brother O'HALLORAN and I agree with him that the appeal should be dismissed.

O'HALLORAN, J.A.: The appellants John A. and George Campbell with others held certain placer-mining leases in the vicinity of Princeton. The appellant Cam-Roy Mining Company Limited (N.P.L.) owned the buildings, mining-plant and

equipment thereon. John A. Campbell was vice-president of the company and he and his fellow director and brother George reside at or near Princeton. The president Royce, another director Jacob and the secretary Wilk reside at Portland, Oregon. The respondent Watkins is a placer-mining operator from California. He entered into an agreement with the appellants, *inter alia,* to operate the leases on a royalty basis if he was satisfied with what his testing and prospecting should disclose.

It was stipulated in that agreement that Watkins's election to operate was to be signified by his notice in writing to that effect. A dispute having arisen as to whether he was operating or still testing, the appellants demanded he stop work unless he accepted their contention that he was operating. He stopped work and sued them for reimbursement of $3,000 he had expended, to which he would admittedly be entitled under the agreement, if his work on the property had not progressed beyond the testing and prospecting stage. The appellants denied his right thereto and counterclaimed for $500 royalty on operation and $1,000 instalment payment on purchase of mining-plant and equipment, to which they would admittedly also be entitled under the agreement, if Watkins had in fact exercised his option to operate.

The learned trial judge held Watkins had not exercised his option to operate. He came to the conclusion the appellants were anxious for him to buy their property and allowed him to proceed as he did. Several other issues of lesser importance are later referred to. As already stated, it was a term of the agreement that Watkins's election to operate did not come into being until, in the language of the agreement, he had given the appellants "written notice of his election to do so"; it would exist only "as and from the date of such notification so to do." As Watkins never did give that notice the appellants' contention is therefore denied in the agreement itself.

But it was argued before us that he was estopped by his own conduct from relying upon non-existence of notice of election. It was said that his operation of the plant on two eight-hour shifts daily over a period of seventeen days was indisputable

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evidence he had passed beyond the prospecting stage, and had entered into actual mining operation even though he had not given written notice of his election to do so. That view was put forward rather plausibly by counsel for the appellants. More careful study of the agreement and the evidence, however, weakens its initial apparent strength.

The agreement does not define in so many words what constitutes "testing and prospecting" the property with a view to its placer-mining operation. But as Hudson, J. observed in giving the judgment of the Supreme Court of Canada in *Republic Fire Ins. Co.* v. *Strong Ltd.*, [1938] 2 D.L.R. 273, the first thing to do is to ascertain the real intention of the parties from a perusal of the whole contract. The meaning of words in the agreement is to be governed by the circumstances in respect to which they are used: *vide River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, Lord Blackburn at p. 763.

Study of the agreement and the supporting evidence leads to the conclusion that the "testing and prospecting" envisioned in the agreement was something more than routine examination of the property by an experienced prospector such as is described by the appellants' witnesses Hall and Smith. The nature of the agreement reasonably implies something more than sinking certain sized holes to bed rock and washing the contents thereof to measure the values, such as Royce the president of the appellant company testified as his understanding of "testing and prospecting." The agreement must be read in the light of the provision therein which bound Watkins to purchase the mining equipment on the leases for the sum of $34,500 not, as and when if ever he should exercise the option to operate, but immediately on his execution of the agreement.

It was a term of the agreement which he complied with, that on its execution Watkins was to pay $3,000 cash on the purchase of the mining equipment at a price of $34,500. In addition it was agreed that upon the execution of the agreement he was "to enter on the said lands immediately and rebuild and relocate the said mining equipment and commence mining operations." The appellant company further agreed therein if he did not exercise

his option it would "reimburse him for such amounts not in excess of $3,000 as he *bona fide* spends in the improvement or betterment of the shovel and washing-plant."

The picture the agreement presents therefore is this: (1) That in order to test and prospect the ground to find out if it justified commercial operation Watkins was required to agree to buy the mining equipment for $34,500 and to pay $3,000 cash as first payment thereon; (2) having agreed to buy the mining equipment he was entitled to use it, in fact, as indicated in the preceding paragraph, he was given specific authority to do so; (3) if he did not exercise his option he would be entitled to refund of his expenditures on the mining equipment up to $3,000, but he would not be entitled to a refund of the instalment of $3,000 which he had paid on its purchase.

That the foregoing expresses the intention of the parties and the meaning of the agreement is confirmed by the receipt for $3,000 (Exhibit 9) given Watkins on the execution of the agreement, for it reads as follows: [His Lordship set out the receipt and continued].

As the agreement provided he should pay $3,000 on the purchase of the mining equipment forthwith, and as it contemplated he should expend at least a further $3,000 upon its improvement and relocation before he was to exercise his option to operate, it is a proper inference it was reasonably intended he should operate the plant under operating conditions during the testing and prospecting period, to that extent at least which would enable him to decide (1) whether the mining equipment he was purchasing was of the kind which would enable commercial operation of the ground to be worked; and (2) whether commercial results could be averaged over a reasonable period. Before he exercised his option to operate Watkins had reasonably to be satisfied that the operation would provide sufficient returns not only to pay a profit after the expense of operation, but to pay a minimum monthly royalty of $500 and a $1,000 monthly payment on the purchase of the mining equipment.

In the circumstances operation over two clean-up periods can hardly be described as anything more than testing and prospect-

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ing within the meaning of the agreement. His gross recoveries during that period were $1,759.72. Averaging this recovery over a monthly period and offsetting against it the expenses of operation plus the $1,500 monthly liability for royalty and mining-equipment purchase, one can readily understand Watkins's hesitation to give written notice of his election to operate and thereby incur the consequential liabilities the agreement provided for.

Moreover it seems in keeping with the terms of the agreement to enable him to "determine . . . the said lands can be worked . . . to advantage and at a profit" that Watkins should conduct test operations over a reasonable period, to inform himself not by estimate but by actual operation of the equipment he was buying what resulting average could be expected over a number of "clean-up" periods. It is understandable that what might properly be regarded as "operating" under other circumstances, could not in the light of the terms of that agreement and surrounding circumstances, be regarded as anything else than careful tests reasonably made by an experienced operator upon a property of uncertain commercial value before committing himself to heavy expenditures in its development.

It must be concluded therefore that Watkins's conduct in testing the commercial value of the leases as he did, could not estop him from denying that he gave the notice which the agreement stipulated would constitute evidence of operation. I should not fail to remark that such estoppel was not pleaded, which, of course, it would have to be, if it were to be relied on. If that estoppel contention could have been regarded as effective, then there would arise the question of amendment of pleadings to conform to the evidence, as well as the question whether the opposite party was prejudiced by such failure to plead and *vide Wilkinson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 161. In view of the conclusion reached, these questions need not now trouble us further.

Counsel for the appellants advanced another ground to deny the respondent the right to rely upon the lack of election which the agreement stipulated. It was contended as pleaded in para-

graph 3 of the dispute note, that Watkins verbally led the defendants to believe "he intended to operate and that the lands could be worked to advantage and at a profit and that he had determined to do so." Estoppel is confined to existing facts; it therefore excludes statements of what he could, might or intended to do in the future. The allegation he had determined to operate without giving the written notice is emphatically denied by Watkins and that denial is not inconsistent with a realistic view of the surrounding circumstances. The parties were fully aware of their respective legal rights, and in particular the importance of the notice of election. In such circumstances, no estoppel can very well arise, *vide Toronto Electric Light Co.* v. *Toronto Corporation* (1916), 86 L.J.P.C. 49, Lord Atkinson at p. 58.

It would seem in this respect, moreover, the appellants consistently misled themselves as to the factual and legal effect of what Watkins said and did, because they relied upon a narrow and confined interpretation of "testing and prospecting" not permitted by the agreement as already pointed out in the circumstances to which it was necessarily applicable. Having found the respondent did not advance beyond the testing stage, it follows he is entitled under the terms of the agreement to the $3,000 awarded him in the Court below. It follows for the same reason he is under no liability to pay $500 royalty on operation and $1,000 on equipment purchase, for which judgment was sought in the counterclaim.

A question then arises as to the disposition of the $1,759.72 gold and platinum which Watkins recovered in the course of his testing operations and upon which the appellants received 10 per cent. royalty. The agreement does not in so many words provide for what disposition is to be made of precious metals recovered during the testing stage. But that in itself indicates an intention they were to belong to Watkins. Moreover as the clause in the agreement requiring Watkins to pay a 10 per cent. royalty to the appellants on the gross value of all gold, platinum and other precious metals which he might recover, is necessarily related in its application to the commencement of the agreement, *viz.*, to the commencement of the testing, it seems to follow by neces-

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sary implication that he is entitled to the precious metals recovered, less of course the 10 per cent. royalty which has been paid.

These conclusions dispose also of the appellants' claim to a reference to assess damages caused them by the injunction obtained by Watkins preliminary to trial. In my view that injunction was properly granted and Watkins's claims in the premises were sustained in the judgment at the trial and are now upheld. The appellants Campbell also asserted that under the agreement they are entitled to a charge by way of 10 per cent. royalty upon the Tulameen leases which it is conceded in the agreement are owned by the respondent Watkins. These leases have nothing to do with the Similkameen leases (owned by the appellants Campbell) with which we have been hitherto concerned. It is contended and the agreement so provides that the 10 per cent. royalty was part of the consideration which led the appellants Campbell to enter into the agreement of 3rd March, 1941.

However, the agreement must be read in its full light. Of course if the respondent had exercised his option and proceeded to operate no question would then arise. But he did not do so, and the agreement is now at end. Notwithstanding this the appellants Campbell contend that the Tulameen leases owned by the respondent should remain subject to a continuing 10 per cent. royalty in their favour. I do not read the agreement in that way. In my view the provision for 10 per cent. royalty related only to operations carried on under the agreement of 3rd March, 1941. When that agreement came to an end, because the respondent did not elect to operate, the royalty agreement necessarily and reasonably came to an end also.

I would dismiss the appeal.

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

Solicitor for appellants: *T. B. Hooper.*
Solicitor for respondent: *J. O. C. Kirby.*

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Criminal law—Charge of stealing letter and money contents—Inadequacy in placing defence before jury—Comments by counsel on failure of accused to give evidence on preliminary hearing.

On a criminal trial, the real defence of the accused should be placed before the jury. It matters not whether it is weak or strong, and the evidence must be presented in such a way that it can be appreciated by the jury.

Where the defence of the accused was not adequately and fairly placed before the jury and there was on the part of the trial judge an unconcealed conviction of the guilt of the accused, impressed upon the jury by comments and observations throughout the hearing, likely leading them to believe that there was no question about the guilt of the accused, a new trial will be ordered.

Held, further, that comment by counsel respecting the failure of the accused to give evidence at the preliminary hearing was fatal to the conviction.

APPEAL from the conviction by MANSON, J. and the verdict of a jury at the Vancouver Fall Assize on the 12th of September, 1940, on a charge of stealing a post letter and $2.50, the contents of the letter. The accused was a postal clerk in the post office. A prepared letter with $2.50 in it was put by the authorities amongst the letters to be sorted by accused. He was watched and there was evidence that when he came to this letter he put it in the bottom row and later he was seen to take a letter from the bottom row and put it in his pocket. He then went to the lavatory and it was then found the prepared letter was not amongst the letters accused had sorted. On his coming out of the lavatory he was taken in charge, searched, and the $2.50 (which was marked for identification) was found on him. The jury brought in a verdict of guilty and he was sentenced to three years' imprisonment.

The appeal was argued at Vancouver on the 14th and 15th of November, 1940, before MACDONALD, C.J.B.C., O'HALLORAN and MCDONALD, JJ.A.

Denis Murphy, Jr., for appellant: The two grounds of appeal are: 1. The learned trial judge did not put the defence to the jury and took one important defence away from the jury. 2. Both Crown counsel and the learned judge commented on the fact

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that the accused did not give evidence on the preliminary hearing. The learned judge told the jury either directly or indirectly that the accused was guilty, and on that assumption the jury went into an examination of accused's actions. It is vital in a case of circumstantial evidence to give the defence to the jury adequately: see *Rex* v. *Harms,* [1936] 2 W.W.R. 114; *Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77; *Rex* v. *Vassileva* (1911), 6 Cr. App. R. 228; *Rex* v. *Nicholson* (1927), 39 B.C. 264; *Brooks* v. *Regem* (1927), 48 Can. C.C. 333, at pp. 355-7; *Rex* v. *West* (1925), 44 Can. C.C. 109, at p. 112; *Rex* v. *Illerbrun* (1939), 73 Can. C.C. 77, at p. 80. There was comment that the accused did not give evidence on the preliminary hearing: see *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431, at p. 436; *Rex* v. *Roteliuk,* [1936] 1 W.W.R. 278, at p. 284; *Rex* v. *Naylor* (1932), 23 Cr. App. R. 177.

Sears, for the Crown: When the accused is found with the stolen goods on him there must be an immediate explanation. The prepared letter was put amongst the letters to be sorted by him, and when he left it was not there. He must have taken it; no one else could: see *Rex* v. *Searle* (1929), 51 Can. C.C. 128. On the presumption of theft see *Reg. v. Langmead* (1864), 9 Cox, C.C. 464; *Rex* v. *Ferrier* (1932), 58 Can. C.C. 370. On comment as to accused not giving evidence, what was said should not be so construed. What was said applied to the fact that no evidence was put in for the defence: see *Rex* v. *Aho* (1904), 11 B.C. 114; *Rex* v. *Portigal* (1923), 40 Can. C.C. 63, at p. 64; *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431, at p. 436.

The judgment of the Court was delivered by

MACDONALD, C.J.B.C.: I do not think we need to hear you in reply, Mr. *Murphy.* It is not our practice, unless special circumstances require it, when directing a new trial, as we do in this case, to discuss the evidence at length; we merely outline our reasons in a general way for reaching the conclusion that a substantial miscarriage of justice has occurred.

We think the defence of the accused was not adequately and fairly placed before the jury. In addition there was, on the part of the trial judge, an unconcealed conviction of the guilt of the

accused, and this was impressed upon the jury by comments and observations throughout the hearing. It is the jury's function to find the facts, and they should not, with the greatest deference, be influenced in the discharge of that duty by observations of the nature I have referred to, from such an influential quarter, leading or likely leading them to believe that there was no question about the guilt of the accused. In the report of the learned trial judge it is stated that the jury were out only nineteen minutes; I fear this is at least some proof that they felt they had little to do except to record the conviction entertained by the trial judge. We found it necessary to consider the evidence with the greatest care not only during argument but while in recess; had the case been fully placed before the jury, we think they would not have disposed of it so hurriedly.

All this made it all the more necessary that the real defence of the accused should have been placed before the jury. It matters not whether it was weak or strong; that requirement is essential. Further, the evidence must be presented in such a way that it can be appreciated by the jury. That, with great respect, was not done in this case. To take one basic point: it was of vital importance for the jury to decide whether or not a certain test letter was a mis-sort letter, as it was called, and, if so, whether or not in the light of regulations and all the facts it might properly be placed in what was called a bottom row. Regulations from the Canada Postal Guide were put in, but the jury were told that in considering this point rule 259 had no application. Mr. *Sears* conceded a few minutes ago that if this rule had been considered the jury as charged would not get a proper view of the evidence. We do not agree with the trial judge that it had no application. Further, even if it had no direct bearing, the question ought to have been placed before the jury whether or not on all the facts, the accused and others working in the post office might reasonably believe it was applicable and justified the course followed in this case.

There were other matters which occurred that might call for comment. We believe, however, on the broad ground that as the defence was not adequately placed before the jury, there should be a new trial.

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There is another point fatal to the conviction, *viz.*, what amounted to comment was made by counsel respecting the failure of the accused to give evidence at the preliminary hearing. I refer to the Dominion Evidence Act, Sec. 4, Subsec. 5; *Rex* v. *Mah Hon Hing* (1920), 28 B.C. 431; and *Bigaouette* v. *Regem*, [1927] S.C.R. 112.

I might add that in England this conviction would have been quashed, as they have no authority to grant a new trial. They appear to be satisfied that if a conviction is not obtained substantially according to law that should end the matter. We will not adopt that course, but rather leave it to the proper authorities concerned with the administration of justice to decide whether or not the accused should be placed on trial for the fourth time.

Appeal allowed; new trial ordered.

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Dec. 1.

REX v. SMITH.

Criminal law—Appeal from sentence—Retaining stolen goods worth $35—Previous criminal record—Sentenced to four years—Reduced—Criminal Code, Sec. 1015.

On appeal from sentence, where evidence is received of character and other relevant circumstances which were not before the trial judge, the Court, having had the advantage of hearing this further material, may, if it considers the facts warrant it in so doing, reduce the sentence.

APPEAL by the prisoner from the sentence of four years' imprisonment by ROBERTSON, J. upon his conviction for retaining stolen goods of the value of $35.

The appeal was argued at Vancouver on the 1st of December, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Accused, in person.
W. H. Campbell, for the Crown.

The judgment of the Court was delivered by
SLOAN, J.A.: The appellant was sentenced by ROBERTSON, J.

to four years' imprisonment in the penitentiary for retaining stolen goods to the value of about $35.

On his appeal the appellant submitted that having regard to the nature of the crime this sentence was, in itself, excessive. He contended, without contradiction by Crown counsel, that there was no evidence tending in any degree to implicate him in the actual theft of the groceries and cigarettes in question.

He argued that the learned trial judge must have given him the relatively severe sentence because of his previous criminal record and asked leave from us to adduce evidence in an attempt to offset the unfavourable impression that such record would naturally induce.

Exercising the wide discretionary powers conferred upon this Court in sentence appeals by section 1015 of the Criminal Code, R.S.C. 1927, Cap. 36, where we may require and receive such evidence as we may think fit, we granted the leave. The appellant thereupon adduced evidence of character and of other relevant circumstances which were not before the trial judge, by calling Rev. Howard Ireland, for many years chaplain at the penitentiary, Rev. J. D. Hobden of the John Howard Society and Mr. Harry Craven. The appellant recently married into a respectable family, and the last-named witness is his father-in-law. It so appears, by a peculiar circumstance, that Craven had been a member of the jury which, when the appellant was 16 years old (in 1923) had found him guilty of manslaughter. For this crime the appellant was sentenced to 15 years' imprisonment, of which he served 10. It was during this period of incarceration that he came under the observation of Rev. Ireland. Craven testified before us that this 1923 crime was the result of a boyish prank. The story, however, does not end there. After his release he was again, in 1935, sentenced to two and one-half years in the penitentiary for unlawfully carrying a pistol, and in 1938 was sentenced to two years less one day for violently stealing while armed. The learned trial judge did have this record before him, and no doubt very properly took it into consideration in sentencing the appellant to four years on the retaining charge. However, we have had other and additional facts and circumstances put

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before us. It is clear that because we have had the advantage of this further material we may, if we consider the facts warrant us in so doing, reduce the sentence: *Rex* v. *McCathern* (1927), 60 O.L.R. 334; 48 Can. C.C. 54; *Rex* v. *Yardley* (1918), 13 Cr. App. R. 131; *Rex* v. *Clue* (1928), 21 Cr. App. R. 68.

After careful and anxious consideration of the evidence, favourable to the appellant, adduced before us and upon the special facts and all the circumstances of this case, we are of the opinion that the interests of justice would be served by reducing the sentence herein from four years to two years in the penitentiary.

Appeal allowed; sentence reduced.

W. H. ARNETT v. ALOUETTE PEAT PRODUCTS LIMITED.

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Nov. 19;
Dec. 12.

Employer and servant—Workman—Definition—Wages—Agreement by workman to take in part payment for wages, shares of the company—Illegality of contract—Truck Act, R.S.B.C. 1936, Cap. 291, Secs. 2 and 13.

The defendant company was incorporated by the plaintiff's father in May, 1933, for the purpose of developing peat lands in Pitt Meadows and to market the peat commercially. The subscribers to the memorandum of association were the plaintiff, his father R. F. Arnett, and two men named Steen and Oien. In the fall of 1933 Steen and Oien left the company, transferring their shares to R. F. Arnett, the result being that the plaintiff and his father became the only shareholders. At the time of incorporation the plaintiff acquired ten shares in the company of the par value of $100 each, and he became secretary of the company, remaining so until 1936. He was also a director of the company. The plaintiff claimed that at the time of incorporation he entered into a contract with the company providing that he was to receive $100 a month for his services, of which $50 was to be paid in cash and the remaining $50 in stock of the company. In addition to his being secretary of the company his work included erection of buildings, digging ditches, digging peat, putting it through the various drying processes, taking it into storage and repairing the plant machinery. As part of his wages eighteen shares of the par value of $100 each were allotted to and accepted by him. He claimed that he was a workman and was entitled to recover $1,800 for services rendered, and pleaded the Truck Act. The plaintiff recovered judgment for $1,505.75.

Held, on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that on the facts the plaintiff is a "workman" and entitled to take advantage of the provisions of the Truck Act. It is immaterial that he assented to the transfer of the shares in question to him and exercised rights of ownership therein. The defendant company is not entitled to set off against the plaintiff's claim for wages the amount payable for the shares. This result follows from the plain language of section 13 of the Truck Act.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 12th of September, 1941, for $1,505.75 in favour of the plaintiff for services rendered the defendant. The defendant company was incorporated in May, 1933, for the purpose of developing peat lands in the municipality of Pitt Meadows. The subscribers to the memorandum of association were the plaintiff, his father R. F. Arnett, and two men named Steen and Oien. The plaintiff at once acquired ten shares in the company of a

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par value of $100 each. He was a director of the company and was secretary from 1933 until 1936. Shortly after incorporation Steen and Oien transferred their shares to R. F. Arnett, leaving R. F. Arnett and his son virtually the only shareholders. The plaintiff's contract of employment provided that he was to receive $100 a month, of which $50 was to be paid in cash and the remaining $50 in stock of the company. His work included the erection of buildings, the digging of necessary ditches, digging peat, manufacturing and baling the peat and repairing the plant. The period for which the plaintiff claims is from May, 1933, to February, 1937. Two certificates for one share each and one certificate for sixteen shares were issued to the plaintiff in lieu of wages amounting to $1,800.

The appeal was argued at Vancouver on the 19th of November, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Symes, for appellant: The plaintiff is not a workman within the meaning of the word. The intention of the legislation was to afford protection to a class of persons not very able to protect themselves: see *Sharman* v. *Sanders* (1853), 13 C.B. 166; *Hunt* v. *Great Northern Railway Co.,* [1891] 1 Q.B. 601. The Truck Act was never intended to enable a man in the plaintiff's position to repudiate a contract made in the circumstances of this case. He knew of the Truck Act when he accepted the shares for which he now claims to be paid. He retained the shares for four years and voted on them at company's meetings. The word "workman" must be interpreted as an ordinary person would interpret it: see *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Company,* [1905] 1 K.B. 453. Labour performed by hand must be the real and substantial business he is engaged in: see Minton-Senhouse on Work and Labour, p. 7. At the time of the alleged contract the plaintiff was a director of the company. The two positions, one of master and the other of workman are totally incompatible and the company may set off the $1,800, being the amount payable for the shares: see *Hewlett* v. *Allen & Sons,* [1892] 2 Q.B. 662; [1894] A.C. 383. He acted as owner of the shares over a period of years and is estopped from disputing the authority of the company to charge his account with the $1,800. The plaintiff's evi-

dence that the credit of $1,200 to his account on April 18th, 1934, for arrears of wages is contradicted by the books of the company kept at the time he was a director and also its secretary.

Cassady, for respondent: This action is brought under the provisions of the Truck Act. The evidence of the plaintiff as to the terms of his employment and the nature of his work is not disputed, and his evidence is corroborated by three witnesses. There is no evidence that the credit item of $1,200 of April 18th, 1934, could be for anything but wages. The plaintiff worked for some time before the incorporation of the company and is entitled to the $1,200 credit at the date the credit was given. As to the contention that the credit entry of $1,200 in the company's ledger should not be considered as a credit for labour because it is shown under the heading "Development of Markets, Tests, Equipment, Etc." it is submitted that the heading would not preclude the book-keeper from charging the plaintiff's wages under it. The evidence establishes that the plaintiff as a workman is entitled to judgment.

Symes, replied.

Cur. adv. vult.

12th December, 1941.

SLOAN, J.A.: In my view on the facts herein the respondent is a workman within and entitled to take advantage of the provisions of the Truck Act, Cap. 291, R.S.B.C. 1936.

The appellant cannot escape the consequences of the said Act by setting up the acquiescence of the respondent. It is quite immaterial that he assented to the transfer of the shares in question to him and exercised rights of ownership therein. *Penman* v. *The Fife Coal Co.,* [1936] A.C. 45. Nor in my opinion is the appellant entitled to set off against the respondent's claim for wages the amount payable for the shares. This result follows from the plain language of section 13 of the said Act and *Kenyon* v. *Darwen Cotton Manufacturing Co.,* [1936] 2 K.B. 193.

I would, therefore, dismiss the appeal.

O'HALLORAN, J.A.: The point to be determined is whether the respondent, a shareholder, director and secretary of a small company incorporated and controlled by his father, is a "work-

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man" within the meaning of the Truck Act, Cap. 291, R.S.B.C. 1936, because he also did manual labour. By that statute, any payment of wages to a "workman" in the form, *inter alia,* of shares in an incorporated company is declared to be a "nullity" and the workman may recover the amount thereof notwithstanding he has accepted and retained the shares. The respondent obtained judgment for $1,505.75, for which he had accepted shares of the appellant company in full payment some three years before he and his father severed their connection with the company.

The respondent's claim was thus stated in the evidence:

Now, as I understand your case, it is this: That in 1933, when you and your father were virtually the only shareholders, at any rate two directors of the company, a bargain was made between the company and you—the company being represented by your father (and I presume also by yourself because you were a director)—that you should get $50 a month in cash, and $50 in shares? Yes.

And now, eight years afterwards, when there are a number of other people financially interested in the company, you are saying that that contract which you made in 1933, was an illegal contract, which should never have been made at all? Yes.

That is your case? Yes.

The respondent joined his father in May, 1933, in incorporating the appellant company to develop peat lands in Pitt Meadows and to market the peat commercially. He acquired ten shares in the capital of the company at a par value of $100 per share, and became a director and also secretary of the company. He then entered into the contract in question with his father, without contrivance or pressure of any sort. In May, 1936, he accepted two shares, and in February, 1937, a further sixteen shares in full payment of $1,800 then owing him. Subsequently other interests invested money in the company and took control of it. His father continued in its management until the summer of 1940, when father and son severed their connection with the company. This action was commenced in May, 1941.

It is conceded the respondent did a great deal of manual labour. But that of itself is not sufficient to make him a "workman" within the meaning of the Truck Act, *supra,* since the mere doing of manual labour cannot affect the general nature of

his employment as was said in *Hunt* v. *Great Northern Railway Co.*, [1891] 1 Q.B. 601, at 604, in a decision upon the English Truck Act. In the circumstances of this small and struggling company it seems reasonable, and not at all unusual, that a company officer should do considerable manual labour if he were free and able to do it. In fact he might spend a great deal of his time doing it, since it does not appear that the indoor administrative and clerical duties of director and secretary would occupy his whole time. Lord Esher said in *Morgan* v. *London General Omnibus Co.* (1884), 13 Q.B.D. 832, at p. 833, that in construing Acts of Parliament judges should use their own knowledge of the various employments existing throughout the realm.

He was associated with his father in trying to make a success of the business venture for which the company had been formed. In the nine months after the company was incorporated he actually received only $175.38. As one interested in the success of the company he drew sparingly upon its cash resources. In practical reality he occupied a position somewhat analogous to that of junior partner in the enterprise. He himself admitted he "always had a preference job to anyone else" and was "one of the principal men in the company." The varied tasks he performed seem to indicate he was something in the nature of a company overseer, acting generally in the interests of the company as exigency demanded. "Workman" in the Truck Act, *supra,* is confined to a person

> who being a labourer, journeyman, artificier, handicraftsman, miner, or otherwise engaged in manual labour.

The manual labour done by the respondent was not done by him in a capacity *ejusdem generis* with the other classes there specifically mentioned. He was employed not in the capacity of a person doing manual labour, but rather in the capacity of one vitally interested in the success of the enterprise as a shareholder, director and secretary, which is emphasized by his relationship to the main promoter of the enterprise, his father. As Baron Pollock put it in *Hunt* v. *Great Northern Railway Co., supra,* at p. 603, his primary duty was to use his intelligence and not his hands. The governing matter is, what was he paid $100 a month for, month in and year out? *Vide Bagnall* v. *Levinstein, Limited,*

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[1907] 1 K.B. 531. The manual labour he performed, no doubt, was incidental and accessory to his employment but it was not his real and substantial employment: *vide Bound* v. *Lawrence,* [1892] 1 Q.B. 226.

To a *bona fide* workman the success of the company as a company is not a primary consideration; his concern is to do his job and be paid adequately for it. The foisting of shares of a company of uncertain prospects upon such a person is one of the evils the Truck Act was passed to prevent. But the respondent's case is quite different. The success of the company was his primary consideration. His own financial position and future prospects advanced or receded with the company's success or non-success. Acceptance of shares in part payment of salary helped him, therefore, for the same reason it helped the company. On him as "one of the principal men of the company" rested a certain amount of responsibility for its success or failure. His father and he made what in real effect was a family arrangement, even though the incorporated company served as a screen between them.

Because the respondent eight years afterwards became dissatisfied with the result of that arrangement, is no ground now to attempt to force money out of the company put into it by people who succeeded his father in its control. The Truck Act, *supra,* was not so intended. Its purpose, as the definition of "workman" implies, was to protect people who engage as an occupation in varied forms of manual labour as their real and substantial business, *vide Sharman* v. *Sanders* (1853), 13 C.B. 166; 138 E.R. 1161 and *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Company,* [1905] 1 K.B. 453. For example, at the trial the respondent gave his present occupation as "wood dealer." A wood-dealer may perhaps do a great deal of manual labour, but if, as the term implies, the real and substantial business is dealing in wood, then the wood-dealer is not a workman within the meaning of the Truck Act.

A substantial part of the respondent's claim centred around a credit to him of $1,200 in the company's books of account. While that sum was undoubtedly owing him on 18th April, 1934, the date

of the entry, yet, as will now be shown, the books of the company establish beyond reasonable doubt it was not due for wages, and was not so entered there. That documentary evidence, together with the surrounding circumstances, does not permit the inference that the respondent was employed to do manual labour as his real and substantial business. That evidence points rather to the conclusion he was employed as a company officer closely connected with the main promoter of the enterprise to supervise work generally in the interests of the company even though that included manual labour in the course of the production and marketing of peat.

On 18th April, 1934, the company books contain a debit entry "Development of markets, tests, equipment, etc., $4,498.26." That sum is there shown to comprise a debit of $1,200 to the respondent and a debit of $3,298.26 to his father. The $1,200 item was carried forward as a credit to the respondent's account. When this latter account was copied into the statement of claim the item of $1,200 was described as "arrears of wages," as if it were so shown in the company's books. But at the opening of the trial respondent's counsel readily admitted it was not so, and the words "arrears of wages" were stricken out of the statement of claim.

Examination of the respondent's account in the company's books as produced and as relied on in the statement of claim, establishes that the item of $1,200 could not be arrears of wages or salary. As only eleven months had elapsed since the formation of the company, any salary or wage arrears could not exceed $1,100 on the material date 18th April, 1934. Again the respondent is there credited with two prior payments of $29.50 and $96.75 ($100) respectively, so that arrears of wages or salary could not on 18th April, 1934, have exceeded $970.50 in any event. This seems to have escaped the learned judge in giving judgment on 30th June, for on further argument in September he reduced the amount of the judgment by that difference. But the significance of that difference does not appear to have been brought to his notice.

The entry of $1,200 cannot be changed or adjusted without

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also changing the original entry of $4,498.26 from which it originated. No attempt was made to change that original entry, nor was it suggested by anyone that it was incorrect. To assume —as the adjustment in the judgment did—that $970.50 of that credit of $1,200 was wages for manual labour, is an unwarrantable assumption, since the acceptance of the unquestioned original entry of $4,498.26 leaves no foundation for it, and on the contrary, compels the inference the respondent's employment extended far beyond mere manual labour. It might have been properly inferred perhaps that $970.50 of the $1,200 was for arrears of salary in his general employment on behalf of the company, but it would then immediately follow he could not be a "workman" within the meaning of the Truck Act.

The credit entry of $1,200 as made was not questioned and should have been so accepted without adjustment in the Court below. It should be clear that it could not be for arrears of wages, but did represent, as the company's books show it to be, moneys allocated to the respondent for "development of markets, tests, equipment, etc." in the sum of $1,200, in the same way as his father was credited with $3,298.26 for similar services. In these circumstances the permissible inference that some portion of the $1,200 related to arrears of salary under his contract so widens the terms of his employment that any claim as a "workman" under the Truck Act, *supra,* is necessarily excluded.

In this respect also it appears from a letter written by his father to intending investors in the company, that this sum of $4,498.26 was described by his father as "advances by myself and son, W. H. Arnett, and are to be issued in stock." When the respondent was asked

> Can you understand your father making that statement to people about to invest in this company, if you had an unpaid claim for a considerable sum of wages as a labourer?

his answer does not lend any support to the claim he advanced, for he said:

> Let me see the date of this thing. Yes, he might. I might have been familiar with some of the details which are now rather distant. I don't recall all the details. I know I have not seen that particular letter.

And he admitted also he knew at that time (before he accepted the eighteen shares) that labourers could not be paid their wages

in shares under the Truck Act as the company had encountered that problem previously in the case of one Westby.

In my view, with respect, the books of the company as written up when the respondent was a director and secretary, coupled with the nature of his association with the company in the light of the existing circumstances lead properly to the conclusion that the services for which he was paid $100 per month, extended far beyond his employment merely as a manual labourer. His real and substantial occupation at the material times herein, was that of a supervising company official, even though he did a great deal of manual labour also in that capacity. I find nothing in *Glasgow* v. *Independent Co.*, [1901] 2 I.R. 278, at 305, or in *Smith* v. *Associated Omnibus Company*, [1907] 1 K.B. 916, to negative this conclusion. As Lord Shand expressed it in *Hewlett* v. *Allen & Sons*, [1894] A.C. 383, at 396 the impugned agreement in the recited circumstances was not

> substantially within the mischief which that Act [Truck Act] was intended to remedy, or within the spirit of the statute as striking against the evil which had been in existence at the time when it was passed.

I would allow the appeal accordingly.

McDONALD, J.A.: The respondent sued for wages and relied upon the provisions of the Truck Act. The question of whether or not respondent was a workman within the meaning of section 2 of the Act was a question of fact. There was ample evidence to justify the learned trial judge in finding that respondent was such a workman, and that the wages in question had been actually earned in the respondent's capacity as a workman. The defence was that respondent had received and held for some years shares in the appellant company in payment of such wages and had voted as a shareholder and further that respondent was a director of the company and also its secretary. By an amendment to the Truck Act passed in 1935, being chapter 82 of the statutes of that year, an employer is prohibited from deducting from a workman's wages any sum on account of the purchase or subscription price of any stock or shares in any corporation or company, and every payment made by the issue of such shares is declared to be illegal, null and void. Every contract made in contraven-

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tion of the Act is also declared to be illegal, null and void, and the workman is entitled to recover his wages in lawful money of Canada, notwithstanding any such contract.

It is difficult to conceive of language which could more clearly express the will of the Legislature and the argument presented to us that the workman, having received the shares, is estopped, would seem to be in direct contravention of one of the main purposes of the Act.

The same may be said of the argument that the employer may set off the par value of the shares in answer to the workman's claim for his wages.

Cases such as *Williams* v. *North's Navigation Collieries (1889) Limited,* [1904] 2 K.B. 44 and *Hewlett* v. *Allen & Sons,* [1892] 2 Q.B. 662; [1894] A.C. 383 have no application to the facts of the present case. In the former case the deductions which were made were applied on account of a judgment debt owing by the workman to his employer, and there was no prohibition in the English Truck Act against the making of such deduction. In the latter case the deductions had been made pursuant to the rules of the employer as payment for sick benefits, and the workman had acquiesced in the payments by the employer into the sick fund and the deduction thereof from the wages payable. Again there was no statutory prohibition of such dealings. Neither case is of any assistance here where we have to deal with the plain simple language of the statute.

I would dismiss the appeal with costs here and below.

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

Solicitor for appellant: *A. H. Douglas.*
Solicitors for respondent: *Cassady & Lewis.*

GUERARD AND GUERARD v. RODGERS AND RODGERS.

S. C.
1941
Nov. 27.

Motor-vehicles—Collision—Negligence—Passengers paying part of expenses of trip—Injury to—Liability—Section 74B of Motor-vehicle Act—Effect of—R.S.B.C. 1936, Cap. 195, Sec. 74B.

Section 74B of the Motor-vehicle Act provides that "No action shall lie against either the owner or the driver of a motor-vehicle by a person who is carried as a passenger in that motor-vehicle, . . . , for any injury, loss, or damage sustained by such person . . . by reason of the operation of that motor-vehicle by the driver thereof while such person is a passenger on or is entering or alighting from that motor-vehicle; but the provisions of this section shall not relieve:—(*a.*) Any person transporting a passenger for hire or gain; . . ."

The plaintiffs were carried as passengers in the defendants' car and were injured in an accident arising from the negligence of the female defendant, who was driving the car. Before starting on the trip the parties had agreed that the plaintiffs would pay part of the cost of the gasoline and part of the other expenses incurred. In an action for damages, the plaintiffs claimed that the above section did not apply because they were being "transported for hire or gain" in the defendants' car.

Held, that the above section applied to the plaintiffs. The mere fact that they had made arrangements with the defendants to pay part of the expenses of the trip did not make them "passengers transported for hire or gain" and their action was barred by said section.

Shaw et al. v. *McNay et al.*, [1939] O.R. 368, followed.

ACTION for damages resulting from a collision between automobiles owing to the alleged negligence of the defendant, Mrs. Inez Rodgers, while the plaintiffs were passengers in defendants' car. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 27th of November, 1941.

Fraser, K.C., for plaintiffs.

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

FISHER, J.: In this matter I will first make my findings in regard to negligence.

Reference might be made to the case of *McMillan* v. *Murray*, [1935] S.C.R. 572, at 574, where Duff, C.J. says that the appellant in that case had shown that he

had not failed in that standard of care, skill and judgment which can fairly and properly be required of the driver of a motor vehicle.

In this case I would hold that the defendant driver, Mrs. Inez

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Rodgers, failed in that standard of care, skill, and judgment which can fairly and properly be required of the driver of a motor-car.

One has to have in mind the circumstances existing here at the time of the accident. It was raining. About half a mile before the scene of the accident there was a sign reading: "Caution: Slippery when wet." Under those circumstances caution was required. There is a preponderance of evidence and I find that at the time of the accident the driver of the car was going at about 40 miles an hour. That was too fast under the circumstances then existing and the defendant Inez Rodgers was guilty of negligence in driving too fast in the existing circumstances, and in my view that negligence caused the skidding and the accident. Apparently I am asked to make a finding that there was some other negligence on the part of either or both of the defendants after the skidding took place, but I am inclined to the view that it is difficult to know just what one should do when a car begins to skid, and I am not prepared to find that there was other negligence after the skidding started. My finding is that the excessive speed or the negligence referred to was the cause of the accident to the plaintiffs, the car going in the ditch and doing serious damage to the female plaintiff.

I have considered the submission of Mr. *Du Moulin* on behalf of the defendants relying on the defence of *volens*, but I would not find here that either of the plaintiffs, with full knowledge of the nature and extent of the risk, agreed to incur it, so that in my view this defence cannot be relied upon.

On the question of damages I would say, in case a higher Court may take a different view of this matter, that, if I had to assess the damages, then I would allow the plaintiff Mr. Guerard $100 general damages and the special damages as they appear, I think, on Exhibit 6, only $20 should be added as Dr. Cannon's bill, and I would eliminate the last two items with regard to the plumbing and repairs.

With regard to the general damages of Mrs. Guerard, I would allow her $3,500.

Now I come to the main defence of the defendants, and this

involves interpretation of section 3 of the Motor-vehicle Act Amendment Act, 1938, B.C. Stats. 1938, Cap. 42, or 74B of the original Act as it now stands. This section has apparently not been previously considered by the Courts of this Province. However, I have had the assistance of certain cases cited on behalf of the defendants from the California and Ohio Courts, *viz.*, *McCann* v. *Hoffman* (1937), 70 P. (2d) 909; *Starkweather* v. *Hession* (1937), 73 P. (2d) 247; *Stephen* v. *Spaulding* (1939), 89 P. (2d) 683; *Voelkl* v. *Latin* (1938), 16 N.E. (2d) 519; and I have an Ontario case cited, a decision by Godfrey, J. in *Shaw et al.* v. *McNay et al.*, [1939] 3 D.L.R. 656, at 659, and I have to have in mind, as I do, that the statutes of California and Ohio and Ontario are different, and I have tried to keep that in mind, although I think some help may be received from a consideration of the Ontario case and the American cases cited. For example, in the *McCann* v. *Hoffman* case the Court states that, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given, and the American cases seem to consider in that respect what was the motivating influence for furnishing the transportation. Then I refer to a case in our own Courts, *Bampton* v. *Regem*, [1932] 4 D.L.R. 209, especially at p. 215. There again I have to have in mind, as I do, that the section being there interpreted was a section of the Criminal Code in which it may be suggested, as is suggested by Mr. *Fraser* on behalf of the plaintiffs, that *mens rea* was involved, and yet I find some help in that case, dealing as it does with subsection (*a*) of section 226 of the Criminal Code, reading in part as follows: "a house, room or place kept by any person for gain," and I have in this statute before me now to interpret the expression "any person transporting any passenger for hire or gain," and Duff, J., as he then was, at p. 217 said:

> No doubt where it is shown that gain is the real object of the keeping of the place, you have a case within s.s. (*a*).

It seems to me that I have to ask myself in this case, what was the real object of the defendant Mr. Rodgers in transporting the plaintiffs, and then come back to make a finding as to whether or

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not the defendant was transporting the plaintiffs in this case for hire or gain.

Such being the issue before me on this phase of the matter, I might say that during the course of the argument, in order to shorten it somewhat, I indicated that I would find the plaintiff Mr. Guerard a credible witness, and I accept his evidence as to what was said between himself and the defendant Mr. Rodgers in his barber shop at Kelowna before the trip began as substantially correct, and also his account of what was said between him and the defendant Mrs. Rodgers over the telephone before the trip started, and having said that, I have to say that I think his evidence at the trial is substantially the same as his evidence given on the examination for discovery, a portion of which was put in. I accept his account of what was said or what occurred between himself and Mr. Rodgers where he is speaking in answer to questions 14 to 27 inclusive, reading as follows: [after setting out said questions and answers and others relative to sharing the expenses of the trip the learned judge continued].

Then, to make my findings of fact clear, I think I should say with regard to what money was paid by Mr. Guerard, I would accept his evidence, except that I think he is mistaken as to any further lunch after the lunch on the second day, which took place at or near Hope. I think the preponderance of evidence is, and I would find, that there was no further payment in the afternoon; but I only make that finding in order that it may be clear what my findings are. To my mind that is not very material.

Said section 74B of the Motor-vehicle Act reads as follows: [after setting out the section the learned judge continued].

I have followed the argument and cases cited and my view is that, if I were to adopt the submission of Mr. *Fraser* on behalf of the plaintiffs in this case, even on my findings as indicated, then the intention of the Legislature would be defeated. I find that the real object of the defendants in transporting the plaintiffs was not gain, and that neither of the defendants was transporting the plaintiffs, or either of them, for hire or gain, and, although I have had it in mind that the wording of the Ontario statute is different, still I find it somewhat helpful to note what was said

in the case of *Shaw et al.* v. *McNay et al.* to which I have referred, especially at p. 659—I would like to read the paragraph, although, as I have said, even while reading it and noting what Godfrey, J. said, I have it in mind that our statute does not use the word "business" as the Ontario statute does. As Godfrey, J. said in the *Shaw* case, so I say in this case, that I do not think the Legislature of our Province intended to impose liability on the owner or driver of a motor-car who on an isolated occasion carries a passenger who, as in this case, merely paid a part of the expense of its operation, and, in order that it may be clear, that is my view even where there has been an arrangement, as here, between the parties as set out in the passages which I read from the discovery, questions 14 to 17. Godfrey, J. goes on in this *Shaw* case (p. 372):

> The plaintiffs had agreed to pay the cost of half the gasoline used on the trip. That certainly could not be held to be compensation for the services rendered by the defendant.

In this case, upon my findings, I would say, as I think I have already indicated, that notwithstanding the fact that some money was paid as stated, by the plaintiffs, and accepted by the defendant Mr. Rodgers, and notwithstanding the fact that there was an agreement or arrangement such as I have found, nevertheless my finding is as I have indicated, that neither of the defendants was transporting the plaintiffs, or either of them, for hire or gain, and I hold that 74B bars the right of the plaintiffs to bring this action and makes it necessary that I should dismiss this action, as I do.

Action dismissed.

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Carrier—Airways company—Carrier of passengers and baggage—Forced landing—Negligence—Injury to passengers and loss of baggage—Special conditions limiting liability—Can. Stats. 1938, Cap. 53, Secs. 25 and 33.

The plaintiffs took passage by the defendant's aeroplane from Vancouver to Zeballos. During the flight a fire started on board, forcing the plane to land on the water near Gabriola Island. The plaintiffs lost their baggage and were severely injured. The tickets issued by the defendant to each of the plaintiffs were expressed to be subject to the conditions that the defendant should in no case be liable to the passenger for loss or damage to the person or property of such passenger, whether the injury, loss or damage be caused by negligence, default or misconduct of the defendant, its servants or agents or otherwise whatsoever. These conditions were signed by each of the plaintiffs on his respective ticket. It was held on the trial that the disaster was due to the negligent operation of the aeroplane, that the defendant could only operate under the licence obtained under The Transport Act, 1938, and at the scheduled fare of $25, and that the fare being established under the statutory regulations the defendant cannot attach conditions to the contract of carriage which abolish its liability, at least not without a new and valuable consideration, and there being no such consideration the plaintiffs were entitled to recover.

Held, on appeal, reversing the decision of SIDNEY SMITH, J. (MCQUARRIE, J.A. dissenting), that as far as The Transport Act, 1938, is concerned, the defendant has complied with it and is within its rights in issuing its special tickets. There is no obstacle raised by said Act to the defendant relying on its special contract which relieves it from liability.

Clarke v. *West Ham Corporation*, [1909] 2 K.B. 858, not followed.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 25th of June, 1941 (reported, 56 B.C. 401), in an action for damages resulting from the forced landing of the defendant's aeroplane, the plaintiffs being passengers thereon. The defendant company was incorporated under the Companies Act of British Columbia. Under the Aeronautics Act and Air Regulations it obtained a licence to operate a scheduled air transport service over the route Vancouver-Zeballos. Pursuant to the provisions of The Transport Act, 1938, it was granted a licence to transport passengers and goods by aircraft over the same route. The plaintiffs booked their passage by the defendant's aeroplane on a trip from Vancouver to Zeballos, leaving Vancouver on the

morning of the 29th of November, 1940. During the passage a fire occurred on board, forcing it to land on the surface of the water near Gabriola Island. In consequence of the fire and the forced landing the plaintiffs lost their baggage and were severely injured. On the trial it was held the plaintiffs were entitled to recover for the loss of baggage and for the injuries sustained.

The appeal was argued at Vancouver on the 5th to the 7th and the 10th to the 13th of November, 1941, before MCQUARRIE, SLOAN and MCDONALD, JJ.A.

Tysoe, for appellant: The contracts of carriage between the plaintiffs and defendant were contracts to carry on the terms and conditions on the backs of the tickets which excluded the defendant's liability for negligence: see *Thompson* v. *L.M. & S. Ry. Co.,* [1930] 1 K.B. 41, at p. 47; *Grand Trunk Railway Company of Canada* v. *Robinson,* [1915] A.C. 740, at pp. 747-8. The Transport Act, 1938, authorizes the making of contracts of carriage by the defendant, relieving it from liability for negligence. The Railway Act is *pari materia* with The Transport Act, 1938, and is of benefit for ascertaining the meaning of The Transport Act, 1938: see Craies's Statute Law, 4th Ed., 124; *Rex* v. *Loxdale* (1758), 1 Burr. 445, at 447; 97 E.R. 394, at 395-6. The Transport Act, 1938, is modelled after the Railway Act. The deliberate omission from The Transport Act, 1938, of any section similar to sections 312 (7) and 348 of the Railway Act is significant: see Craies's Statute Law, 4th Ed., 133; *Hyde* v. *Johnson* (1836), 5 L.J.C.P. 291; *Tame* v. *Grand Junction Canal* (1856), 11 Ex. 785; *The Queen* v. *Price* (1871), L.R. 6 Q.B. 411, at 416. The case of *Clarke* v. *West Ham Corporation,* [1909] 2 K.B. 858, relied on by the plaintiffs, was based on a special statute and has no application whatever in determining the rights of carriers under The Transport Act, 1938. There is no evidence that the defendant is a common carrier of passengers or goods: see *G.N. Ry. Co.* v. *L.E.P. Transport and Depository, Ld.,* [1922] 2 K.B. 742; Leslie's Law of Transport by Railway, 7 and 452; Macnamara's Law of Carriers by Land, 2nd Ed., p. 11, sec. 19; *Dickson* v. *Great Northern Railway Co.* (1886), 18 Q.B.D. 176. A common carrier, unless prevented by statute,

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can by contract relieve himself from liability for negligence: see *Peek* v. *The North Staffordshire Railway Company* (1863), 32 L.J.Q.B. 241, at pp. 245-50 and cases there cited; *Shaw* v. *Great Western Railway Co.*, [1894] 1 Q.B. 373, at p. 380; *G.N. Ry. Co.* v. *L.E.P. Transport and Depository Ld.*, [1922] 2 K.B. 742, at pp. 752, 754, 765, 766, 771. These cases were not referred to the Court in *Clarke* v. *West Ham Corporation*. That case was wrongly decided. If the duty exists it is only in the case where the passenger pays the maximum toll. The evidence shows he paid a lower toll than the maximum. The toll paid was that set out in a special tariff which is lower than the toll in a standard tariff which The Transport Act, 1938, says must be filed and approved by the Board. It must be assumed the defendant obeyed the statute: see Powell on Evidence, 10th Ed., 348; *Powell* v. *Milburn* (1772), 3 Wils. K.B. 355, at 366; 95 E.R. 1097, at 1103; *Sissons* v. *Dixon* (1826), 5 B. & C. 758, at p. 759; *The King* v. *Hawkins* (1808), 10 East 211; *Wright* v. *Skinner* (1866), 17 U.C.C.P. 317, at p. 332; *Richards* v. *Verrinder* (1912), 17 B.C. 114, at p. 122. On the holding that the conditions of the contract of carriage are void unless the plaintiffs are given an option of travelling without such conditions, there was no evidence of this, and it was not pleaded: see *Marleau* v. *The Peoples Gas Supply Co. Ltd.*, [1939] O.W.N. 367. There are many recent English cases where passengers have travelled at cheap rates subject to conditions which relieved the railway companies from liability for negligence. The Transport Act, 1938, leaves a licensee free to make any contract it likes with passengers unless the Board of Transport Commissioners interferes.

Paul Murphy, for respondents: The defendant is a common carrier of passengers by air. The plaintiff relies on *Clarke* v. *West Ham Corporation*, [1909] 2 K.B. 858. The chief attack on this case was that it was wrongly decided. It is the duty of a common carrier to carry anyone who offers himself for carriage, is ready to pay the fare and is not objectionable. Also it is their duty to take all due care and to carry safely as far as reasonable forethought can attain that end. The *status* of common carriers is established in Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 60, par. 89; *Lane* v. *Sir Robert Cotton* (1701), 12 Mod. 472,

at p. 484; *Ker* v. *Mountain* (1793), 2 Esp. 27; *Bretherton* v. *Wood* (1821), 6 Moore 141; *Pozzi* v. *Shipton* (1838), 8 A. & E. 963; *Palmer* v. *Grand Junction Railway Co.* (1839), 4 M. & W. 749; *Carpue* v. *London Railway Co.* (1844), 5 Q.B. 747; *Benett* v. *Peninsular Steamboat Co.* (1848), 6 C.B. 775; *Johnson* v. *Midland Ry. Co.* (1849), 4 Ex. 367, at p. 372; *Marshall* v. *Matson* (1867), 15 L.T. 514; *Readhead* v. *Midland Railway Co.* (1869), L.R. 4 Q.B. 379; *Sutherland* v. *The Great Western Railway Co.* (1858), 7 U.C.C.P. 409, at p. 414; *Pitcaithly* v. *Thacker* (1903), 23 N.Z.L.R. 783; *Kenny* v. *Canadian Pacific Ry. Co.* (1902), 5 Terr. L.R. 420, at p. 425; *British Columbia Electric Rway. Co.* v. *Wilkinson* (1911), 45 S.C.R. 263, at 268; *Baker* v. *Ellison,* [1914] 2 K.B. 762; *Bradford Corporation* v. *Myers,* [1916] 1 A.C. 242, at p. 255; Macnamara's Law of Carriers by Land, 2nd Ed., 535; 1 Sm. L.C., 13th Ed., 213; Shirley's Leading Cases in the Common Law, 11th Ed., 308. The existence of a common carrier of passengers is recognized and is the foundation of the decision: see *Ansell* v. *Waterhouse* (1817), 18 R.R. 413; *Austin* v. *Great Western Railway Co.* (1867), L.R. 2 Q.B. 442; *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 49 L.J.Q.B. 361; *Jennings* v. *Grand Trunk R.W. Co.* (1887), 15 A.R. 477, at 484; *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.,* [1895] 1 Q.B. 134; *Kelly* v. *Metropolitan Railway Co., ib.* 944; *Canadian Pacific Railway Co.* v. *Pyne* (1919), 48 D.L.R. 243, at 244; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213, at 231; *Fosbroke-Hobbes* v. *Airwork, Limited* (1936), 53 T.L.R. 254; *Pearson* v. *Vintners Ltd. and Chapman* (1939), 53 B.C. 397. The fare of $25 is fixed by statute and could not be varied. No consideration existed for the plaintiffs' promises: see *Fleming* v. *Bank of New Zealand,* [1900] A.C. 577. The baggage is not carried gratuitously but for reward, it is included in the fare paid by the passenger: see *Great Western Railway Co.* v. *Bunch* (1888), 13 App. Cas. 31; *Wilkinson* v. *Lancashire and Yorkshire Railway,* [1907] 2 K.B. 222; *Vosper* v. *Great Western Ry. Co.,* [1928] 1 K.B. 340; Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 12, par. 16. The defendant could not impose con-

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ditions inconsistent with its duty to carry as a common carrier: see *Sutcliffe* v. *Great Western Railway,* [1910] 1 K.B. 478, at p. 500; 10 C.J. 713, note 64. A promise to do what one is legally bound to do is not consideration: see Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 141, par. 200. Under The Transport Act, 1938, the legal consequences of their statutory duty are (1) to make illegal the contract relied upon because the only consideration flowing to each plaintiff was their right to be carried in fulfilment of the statutory duty, and (2) that the statutory duty could not be abolished by the imposition of conditions of carriage having that effect. The defendant was not at liberty to refuse to take anyone except upon such conditions as it thought fit to impose: see *Dickson* v. *Great Northern Railway Co.* (1886), 18 Q.B.D. 176. As to the plaintiffs' claim for loss of baggage the company is a common carrier and as such is insurer for its safety: see Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 53, par. 80, and p. 12, par. 16; *Richardson, Spence & Co. and "Lord Gough" Steamship Company* v. *Rowntree,* [1894] A.C. 217; *Henderson* v. *Stevenson* (1875), L.R. 2 H.L. (Sc.) 470; *Thompson* v. *L.M. & S. Ry. Co.,* [1930] 1 K.B. 41. Section 348 of the Railway Act, R.S.C. 1927, Cap. 170, applies to the defendant company: see *Grand Trunk Railway Company of Canada* v. *Robinson,* [1915] A.C. 740; *Sherlock* v. *The Grand Trunk Railway Co.* (1921), 62 S.C.R. 328; *Burrard Inlet Tunnel & Bridge Co.* v. *The "Eurana,"* [1931] 1 W.W.R. 325. There were two contracts: (1) The sale and purchase of the right to travel from Vancouver to Zeballos for a fixed charge; (2) to abolish the defendant's liability for negligence. The release constitutes an independent contract, covering not only the release of liability but also the obligation imposed upon each plaintiff to indemnify the defendant, and is without consideration. After the accident the company instructed the doctor to do everything possible for the plaintiffs. Their liability is admitted: see *Maclaine* v. *Gatty,* [1921] 1 A.C. 376, at p. 386; Halsbury's Laws of England, 2nd Ed., Vol. 13, p. 400, par. 452; *Carr* v. *The London and North Western Railway Company* (1875), 44 L.J.C.P. 109; *Fraser* v. *Driscoll* (1916), 9 B.W.C.C. 264; *Dutton* v. *Sneyd Bycars*

Company, Ld., [1920] 1 K.B. 414; *The City of Montreal* v. *Bradley*, [1927] S.C.R. 279; Everest & Strode on Estoppel, 5.

Tysoe, in reply: A special contract made by a common carrier does not require a new consideration: see cases referred to by Blackburn, J. in *Peek* v. *North Staffordshire Railway Company*, *supra*, and *Hamilton* v. *The Grand Trunk Railway Co.* (1864), 23 U.C.Q.B. 601; *Bates* v. *The Great Western Railway Co.* (1865), 24 U.C.Q.B. 544; *Spettigue* v. *Great Western Railway Co.* (1865), 15 U.C.C.P. 315; *Dodson* v. *Grand Trunk Railway Co.* (1871), 8 N.S.R. 405. In any event there was a new consideration. There was no admission of liability: see *Dame Botara* v. *Montreal Locomotive Works, Limited* (1917), 54 Que. S.C. 359; *Agnew* v. *Hamilton* (1932), 46 B.C. 147, at p. 151.

Cur. adv. vult.

13th January, 1942.

MCDONALD, C.J.B.C.: This appeal raises several important points of law. It is an appeal by the defendant against a judgment awarding damages to each of three plaintiffs.

The plaintiffs sued in respect of personal injuries and loss of luggage caused by the defendant's negligence while they were passengers in the defendant's aeroplane travelling from Vancouver to Zeballos. The plaintiffs recovered fairly large damages, but neither the *quantum* of damages nor the negligence is questioned in this appeal. The defendant's whole case here is, as it was below, that the action was barred by special contract, the plaintiffs' tickets each containing a term that passengers travel at their own risk entirely. The plaintiffs all signed such tickets, and the evidence shows that they knew of this term and understood it. The trial judge has held that the term did not bind them.

The case set up on the pleadings showed little of the substantial issues on which it was decided. The statement of claim simply alleged that the plaintiffs were passengers in defendant's plane and were injured through defendant's negligence. The defendant set up the special tickets on which the plaintiffs travelled, and by which the defendant contracted out of liability. The plaintiffs' reply answered that the defendant was a common carrier and that the plaintiffs received no consideration for agreeing to any

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conditions of carriage. The defendant rejoined that if it was a common carrier, which it denied, it did not contract as such.

The case made by the plaintiffs at the trial was that the defendant had filed with the Transport Commission a tariff of charges in which the fare from Vancouver to Zeballos was $25, the fare paid by the plaintiffs, that no other tariff was in evidence, that the defendant could not annex conditions of carriage if it charged the full amount of the tariff, that the defendant never offered the plaintiffs any option to travel unconditionally at any price, and that a conditional ticket so sold was invalid. The trial judge, following the decision in *Clarke* v. *West Ham Corporation,* [1909] 2 K.B. 858 accepted all these contentions. There is certainly no evidence that the defendant offered the plaintiffs more than one rate, or informed them that they could travel unconditionally at any rate; and what little evidence there is goes the other way. There is, however, some evidence (which I shall refer to later) that a higher tariff than that on which the plaintiffs were charged was on file with the Transport Commission, if this is material; but there is nothing to show that this was referred to when the tickets were sold, or even what this tariff contained.

I am not altogether satisfied that the plaintiffs were entitled to rely on all these matters without setting up at least some of them in their reply. However, the point of *onus* is a difficult one, and in my view of the substantive law it need not be decided.

As I understand it, the plaintiffs argue that the conditional tickets are invalid under the common law as expounded in *Clarke* v. *West Ham Corporation, supra,* but also that the Dominion Transport Act, 1938, and the necessary proceedings to be taken under it, do not permit of such conditional contracts of carriage. I shall deal with the latter point first.

I assume that The Transport Act, 1938, applies to this company, even when it is transporting between points both in the Province, no argument to the contrary having been advanced. No tariff of charges is contained in the Act, but by section 17 (1):

> Every licensee shall file a standard tariff or tariffs of tolls with the Board [of Transport Commissioners] for approval and may file such other tariff or tariffs as are authorized by this Part.

By section 19 a tariff when filed with and approved by the Board, must be followed until superseded by a new tariff. By section 20 there may be standard and special passenger tariffs. By section 21 standard tariffs shall specify maximum tolls to be charged on a mileage basis. By section 22 special tariffs shall specify tolls lower than the standard. No definition of "standard" tariffs, other than that they are maximum, is given. I see nothing in the Act to indicate that they must be unconditional; indeed, the intention that the Act conveys to my mind is that "standard" means "first-class." I have a distinct impression that the word has had that meaning in American railway parlance for many years. All the provisions in the Act relating to tariffs indicate to me that their primary purpose is to prevent discrimination between persons and between localities. It may be impractical to have first-class and second-class services on the same plane; but one plane may easily give higher-class service than another.

Section 26 of the Act indicates that a tariff filed with the Board is deemed to be approved unless the Board signifies disapproval. By a general order made 16th December, 1938, the Board announced that they intended to let air-transport carriers fix their own rates, subject to later adjustment or alteration. An amendment of 23rd March, 1938, required tariffs to set out specifically the conditions of service to each geographical point.

The defendant's licence is in evidence, but does not call for special comment. Exhibit 20, however, is a tariff of the defendant's charges, which is shown as having been filed with the "Transport Commission" (which evidently means the Board), and it states on its face that it is a "Special Passenger and Goods Tariff." It also contains the statement:

> All charges for passengers and goods . . . , governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd. C.T.C. No. 1 . . .

Exhibit 19 is headed "C.T.C. No. 1, Regulations for Carriage," and is shown to have been filed with the Transport Commission, which identifies it as the regulations referred to in Exhibit 20. These regulations begin:

> PASSENGERS
>
> 1. Liability. These rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the company's passenger tickets.

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The tariff of charges gives the passenger rate from Vancouver to Zeballos at $25, which is the amount each plaintiff paid.

Since this tariff is distinctly labelled "Special" on its face, and since section 22 of the Act requires a special tariff to be lower than a standard tariff, and section 17 requires a standard tariff to be filed by all, it seems to be clear that we have here *prima facie* evidence that the defendant had at least two tariffs in effect. There may be no presumption that a private party has obeyed the law, but I think there is a presumption that the Transport Board has. The standard tariff would necessarily be higher than the special tariff, according to which the plaintiffs were charged. The Act obviously contemplates that tickets under the special tariff shall be subject to disadvantages, and the result of the Commission's accepting the tariff and regulations is, I think, that it assents to the defendant's annexing whatever disadvantages it sees fit, so far as the Board can do so.

The result is that, so far as The Transport Act, 1938, is concerned, the defendant has complied with it and is within its rights in issuing its special tickets. There is no provision in this Act similar to section 348 of the Dominion Railway Act, which allows no special contracts unless the particular form has been approved by the Railway Commission. Nor is there any provision like that in the English Railway and Canal Traffic Act, 1854, which provides that all conditions imposed by carriers shall be void unless "just and reasonable." I can see, therefore, no obstacle raised by The Transport Act, 1938, to the defendant's relying on its special contract which relieves it from liability.

That, however, by no means ends the matter, for the case of *Clarke* v. *West Ham Corporation, supra,* held that even at common law a common carrier could not impose limiting conditions, or could impose them only under circumstances not here shown to exist, *viz.,* where a higher unconditional rate had not only been fixed, but had been offered to the customer as an alternative.

SIDNEY SMITH, J. put his judgment, which follows this case, on the narrower ground; but of course the plaintiffs are also entitled to support their judgment on the wider ground if they can. Either ground requires that the defendant be shown to be

a common carrier. I am far from convinced that this is shown. The trial judge held that section 25 of The Transport Act, 1938, makes the defendant a common carrier. By section 25 (1) every licensee shall, according to the capacity of its aircraft, "afford to all persons and companies all reasonable and proper facilities." And by section 25 (2) such licensee must not discriminate. The effect of this section might well be doubtful if it were new legislation. Actually it is not: its peculiar language is borrowed from the English Railway and Canal Traffic Act, 1854, Sec. 2. It so happens that there is no lack of decisions to construe it by, and I think they preclude the construction which the learned judge put on section 25 in this case. The cases of *Great Western Railway Co.* v. *Railway Commissioners* (1881), 7 Q.B.D. 182 and *The Queen* v. *Railway Commissioners and Distington Iron Company* (1889), 22 Q.B.D. 642 show that both subsections were directed to preventing discrimination. The term "facilities" refers to opportunities of user, both of the carrier's stations and its planes. The section is not directed to charges at all; *ibid.* Finally, in *Dickson* v. *Great Northern Railway Co.* (1886), 18 Q.B.D. 176 we have it clearly laid down that the English section corresponding to our section 25 does not constitute a carrier a common carrier, but leaves it open to him to choose his own *status*: see particularly *ibid.* pp. 184, 185, *per* Lindley, L.J. The carrier in that case was held liable, but only on the ground that section 7 of the Act imposed liability whether he was a common carrier or not.

I think then that section 25 does not support the plaintiffs' case. Of course, it was still open to the plaintiffs to show otherwise that the defendant was a common carrier, *e.g.*, by showing its mode of catering to all. A certain amount of evidence of this sort was given, but none of it went to show that the defendant ever offered carriage other than the same conditional carriage that it offered the plaintiffs. I am not at all sure that the plaintiffs are not in the dilemma of having to admit either that the defendant, as a common carrier, was free to carry conditionally without giving any option, or that there was no evidence of its being a common carrier at all, if that course of dealing was

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inconsistent with its *status* as a common carrier. However, I do not come to any definite conclusion on that point.

Another point that causes me to doubt whether the defendant is a common carrier is that it is settled that any carrier may refuse that *status* by generally reserving to himself powers and discretions not owned by a common carrier, *e.g.*, the right to pick and choose the persons or goods that he will carry: see Halsbury's Laws of England, 2nd Ed., Vol. 4, p. 3. It is therefore of some importance to note that No. 3 of the regulations filed by the defendant with the Transport Board reserves the right to reject any passenger who, in the defendant's opinion, is incapable or objectionable. This reservation goes farther than any right inherent in a common carrier, who could only reject a passenger incapable or objectionable in fact, that is, in the opinion of a jury. The defendant reserves the right to be its own judge; and, on the principle stated, this reservation alone might well be held to prevent its becoming a common carrier.

However, even assuming in the plaintiffs' favour that the defendant was a common carrier, assuming in their favour all the facts found by the trial judge, assuming that they could raise these on the pleadings, I still think the appeal should be allowed, simply because the whole foundation for the judgment below is the decision in *Clarke* v. *West Ham Corporation, supra,* and, with all proper respect, I think that decision is bad law. Not only is its reasoning fallacious on its face, but to my mind it is fairly obvious that the decision is based on the false analogy of principles evolved in cases on section 7 of The Railway and Canal Traffic Act, 1854, decisions wholly inapplicable, and worse than inapplicable, because section 7 did not reproduce the common law, but was passed for the very purpose of changing it drastically.

It is perhaps significant that the decision has never since been judicially referred to, except once, on the minor point as to who is a common carrier. Similarly, nearly all the text-books ignore it, except on that point. Leslie on Transport by Railway, one of the few exceptions, considers that the case was wrongly decided: see pp. 500, 501. The last (3rd) edition of Macnamara

on Carriers accepts the decision without questioning it; but is is noteworthy that the 2nd edition, printed in 1908, the year before *Clarke* v. *West Ham Corporation, supra,* contains no statement of the law in harmony with that decision, *i.e.,* stating that a common carrier cannot limit his liability at common law; in fact it states the contrary quite confidently: see pp. 74 and 77.

Clarke v. *West Ham Corporation, supra,* to my mind, is more objectionable than a mere irrational innovation; it perverts law that was settled long ago; so well settled that it took a statute to alter it, even in a limited direction, *viz.,* as regards railway and canal traffic.

Hence I find it unnecessary to decide whether I would be justified in refusing to follow a decision of the English Court of Appeal merely because I thought it wrong; here I have a decision that is not only inconsistent with former decisions of equal or greater authority, it is also inconsistent with principles laid down in later cases by the same Court and by the Privy Council.

I shall consider the older decisions first. There is a famous summary of these in the advice given by Blackburn, J. to the House of Lords in *Peek* v. *North Staffordshire Railway Company* (1863), 10 H.L. Cas. 473, at 492 *et seq.* He pointed out that originally there was some doubt whether or not common carriers could limit their common-law liability by special contract, but that a large number of decisions up to 1854 established this right beyond question, however drastic or unreasonable the terms insisted on by the carrier. A good example of these decisions is *Carr* v. *Lancashire & Yorkshire Ry. Co.* (1852), 7 Ex. 707. That Blackburn, J.'s statement of the common law, so settled, is authoritative, can hardly be questioned. In the same *(Peek's)* case, Willes, J. concurred in his summary, and Lord Wensleydale at pp. 574 and 575 and Lord Chelmsford at p. 581, both stated that at common law a carrier could contract out of liability. In fact, until the decision in *Clarke* v. *West Ham Corporation, supra,* no one seems to have disputed this for at least 70 years or so. The law is well settled in the carrier's favour in Canada as in England: see *Bates* v. *The Great Western Railway Co.* (1865), 24 U.C.Q.B. 544; *Spettigue* v. *Great Western Railway Co.*

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(1865), 15 U.C.C.P. 315; and *Dodson* v. *Grand Trunk Railway Co.* (1871), 8 N.S.R. 405.

Moreover, until *Clarke* v. *West Ham Corporation, supra,* was decided no case ever suggested that at common law a common carrier's power to restrict his liability by contract was conditional on his offering any alternative terms. We shall see presently the origin of this idea.

The practice of common carriers contracting out of liability was carried to such lengths that the Legislature interfered: see Blackburn, J. in *Peek's* case (10 H.L. Cas.), at pp. 492 and 506. By The Railway and Canal Traffic Act, 1854, Sec. 7, it was enacted that all conditions in contracts of carriage by particular carriers, whether common carriers or not, should be void unless the Courts considered them just and reasonable. This Act had no application to passengers. Before long quite a body of case law grew up as to the effect of this Act. In *M'Manus* v. *Lancashire and Yorkshire Railway* (1859), 4 H. & N. 327, it was held that a contract giving the carrier complete immunity was unreasonable; in *Peek's* case, *supra,* less drastic terms were also held invalid for the same reason. In that case, however, Blackburn, J. said (10 H.L. Cas. at p. 512) that he thought that conditions of carriage otherwise too drastic, might well be upheld if the carrier, instead of insisting on them, offered them as an alternative and gave a special reduced rate or some other "advantage" to the customer. But this simply meant that this concession could influence the Court in holding the contract "just and reasonable" within section 7 of the Act of 1854, and later attempts to deduce that the question of offering an alternative or a special rate had a bearing on the validity of contracts, not under that section, show a clear misconception. If there can be any doubt of this, it is dispelled by the fact that other less drastic conditions have been held to be perfectly valid, although no alternative was offered, nor any reduced rate: see *Sutcliffe* v. *Great Western Railway,* [1910] 1 K.B. 478.

The decision in *Clarke* v. *West Ham Corporation, supra,* was not a decision on the Act of 1854; it dealt with passengers, not goods, and passengers on a tramway. It was based to some extent

on statute (a private Act), but this was held to have effect only to show that the defendant (a tramway company) must carry all comers. The Act also fixed a maximum fare, but since the fare charged the plaintiffs was less than the maximum, this provision had little bearing. The decision therefore stands as one on the supposed common-law disabilities of a common carrier. For the reason given, I feel quite at liberty to examine the reasoning in the decision. This may be summarized thus: the defendant is a common carrier; a common carrier must carry everyone; therefore, it must carry unconditionally. That seems to me an obvious *non sequitur*: the two things have no necessary connexion at all. Moreover, such reasoning seems to me to defeat itself. As I have said, a carrier may prevent his becoming a common carrier by refusing to do what a common carrier must, and if there were an inconsistency between conditional carriage and the *status* of a common carrier, then a carrier who sold only conditional tickets, as the defendant in *Clarke* v. *West Ham Corporation, supra,* did, would thereby take himself out of the class of common carriers. I do not say that this is the law; I think it is not, but it is the logical conclusion from the reasoning in that case, and I think reduces that reasoning to absurdity.

That earlier views as to a carrier's right to contract out of liability were not regarded as overruled by *Clarke* v. *West Ham Corporation, supra,* is shown by the Court of Appeal's views in *G.N. Ry. Co.* v. *L.E.P. Transport and Depository Ld.,* [1922] 2 K.B. 742. At p. 752 Bankes, L.J. said:

> The common carrier is a creation of the common law in the sense that his peculiar rights and obligations depend upon the common law. He comes into existence by his own volition and until Parliament clipped his wings he could limit his liability of his own volition.

And at p. 754:

> . . . , the elaborate review of the law by Blackburn, J. in his advice to the House of Lords in *Peek* v. *North Staffordshire Ry. Co.* supporting the view of Parke, B. in *Wyld* v. *Pickford* (1841), 8 M. & W. 443, and Maule, J. in *Crouch* v. *London and North Western Railway Co.* (1854), 14 C.B. 255, 293, seem to me to indicate plainly that a common carrier can limit his liability by contract while still retaining his common law character of common carrier.

Scrutton, L.J. at p. 766 said:

> Carriers very soon began to limit their liability as insurers under the

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custom of the realm. . . . Sometimes this limitation was imposed by a general notice; sometimes by a special contract.

At p. 771 Atkin, L.J. quotes Maule, J. in the *Crouch* case, *supra,* as follows:

> A common carrier who gives no notice limiting his responsibility, is an insurer; but, if he gives notice that he will contract only to a limited extent, and with respect to articles of a given value, he ceases to be an insurer beyond that, though in all other respects he remains a common carrier.

On the same page, referring to Blackburn, J.'s advice to the Lords in the *Peek* case, *supra,* he adds:

> It is an authoritative statement of the law and was accepted as such by the House of Lords in that case.

So much for the supposed general principle put forward in *Clarke v. West Ham Corporation, supra,* that a common carrier cannot contract out of liability. I next consider the more modest claim that such contracting-out is only valid if the contract provides for carrying at a lower rate than the maximum and the customer is given the option of unconditional carriage, though at a higher price. One would think, to read the reasoning of Lord Coleridge, J., the trial judge in *Clarke* v. *West Ham Corporation, supra,* that he had never heard of the decisions on the common law reviewed by Blackburn, J. in the *Peek* case; and the reasoning of the learned judges of the Court of Appeal, who, I surmise, were misled by counsel, suggests that they were unaware that the decisions following and based on section 7 of The Railway and Canal Traffic Act, 1854, were entirely at variance with the common law. This seems particularly clear from Farwell, L.J.'s judgment, though he relies on the unreasonableness of a carrier's offering customers only a conditional ticket, without option. As we have seen, it was settled before the Act of 1854 that the reasonableness of a carrier's terms is entirely irrelevant, and was only relevant after that date because the Act expressly made it so. But the Act had only a limited application; it applied only to goods, and not to passengers at all.

I think there is another indication that the decision in *Clarke* v. *West Ham Corporation, supra,* is based on the false analogy of decisions on section 7 of the Act of 1854. As Leslie on Transport by Railway, p. 501, referring to that case, says:

> The decision proceeds upon no other ground than that the carrier owes the passenger a duty which the contract does not express, and that the

carrier cannot rely upon the contract because it excludes that liability without consideration for so doing. It was not denied that there was consideration to support a contract, but the decision rests upon the assumption, and can rest on nothing else, that the Legislature, in imposing maximum charges, has correlated those charges with what may be called maximum or statutory liability.

Actually, Cozens-Hardy, M.R. alone referred to the question of consideration, and he in an oblique, negative way, at p. 875 of the report ([1909] 2 K.B.). But I think this reasoning is also implied in Kennedy, L.J.'s judgment though his language is vague. This idea that a separate "consideration" is necessary to make a limitation of liability binding, seems obviously to be due to misapprehension of the passage in Blackburn, J.'s advice to the Lords in *Peek's* case, *supra*. As I have mentioned, he pointed out (10 H.L. Cas. at p. 512) that drastic restrictions of liability may be upheld as "just and reasonable" under section 7 of the Act of 1854 if the carrier offers a customer "some additional advantage," such as a special reduced rate. Obviously, however, this additional benefit has nothing whatever to do with the question of consideration; its only bearing is on what restrictions are "just and reasonable," and since it is irrelevant whether restrictions are just and reasonable unless the contract comes under the Act of 1854, it is equally irrelevant whether the customer is offered "some additional advantage" or not. It seems to me a complete fallacy to say that when a person has a right to ask for an advantageous contract or to be carried without a contract, but he chooses to enter into a disadvantageous contract, there can be any question of *nudum pactum*. The principle still governs that the consideration for either party's obligations is the other party's obligations. The situation preceding the contract could at most go to adequacy of consideration, which is irrelevant.

Here I may again quote Leslie on Transport by Railway at p. 500:

> If a carrier is found in a particular case to be carrying under a special contract, it is immaterial, unless there be jurisdiction and cause to set the contract aside, to inquire what liability he would be under if he had not made a special contract. If he be a common carrier of passengers, no doubt a particular passenger may stand upon his strict rights when entering into the contract, and refuse to agree to any special contract at all. But if he

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does not so refuse, and the special contract is made, the nature and extent of his unasserted rights become immaterial. This is stated by Lord Haldane, L.C., with the utmost clearness in delivering the opinion of the Privy Council in *Grand Trunk Ry. of Canada* v. *Robinson*, [1915] A.C. 740, at p. 748) "It cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

The learned writer's remarks appeal to me, though I reserve the point whether a passenger can insist on being carried unconditionally, where a carrier has never published a tariff of unconditional charges. The passage from Lord Haldane's opinion seems to me clearly inconsistent with the reasoning in *Clarke* v. *West Ham Corporation, supra;* nor can the Privy Council's decision be explained away as a decision on a special form of contract authorized by statute. The Railway Act does make special forms invalid unless approved by the Railway Commission; but when approval is given, this merely has the effect of removing a statutory obstacle, and allowing the contract to have its common-law operation. The *Grand Trunk* case therefore is a decision on the common law; it is quite in harmony with the decisions quoted by Blackburn, J. in *Peek's* case and with the decisions on the carriage of passengers after 1854, the Act of that year only affecting goods: *cf., e.g., Hall* v. *North Eastern Railway Co.* (1875), L.R. 10 Q.B. 437.

No reference was made before us to the Carriers Act, R.S.B.C. 1936, Cap. 31. This purports to deal with goods only, and if it could apply to aeroplanes it would not affect this case, since section 6 clearly authorizes a carrier to contract out of liability.

I should perhaps refer briefly to the argument based on estoppel. An employee of the defendant is said to have represented that the defendant would defray the plaintiffs' hospital expenses. The evidence of this is unsatisfactory; but in any case I think it is clear that no estoppel can be created except by representation of a present fact, and that no representation as

to the future can have legal effect unless it amounts to a contract: *Jorden* v. *Money* (1854), 5 H.L. Cas. 185. It has not even been argued here that what was said constituted a contract; and in any event it is difficult to see what consideration there could be unless the plaintiffs released the defendant from its supposed liability. The plaintiffs' course in suing precludes them from taking that position.

I would allow the appeal.

McQUARRIE, J.A.: This case concerns an important phase of air transportation, and on the trial and before us occupied a good deal of time, I presume necessarily. The vital issue, however, practically narrows down to the one line of defence which deals with the conditions endorsed on the back of the tickets purchased by the respondents and definitely agreed to by them at the time of purchase, as evidenced by their several signatures at the foot or end thereof.

It is common ground that the respondents read and understood the nature and effect of the said conditions, and signed same freely and voluntarily, without reservation of any kind. The respondents' claim is for damages for personal injuries and loss of baggage, the *quantum* of which is not disputed by the appellant, and is based on the dangerous condition and negligent operation of the air machine provided by the appellant for their transportation. The negligence imputed to the appellant is set out in detail in paragraph 7 of the statement of claim, with the particulars there furnished. That negligence, being the cause of the disaster, is admitted by the appellant and was found as a matter of fact by the learned trial judge. By reference to said paragraph 7 of the statement of claim, it will be seen that the appellant provided for the transportation of the respondents a machine which was in a dangerous or faulty condition and reasonably likely to take fire, to the knowledge of the appellant, and without any intimation of such condition being known to the respondents, or any of them. It is well worth while to consider most carefully the negligence admitted by the appellant.

Paragraph 7 of the statement of claim reads as follows: [After setting out the paragraph his Lordship continued].

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Counsel for the appellant submits in effect that while everything alleged against it is true, there is no liability on the part of the appellant because it owed no duty to the respondents, and in any event, the release signed by the respondents as aforesaid absolves it from responsibility of any kind. That, to my mind, is a somewhat startling proposition.

I agree with the learned trial judge that on the admitted facts the conditions on the back of the tickets do not prevent the respondents from recovering the damages claimed and I agree with his reasons for judgment so far as they go. In my opinion, however, there is an even stronger ground for dismissing the appeal, although such ground was not pressed on us at the hearing by counsel for the respondents, and was not relied on by the trial judge in his judgment. That ground is open to the respondents under paragraph 7 of their statement of claim and the particulars there stated. I raised the point on the hearing and consequently counsel for the appellant will not be taken by surprise in finding it here. The ground that I shall endeavour to advance does not depend on whether *Clarke* v. *West Ham Corporation,* [1909] 2 K.B. 858 is bad law or not. In that connection, with due deference, I would hesitate to follow the lead of the Chief Justice in his positive declaration that it is bad law, and I think the trial judge was justified in following it because at the time he gave judgment so far as I can ascertain it had never been overruled. If it is to be overruled that should be done by another tribunal more intimately associated with its source. The ground to which I am referring does not depend on whether the appellant was a common carrier or not, and in dealing with it the question of estoppel is entirely irrelevant. It does not involve whether there was or should have been additional consideration, for the alleged release signed by the respondents, or whether two tariffs were filed with the Board by the appellant or only the one which was Exhibit 20 on the trial and is headed "Special Passenger and Goods Tariff," or the question whether the respondents at the time they applied for tickets should have been offered unconditional transportation or not. The ground for dismissing the appeal to which I refer is that the conditions

endorsed on the back of the tickets are not binding on the respondents for the reason that they undoubtedly signed said conditions on the implied warranty that the air machine to be provided for their transportation would be reasonably

> fit . . . as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage;

and not be a veritable death-trap as disclosed by the particulars set out in said paragraph 7.

I think it will be taken for granted that any person not mentally deficient, intending to make an air journey who knew enough of the true condition of the plane would not have considered for a moment travelling in it and certainly would not have signed the said conditions.

Commercial air transportation is a comparatively recent development and was entirely unknown to common law; hence we cannot look for many authorities relating to the subject. The words I have hereinbefore placed in quotation marks are taken from the judgment of the Court delivered by Parke, B. in *Dixon* v. *Sadler* (1839), 5 M. & W. 405, at p. 414. It is cited in Anson on Contracts, 17th Ed., 367. It is there coupled with the Marine Insurance Act, 1906, Sec. 39, which was "An Act to codify the Law relating to Marine Insurance." *Dixon* v. *Sadler* is also referred to in Leake on Contracts, 8th Ed., 287. I mention it only for the reason that I think the same principle is applicable here. It is well known that certain distinguished pioneers in the air navigation to whom much credit is due for the remarkable progress that has been made in commercial air transportation, with more experience in flying than in business or commercial matters, embarked on the idea of organizing air lines in many parts of Canada without the funds necessary for such a venture, and more or less on a shoestring basis, and on the strength of their flying reputations were allowed to carry on in air transportation of the general public. Of course they had to make arrangements with others who could furnish them with finances, and in consequence the control of their organizations was more or less given over by the flyers to others who did their best to carry on.

It is well known also that air machines cost a great deal of money, as do also their equipment, maintenance and necessary

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repairs. I am afraid the result was that some of them did not have suitable planes and were not able to keep even the ones they obtained in a safe condition. In that connection I am not reflecting in the least on any of the air pilots referred to, and in particular certainly not as to the notable pilot whose name the appellant company has adopted.

It is common knowledge also that the appellant, possibly on account of war conditions, is not now operating, and that Ginger Coote shortly after the outbreak of this war, went overseas and gave his services to the British Empire. Frankly, I do not think that he was to blame in any way for the conditions which prevailed at the time the respondents embarked on the ill-fated air journey with which we are concerned. It is fortunate that the control of such public utility companies has been given over to the Board of Transport Commissioners, but it may be that The Transport Act, 1938, together with the regulations and orders of the Board, require some checking up and strengthening, but that is, of course, a matter for the Government and not for us.

I am of opinion that section 25 (1) of The Transport Act, 1938, referred to by the Chief Justice, is strictly in line with the ground I have advanced, and consequently I shall not develop that ground further in this judgment. Said section 25 (1) provides that every licensee shall, according to the capacity of its aircraft, afford all reasonable and proper facilities which I think must mean that the air machines provided shall be reasonably fit to encounter the usual perils of the journey. Said section 25 (1) was placed before us by counsel for the respondents and was relied on by the learned trial judge in his judgment without extending its application in the way I have endeavoured to do here. The words "afford to all persons and companies all reasonable and proper facilities" cannot be confined to the prevention of discrimination because that matter is covered by section 25 (2)

As to the extent of fitness required, reference might well be made to Leslie's Law of Transport by Railway, 2nd Ed., 459, 460 and 461, but I do not think in view of the admission by the appellant hereinbefore mentioned, it could be suggested that the aircraft provided for the transportation of the respondents was in any respect fit to make the proposed journey.

For these reasons I must, with all deference, dissent from the judgment of the majority of the Court, and would dismiss the appeal.

SLOAN, J.A.: I would, with deference, allow the appeal. To appreciate the present relationship in law between the respondents as passengers and the appellant as a common carrier (and I assume it to be so for the purpose of this appeal) it is necessary, in my opinion, to turn back to those days when a carrier operated horse-drawn vehicles. He was an insurer of the goods he contracted to carry and, subject to certain exceptions, was liable for all loss or injury to the goods even when there was no negligence on his part and where, in fact, he had taken every reasonable care and precaution for their protection. He was not an insurer of his passengers: his liability to them was to take due care for their safety. There was and is nothing in the common law to prevent a consignor of goods and a common carrier from entering into special contracts in relation to the carrier's liability therefor, nor to limit the right of the carrier to carry his passengers upon such conditions as he might impose and they would accept.

When railways superseded the horse-drawn van and coach the carriage of goods and transportation of passengers by rail was regarded in law as subject to the general law of carriers, including the provisions of the Carriers Act, 1830, 2 Geo. IV. & 1 Will. IV. c. 68.

This Carriers Act had been passed to prevent carriers of goods from posting up of notices limiting liability except on payment of an additional sum for insurance, but the right of a common carrier to make a special contract with his consignor limiting his liability was not abrogated by the statute. Railway companies took advantage of this situation and protected themselves by special terms of their contract of carriage against loss to goods even if caused by their gross negligence.

This state of affairs led to the passage of The Railway and Canal Traffic Act, 1854, 17 & 18 Vict., c. 31. The general purpose of this statute was to restrict the right of the railway companies to contract themselves out of all liability for loss of or injury to goods occasioned by their negligence. Any special contract between a railway company and a consignor of goods

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had to be in writing, and, among other things, to contain only such terms and conditions in restriction of the companies' liability for negligence as should be adjudged by the Court to be just and reasonable. If the Court considered the conditions unjust and reasonable they were not binding upon the consignor.

Difficulties arose as to when a condition was "just and reasonable" and certain tests were adopted by the Court, as (I think) a convenient yard stick. If, for example, the consignor had the *bona fide* alternative offered to him of shipping his goods at a substantial advantage in rates upon condition that he relieved the company of its liability as a common carrier and he accepted, such condition of the special contract thereby created was held just and reasonable and the company protected.

Turning, however, to the responsibility of the common carrier to his passenger we find somewhat different considerations apply. The duty of the carrier to use care in the carriage of his passenger arises out of the contractual relationship created by the purchase of a ticket. The duty to take care exists, as well, quite independent of the contract. However, in the absence of statutory interference, any special condition of carriage contained in the contract governs the extent of the carrier's liability. The Carriers Act, 1830, and The Railway and Canal Traffic Act, 1854, related to carriage of goods and did not apply to special passenger contracts. In consequence it is difficult to understand why in *Clarke* v. *West Ham Corporation,* [1909] 2 K.B. 858 (relied upon by the trial judge herein), it was thought that a railway company was not entitled to limit its liability for negligence unless the passenger had the option of travelling for a higher fare without any special condition. That is the imposition of a restriction upon the common-law right of a person by contract to relieve his carrier from responsibility for negligence, a restriction for which can be found no sanction in any English statute of general application. The "alternative contract" test considered of value in determining if conditions limiting liability imposed by a special contract relating to the carriage of goods are just and reasonable and within the provisions of The Railway and Canal Traffic Act, 1854, should not, in my opinion with

deference, have been applied in *Clarke* v. *West Ham Corporation, supra,* to destroy a passenger contract not subject to the same statutory infirmity as one relating to the carriage of goods.

If then by common law a common carrier whether by coach, train, or aeroplane (and I see no essential difference in law between these different methods of conveyance in relation to the carrier's responsibility) may by a special term of his contract of carriage limit or supersede his common law liability to his passenger, it is necessary to see if any relevant Canadian statute has changed this state of the law so far as commercial passenger carriers by air are concerned. The governing statute is The Transport Act, 1938. I have had the benefit of reading the judgment herein of my Lord the Chief Justice and as he has dealt with the Act in question in some detail and reached the same conclusion upon it as I have, it seems to me no good purpose would be served by the extension of my reasons on this aspect of the case. I agree with him that nothing in the said Transport Act abrogates the common law right of the common carrier by aeroplane to limit his liability to a passenger by an agreed term of the contract of carriage.

It follows, therefore, that, in my opinion, the appeal should be allowed, the judgment below set aside and the action dismissed.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitors for appellant: *Craig & Tysoe.*
Solicitors for respondents: *Murphy & Murphy.*

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J. DAVIES *ET AL.* v. E. B. EDDY COMPANY LIMITED.

Mechanic's lien—Verbal agreement to improve and reconstruct building—Owners to pay for labour and material plus ten per cent. to contractor—Continuing contract—Work changed from time to time—Filing of lien—R.S.B.C. 1936, Cap. 170, Secs. 2 and 19.

In May, 1940, the plaintiff was employed by the owner of a building to renovate it. He was to put in an office below, put in new plumbing, new roof, paint the outside, waterproof the building outside, a new office on the third floor, new elevators and new heating. There was no agreement to do the work for a stated price or within a stated time. He supplied the labour and material for the work as the owner wished to have it done and received ten per cent. of the cost plus his own wages as foreman. Work continued from May, 1940, into 1941, and large payments were made on account. During this time orders by the owner were changed periodically and other work ordered. On May 13th, 1941, payments having fallen into arrear, the plaintiffs filed a mechanic's lien but took no proceedings. Further work was done on one or two occasions up to May 30th, 1941, some of the work contracted for remaining uncompleted. On June 11th, 1941, a second mechanic's lien was filed and action commenced on June 13th to enforce the lien. The action was dismissed on the sole ground that the lien had not been filed in time.

Held, on appeal, reversing the decision of LENNOX, Co. J., that this is a continuing contract and the contractor's lien did not expire until thirty-one days had elapsed after the last work was done, namely, on the 30th of May, 1941. The claim for lien filed on the 11th of June, 1941, was filed in time.

APPEAL by plaintiffs from the decision of LENNOX, Co. J. of the 22nd of September, 1941, in an action to recover $2,124 and for a declaration that the plaintiffs are entitled to a mechanic's lien in respect of the premises known as 835-37-39 Cambie Street in the city of Vancouver. The facts appear in the head-note and in the judgment of MCDONALD, J.A.

The appeal was argued at Vancouver on the 21st of November, 1941, bfore SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Fleishman, for appellants: The learned judge erred in holding that the lien filed on the 11th of June, 1941, was not filed in time, as there is ample evidence that work was continued up to the 17th of May, 1941. There was error in his construction of section 10 of the Mechanics' Lien Act, as he should have held that knowledge of the owner was proved by documentary evidence

tendered at the trial: see *Tufts* v. *Hatheway* (1858), 9 N.B.R. 62; *Montreal Tramways Co.* v. *Leveille,* [1933] S.C.R. 456.

Norris, K.C., for respondent: The whole question is whether the lien was filed in time. The evidence shows clearly that this was not a continuous job. From time to time the owner gave the carpenter instructions on different matters in the way of repair of the building. If at all, liens should have been filed on each different employment.

Fleishman, replied.

Cur. adv. vult.

13th January, 1942.

MCDONALD, C.J.B.C.: Early in 1940 the plaintiffs contracted verbally with the firm of MacLachlan & Cheeseman, then the owners of a building on Cambie Street, for the improvement and rebuilding of such structure. The plaintiffs being general contractors, sub-let certain parts of the work which included construction of a new office on the lower floor, new plumbing and new roof, outside painting, outside waterproofing, new offices on the third floor, new elevators and new hot-water heating. The owners were to pay for all labour and material, plus 10 per cent. to the contractor. There were no specifications and the contract was rather vague in its terms. It is admitted that the owners were at liberty to stop work at any time they saw fit. The work continued through 1940 and into 1941 and large payments were made on account. On March 6th, 1941, the defendant acquired title to the property and became the registered owner. On May 13th, 1941, payments having fallen into arrear to the extent of some $2,000, plaintiffs filed a mechanic's lien, but took no proceedings to enforce same. Further work was done on one or two occasions up to and including the 30th of May, 1941. Some of the work contracted for still remains undone. On 11th June, 1941, a second mechanic's lien was filed, stating "that the work, service or material was finished, discontinued, placed or furnished, on or about the 17th May, 1941." On 13th June, 1941, an action was commenced to enforce this lien. LENNOX, Co. J. dismissed the action on the sole ground that the lien had not been filed in time.

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It was contended before us that this was a finding of fact which we ought not to disturb. It is, of course, a question of fact, but I think it is a case where we must reverse the finding. As Taschereau, C.J. pointed out in *Dempster* v. *Lewis* (1903), 33 S.C.R. 292, at p. 295:

> No one would contend that where a statute gives a right of appeal upon questions of fact . . . , it imposes upon the Court appealed to the obligation to confirm the judgment appealed from, or that the Court of Appeal has jurisdiction in such cases only upon the condition that it shall not reverse.

This opinion is particularly applicable in the present case where the evidence given by the plaintiffs is not contradicted, and it is difficult to see from the record why it should not be accepted.

What we have here is a continuing contract and the contractors' lien did not expire until 31 days had elapsed after the last work was done, *viz.*, on 30th May, 1941. Owing to the peculiar and indefinite nature of the contract, it was rather difficult for the plaintiffs to decide just at what moment to file the lien because orders were changed from day to day, certain proposed work was abandoned, and other work ordered. It was contended before us that in such a contract each particular part of the work must be considered as a separate contract, and that if the plaintiffs were to protect themselves they must file their lien within 31 days after each particular piece of work was completed. To reduce this to absurdity would mean that that rule must be applied to every daub of paint, every handful of nails, every door and every window. This, of course, is sheer nonsense, and I have no manner of doubt that the claim of lien was filed in time. If there be any difficulty as to the form of the affidavit the necessary amendments should be made pursuant to section 20 of the Mechanics' Lien Act, for there is no suggestion whatever that anyone has been prejudiced.

The decision of this Court in *Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), 55 B.C. 467 is to the effect that in a contract such as this, where the work has not been completed, the appellants' lien is still in existence, and does not expire until the work has been completed and 31 days have elapsed thereafter.

The appellants do not ask for personal judgment.

SLOAN, J.A.: It is my opinion on the facts of this case that the work contracted for had not been completed at the date of the filing of the second lien. The learned trial judge therefore erred, with respect, in holding that the said lien was not filed in time. *Taylor* v. *Foran* (1931), 44 B.C. 529; *Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), 55 B.C. 467; *Deeves* v. *Coulson Construction Co., Ltd.*, [1941] 3 W.W.R. 858.

I would allow the appeal accordingly and declare that the appellants are entitled to enforce their lien against the property in question.

O'HALLORAN, J.A.: The learned trial judge without calling upon the defence, dismissed the appellants' action to enforce a mechanic's lien. He held the mechanic's lien affidavit was not filed within the time prescribed by the statute. The decision of this appeal depends upon the correctness of that conclusion.

Under section 19 of the Mechanics' Lien Act, Cap. 170, R.S.B.C. 1936, the time in which a mechanic's lien affidavit must be filed, if the lien is not to expire, depends upon the *status* of the claimant. (1) In the case of a lien of a contractor or sub-contractor, the affidavit must be filed within 31 days after completion of the contract; (2) in the case of a lien for materials (excepting for a mine or quarry), it must be filed within 31 days after completion of the works or improvements; (3) in the case of a lien for services, it must be filed within 31 days after completion of the services; and (4) in the case of a lien for wages, within 31 days after the last work is done.

The appellant is a carpenter and contractor. In May, 1940, he was employed by the owner of the building to renovate it. He thus described the work he was employed to do:

> He was to put in the office down below, put in new plumbing, new roof, paint the outside, waterproofing the building outside, and put in new offices upstairs on the third floor, and new elevators, and things like that in the building, new heating, that is new hot water.

That work has not been completed, but through no fault of the appellant. He testified he did not have a contract to do the work for a stated price or within a stated time. He supplied the labour and material for the work as the owner wished to have it

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done, and he received 10 per cent. of the cost of labour and material in addition to his own wages as foreman.

The appellant rendered his accounts to the owner accordingly from time to time. It is not disputed that the work was done. The respondent (defendant) did not call any evidence. Although he did not have a contract with the owner to do the work at a stated price or within a stated time, the appellant seems to come within the meaning of "contractor" as that term is employed in the statute. "Contractor" is there defined in section 2 as

> a person contracting with or employed directly by the owner or his agent for the doing of work or service, or placing or furnishing material for any of the purposes mentioned in this Act.

If the appellant is to be regarded as a contractor as the above definition seems to demand, then as there is indisputable evidence the above described renovation of the building has not yet been completed, and also that such non-completion is not due to any fault of the appellant, it must be held that his lien has not expired: *vide Taylor* v. *Foran* (1931), 44 B.C. 529, which is in accord with the reasoning in this Court's decision in *Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), 55 B.C. 467. It is true as already pointed out, that the appellants did not have a contract to do the work at a stated price or within a stated time, and it is true also that a contractor's lien expires 31 days after completion of the "contract," *vide* section 19 (1) (*a*).

However, "contract" in the latter section cannot be read in a restricted sense, but must be given the liberal construction demanded in the definition of "contractor," where the claimant is employed directly by the owner as he was in this case, for "the doing of work or service or placing or furnishing material." The meaning of "contract" in section 19 (1) (*a*) is governed by the circumstances in which it is used: *vide River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, Lord Blackburn at p. 763, and also *Stradling* v. *Morgan* (1558), 1 Plow. 199; 75 E.R. 305, at 315. However, the strength of the appellants' claim does not rest solely upon this finding that he is a "contractor" within the meaning of the statute.

If he is not a contractor then his claim divides itself into three parts, *viz.*, materials, services, and labour. As to materials, there

is indisputable evidence the works or improvements have not yet been completed. Therefore the lien in respect thereto has not expired, *vide* section 19 (1) (*b*) and *Hodgson Lumber Co. Limited* v. *Marshall et al., supra.* Then as to services and wages for which a lien ceases 31 days after completion and doing of the work respectively. There is indisputable evidence that services were rendered and labour done on 14th June, 1941, as part of the continuing job of renovating the building. As the lien affidavit was filed on the 11th of June, 1941, and the plaint issued two days later, then in the light of the record before the Court, the proceedings cannot be regarded as out of time.

The respondent (defendant) did not call any evidence at all, let alone any evidence to question the appellants' testimony that the last work was done and services rendered on 14th June, 1941. The appellants' unchallenged evidence is corroborated by his statement of account for certain labour, material and services finished on June 14th, 1941, reading, "To repair plaster and stairway, plasterer, labour, and materials $10." It was one of some eight continuing accounts rendered by the appellants to the owner commencing 25th November, 1940, which were filed as Exhibit 5 during the appellants' cross-examination, and put in by counsel for the respondent (defendant).

The general account (Exhibit 8) also shows this $10 item as a continuing part of the renovation job. That exhibit also discloses some $1,121.50 of bills received by the appellants from sub-contractors or others, but which the exhibit indicates he was not to render the owner until the completion of the job. It appears as well that on 14th June there was between $2,000 and $3,000 of the above described renovation job still to be done, but which the appellants had been authorized by the owner to complete in the fall of 1941.

The conclusions reached herein are supported by the evidence but the pleadings are not framed accordingly. The mechanic's lien affidavit as filed is plainly incorrect as it is inconsistent with the appellants' oral testimony and with his book-keeping records as produced. An amendment was not sought in the Court below under section 20 of the Mechanics' Lien Act, *supra,* or otherwise

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to conform with the evidence, as it should have been. In the circumstances it is an appropriate order that the pleadings be amended to conform to the facts established in the evidence as was done in *Wilkinson* v. *British Columbia Electric Ry. Co. Ltd.* (1939), 54 B.C. 161. I say nothing at present regarding costs.

In my view the appellants are entitled to enforce their mechanic's lien and the appeal should be allowed accordingly.

I would allow the appeal with costs here and below.

Appeal allowed.

Solicitor for appellants: *A. H. Fleishman.*
Solicitors for respondent: *Norris & Pratt.*

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Divorce—Maintenance for child of marriage—Time within which application can be made—Security for payments—R.S.B.C. 1936, Cap. 76, Sec. 20; Cap. 249, Sec. 4 (3)—Divorce Rules 1925, rr. 65 and 69 (a) and (c).

On the 17th of December, 1926, the plaintiff obtained a final decree of divorce, and on the 20th of December, 1926, she launched a petition for her own maintenance under r. 65 of the Divorce Rules, 1925. The registrar directed the husband to pay $35 per month, but the order was not confirmed by a judge and no monthly payments were ever made thereunder. In April, 1941, the petitioner obtained leave to amend her 1926 petition by claiming maintenance for their child (then sixteen years old). The registrar, under r. 69 (*a*), reported that the husband should pay $40 per month for the child's maintenance, and recommended that the interest of the husband in his father's estate (in the hands of a receiver for distribution) be charged in the sum of $2,400 to make provision for the payments. The learned judge reduced the monthly payments to $25 but made no order as to the security.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (O'HALLORAN, J.A. dissenting), that section 20 of the Divorce and Matrimonial Causes Act provides that the order for maintenance of children of the marriage may not be made at any time later than the making of the final decree for divorce, while r. 69 (*a*), in providing for an order for maintenance, contains no limitation as to time, and it is contended that the rule is in conflict with the statute and the statute must prevail. By an amendment of the Court Rules of Practice Act passed in 1925 it was enacted that such Rules should regulate the procedure and practice in

the Supreme Court in matters therein provided for, hence the Rules were given legal effect. Rule 69 (*a*) deals only with procedure and in effect extends the time. The Rules had been promulgated and were brought before the Legislature and made into law. Therefore, although this application is made some fourteen years after the decree, nevertheless there was jurisdiction in the Supreme Court to deal with the matter.

Held, further, as to the question of security, there is no power to make any such order, at any rate, at this stage of the proceedings.

Hunt v. *Hunt* (1883), 8 P.D. 161, and *Twentyman* v. *Twentyman*, [1903] P. 82, followed.

Held, further, allowing the cross-appeal (O'HALLORAN, J.A. dissenting), that the evidence must be taken to have been sufficient to satisfy the registrar as to the order to be made, and there is nothing before the Court to justify its holding that the registrar was wrong. The monthly payments of $40 were restored.

APPEAL by respondent from the order of MORRISON, C.J.S.C. of the 18th of June, 1941, on the petition of Andrina Betsworth for the maintenance of her child Florence Andrina Eleanor Betsworth. She was awarded the custody of the child at the time she obtained a final decree of divorce on the 17th of December, 1926. Three days later she petitioned under r. 65 for her own maintenance, but not for her child. An order was made by the registrar directing the husband to pay petitioner $35 per month, but the order was not confirmed by a judge as required by r. 69 (*c*), and no monthly payments were made under it. Nothing further was done until April, 1941, when petitioner obtained leave to amend her 1926 petition by claiming maintenance for her child instead of herself, the child being now sixteen years old. The registrar, under r. 69 (*a*) reported that the husband should pay $40 per month maintenance, and he further reported that the interest of the husband in his father's estate, now in the hands of a receiver for distribution, should be charged in a sum not exceeding $2,400 to make provision for the monthly payments until she arrives at the age of 21 years. An order was made reducing the payments to $25 per month. The respondent appealed and the petitioner cross-appealed.

The appeal was argued at Vancouver on the 2nd of December, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

D. J. McAlpine (*Garfield A. King*, with him), for appellant: This petition was launched fourteen years after the divorce and

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was allowed under Divorce Rule 65. In view of the delay the petition should not have been heard. The appeal is from the order of the learned Chief Justice, who allowed $25 per month under r. 69 (*a*) of the Divorce Rules. The question is "Can a wife at this stage get maintenance for a child?" The rules are invalid and unauthorized by the Divorce and Matrimonial Causes Act. Both husband and wife remarried. The wife's present husband is well employed and she is engaged in part-time employment. As to securing the payment by charging the interest of the husband in his father's estate, the Court has no jurisdiction to make any such order. The Court can go no further than make an order directing the husband to make periodical payments. The only section of the Act as to maintenance for children is section 20. Orders may be made up to the final decree but not after. Rule 69 (*a*) provides for applications for maintenance without any express limit as to time, but the Act prevails in case of conflict. The rules are limited to practice and procedure: see *Belanger* v. *The King* (1916), 54 S.C.R. 265; *In re Spratley,* [1909] 1 K.B. 559; *Ex parte Walker. In re McHenry* (1883), 22 Ch. D. 813. The rules cannot supersede the Act. There was no finding that the child required maintenance: see *May* v. *May and McKinlay,* [1934] 3 W.W.R. 471; *Wilson* v. *Wilson* (1920), 16 Alta. L.R. 333. As to alimony, the necessity of the wife is essential: see Evans on Divorce, 1923, pp. 292-3. The child is well off. The step-father has taken on the responsibility.

H. Alan Maclean, for the Attorney-General: The rules were given legal effect by section 4 (3) of Cap. 249, R.S.B.C. 1936. *Mellor* v. *Mellor* (1905), 11 B.C. 327; *Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384.

Lucas, for respondent: The appellant is confined to the evidence that is before the Court. The basis of the cross-appeal is that there is no evidence for making an award less than what was recommended by the registrar. It is just and proper that the father be called upon to provide maintenance for his child. There was no reason or evidence to justify the learned Chief Justice in exercising his discretion as he did: see *Atkins* v. *Atkins,* [1939] P. 387.

McAlpine, in reply, referred to Halsbury's Laws of England, 2nd Ed., Vol. 10, p. 755, par. 1190; *Hunt* v. *Hunt* (1883), 8 P.D. 161; *Twentyman* v. *Twentyman,* [1903] P. 82.

Cur. adv. vult.

13th January, 1942.

MCDONALD, C.J.B.C.: On 17th December, 1926, the respondent was granted an absolute decree of divorce from the appellant. There was one child of the marriage, a girl now aged sixteen years. By the final decree the respondent was given custody of the child, and ever since she has supported the child out of her own earnings. In June, 1940, she remarried and her present husband has provided a home for her daughter and assisted in her maintenance. He appears to be quite able to do so. The appellant has also since remarried but has been unemployed for some months. There was, however, evidence before the registrar whose report is now before us for consideration, to the effect, as the registrar puts it, that the appellant

is entitled to an interest in the estate of his father, Edwin Betsworth, deceased, which from the evidence adduced will apparently be of considerable value.

This estate is now in the hands of a receiver appointed by a judge of the Supreme Court and is in the process of being administered.

The petition, upon which the above report was made, was launched some years ago as a petition for maintenance of the respondent, but was recently amended and became an application for maintenance of the child. It is that application which we are to consider.

The registrar reported that the amount required for the maintenance of the child is $40 per month until she attains the age of 21 years, and further recommended that the interest of the appellant in his father's estate be charged in the sum of $2,400 to make provision for such monthly payments. When this report came before the learned Chief Justice of the Supreme Court it was varied to the extent that the monthly payment of $40 was reduced to $25 and no recommendation was made as to creating a charge to secure same.

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By section 20 of the Divorce and Matrimonial Causes Act it is provided that on

> any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the . . . , maintenance, and education of the children of the marriage.

In 1925 our Divorce Rules were made pursuant to the Act, and r. 69 (*a*) provides that upon an application for maintenance of the children of the marriage, the matter shall be referred to the registrar who shall make full investigation and shall direct such order to issue as to such maintenance as he shall think fit, or may refer the application or any question arising therefrom to the judge for his decision. By r. 69 (*c*) it is provided that the findings of the registrar shall be reported back to the judge who shall make such order in respect thereof as he may deem proper.

It will be noted that section 20 of the Act provides that the order for maintenance may not be made at any time later than the making of the final decree for divorce while the rule contains no such limitation as to time. It is contended that the rule is in conflict with and inconsistent with the statute, and that the statute must prevail.

By an amendment to the Court Rules of Practice Act passed in 1925, the Divorce Rules above referred to having been approved by order in council, it was enacted that such rules should regulate the procedure and practice in the Supreme Court in the matters therein provided for. Hence, the rules were given legal effect, if there had been any previous doubt as to this. In my opinion there is no conflict between section 20 of the Act and r. 69 (*a*). Section 20 deals with two matters, one relating to substantive rights as to maintenance, and the other relating entirely to procedure, *viz.*, the time within which an order for maintenance must be made. Rule 69 (*a*) deals only with procedure and in effect extends the time. I think, therefore, that cases such as *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, and *Belanger* v. *The King* (1916), 54 S.C.R. 265, have no application. Such cases only go to show that where it is provided that rules and regulations may be made for the purpose of carrying out a statute, then if a rule or regulation is incon-

sistent with the statute the latter must prevail. As I say, I hold there is no inconsistency here. There is the further fact that in the cases cited the rules in question while purporting to be made pursuant to the Act were never themselves brought bodily before the Legislature for its consideration. Here the very rules had been promulgated and were brought before the Legislature and made into law.

I think, therefore, that although this application is made late, indeed some fourteen years after the decree, nevertheless there was jurisdiction in the Supreme Court to deal with the matter.

There is a cross-appeal asking that the amount of $25 fixed by the learned Chief Justice be amended to read $40 to be secured as recommended by the registrar, and that the recommendation be adopted.

Dealing with the question of security first, I think it is clear that there is no power to make any such order; at any rate, at this stage of the proceedings. As to what may appear later I express no opinion. In this connexion I would follow the English decisions. In *Hunt* v. *Hunt* (1883), 8 P.D. 161, Sir J. Hannen held, dealing with a section of the Divorce Act of which our section 20 is a replica, that there was no power to order that the respondent secure the payment of moneys provided for the maintenance of children. This decision was followed in *Twentyman* v. *Twentyman,* [1903] P. 82, although it may be noted that Sir Francis Jeune stated that if he were not bound by the previous decision he might have ruled otherwise. These decisions were accepted as good law and it was thought in England necessary to amend the law in 1925 to avoid their effect (see Halsbury's Laws of England Supplement, 1941, title "Divorce," par. 1190). No such amendment has been made here and I would therefore hold that no order for security ought to be made at this time. The provisions of our Supreme Court Rules which, when the occasion demands, are to be read along with our Divorce Rules, do not, I think, offer any assistance, if we are to follow the English decisions as they stood before the amendment of 1925.

As to the amount of maintenance to be allowed, the Court is somewhat embarrassed for lack of evidence. We have nothing

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whatever before us, nor had the learned Chief Justice, to indicate what the evidence was upon which the registrar made his recommendation of $40 per month. Neither counsel expressed any desire that we should refer the matter back to the registrar for further information, and I can see no ground to justify either the learned Chief Justice or ourselves in varying the registrar's report. As pointed out by the Court during the argument, the words in the report "which from the evidence adduced will apparently be of considerable value" are extremely vague. Nevertheless, the evidence must be taken to have been sufficient to satisfy the registrar as to the order to be made, and we have nothing before us, I think, to justify our holding that the registrar was wrong. I would, therefore, dismiss the appeal and allow the cross-appeal to the extent of ordering monthly payments of $40.

I note that the learned Chief Justice made no order as to costs, and I think under all the circumstances there is good cause for making the same order here.

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

O'HALLORAN, J.A.: The order appealed from is attacked on the substantive ground the Court had not jurisdiction in the existent circumstances, to direct the appellant to pay maintenance to the respondent for the support of their child. The respondent was awarded the custody of the child at the time she obtained a final decree of divorce from the appellant in undefended proceedings some fifteen years ago.

Counsel for the appellant contended rr. 65 and 69 and supporting rules of the Divorce Rules, 1925, under the presumed authority of which the maintenance order was made, exceed the jurisdiction given in the Divorce and Matrimonial Causes Act, Cap. 76, R.S.B.C. 1936. It is said that statute, under which the said rules are expressed on their face to be made, does not empower maintenance provision for a child after the marriage has been dissolved by a final decree of divorce.

By r. 65 of the Divorce Rules, 1925, application for maintenance is made in a separate petition, and unless leave is given by a judge, the petition may be filed at any time not later than

one calendar month after the final decree of divorce has been obtained. Rule 69 (*a*) reads in material part as follows:

> Upon an application for maintenance . . . , the pleadings when completed shall be referred to the Registrar, who shall investigate the averments therein . . . , and shall direct such order to issue as to the maintenance of either party to the marriage or the children of the marriage as he shall think fit, . . .

Within three days after she had obtained the custody of the child in the final decree of divorce in December, 1926, the respondent launched a petition under r. 65 for her own maintenance, but not for the maintenance of the child. In February, 1927, the registrar directed the appellant, who was then earning $7.50 per day as a carpenter, to pay $35 a month for the maintenance of the respondent. That was not confirmed by a judge as required by r. 69 (*c*). No monthly payments were ever made thereunder. The matter seems to have remained in that inactive position for fourteen years, during which interval both parties remarried.

But in April, 1941, the respondent was successful in obtaining leave to amend her dormant 1926 petition, by claiming maintenance for the child instead of for herself. By this convenient amendment she was able fourteen years on, to advance what was in substance, an entirely new petition, in the guise of the old petition for her own maintenance, which she of necessity thereby abandoned. The child is now sixteen years old. In course the registrar under r. 69 (*a*) reported the appellant should pay $40 per month for the child's maintenance. The learned judge reduced it to $25 per month, and ordered the appellant to pay that sum monthly to the respondent for the maintenance of the child.

The Divorce Rules, 1925, were made pursuant to the power contained in the Divorce and Matrimonial Causes Act, which appeared as Cap. 70 of R.S.B.C. 1924. Section 37 thereof read as follows:

> The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same.

That section does not seem to have been included when Cap. 70 of R.S.B.C. 1924, *supra,* was carried forward into Cap. 76 of

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R.S.B.C. 1936. However that may be, in the absence of statute or rule, the Court as master of its own procedure and practice, may prescribe rules for the conduct of proceedings over which it has jurisdiction.

Counsel for the respondent as well as counsel for the Attorney-General of the Province who supported the validity of the Divorce Rules, 1925, contended these rules have the force of law by virtue of the Court Rules of Practice Act, Cap. 249, R.S.B.C. 1936. By section 4 (3) thereof the Divorce Rules, 1925

> shall . . . regulate the procedure and practice in the Supreme Court in the matters therein provided for.

Plainly the Court Rules of Practice Act as its name implies, relates to matters of practice and procedure. But it was said for the respondent and the Attorney-General that an order for maintenance of a child is a matter of procedure, even though made after the final decree of divorce. It was contended a rule relating to the time or manner in which such an order may be made is purely procedural.

The jurisdiction to order maintenance for a child must rest on statute. It does not exist at common law as the majority of this Court decided in *Mayell v. Mayell,* [1940] 3 W.W.R. 295. The empowering statute is the English Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 which came into operation here on 19th November, 1858, *vide* the English Law Act, Cap. 88, R.S.B.C. 1936. Section 20 thereof as it appears in Cap. 76, R.S.B.C. 1936, *supra,* reads in material part: [already set out in the judgment of MCDONALD, C.J.B.C.]

The jurisdiction there conferred is expressly limited. It does not empower the making of the maintenance order after the final decree of divorce. As the right to maintenance arises by statute, it is a substantive right whose limits depend upon the statute. The statute has fixed those limits, and the jurisdiction is limited accordingly. A statutory provision which derogates from the common law, as this does, should be strictly construed. It does not permit implications which are not supported by clear and unequivocal language. In the circumstances, to extend the limits is to extend the jurisdiction, and if that is to be done, it must be done by statute and not by rule, for a rule cannot create

jurisdiction, *vide Barraclough* v. *Brown* (1897), 66 L.J.Q.B. 672, Lord Davey at 677.

The making of the impugned maintenance order could not be regarded as a matter of practice and procedure, unless the jurisdiction to make the order after a final decree of divorce is contained in the statute, the sole source of jurisdiction. But the express limitation of that jurisdiction in itself excludes the jurisdiction sought to be exercised in the Court below. As the power is not contained in the statute, the rules in question attempt to exercise a jurisdiction which does not exist. As Sir Charles Fitzpatrick, C.J., said in *Belanger* v. *The King* (1916), 54 S.C.R. 265, regulations cannot operate as amendments to the statute; and *vide* also *Regina* v. *On Hing* (1884), 1 B.C. (Pt. 2) 148, Sir Matthew Baillie Begbie, C.J.B.C. at 149.

Once a final decree of divorce has been granted the Court becomes *functus officio* as it does after final disposition of any other matter. As the statute definitely confines the jurisdiction to grant maintenance for the support of a child to the period before the final decree or in the final decree itself, it must follow that once the final decree of divorce has been granted the Court has become *functus officio* and its jurisdiction exhausted. In this case the Court below purported to exercise a jurisdiction which was exhausted fifteen years ago. An attempt now after the exhaustion of that jurisdiction, to make the maintenance order under review, is an attempt to create a new and substantive right, which may be done only by statute. But no statutory power exists.

In the result, when rr. 65 and 69 and supporting rules of the Divorce Rules, 1925, purport to empower grant of maintenance for the support of a child after the final decree of divorce has been obtained, they purport to exercise a substantive right which the statute itself does not confer, and instead employs apt language to show it does not do so. This lack of jurisdiction seems to have been recognized in England, for by an amendment to the Divorce and Matrimonial Causes Act passed in 1859, *vide* section 4 of Cap. 61 of the statutes of that year, 22 & 23 Vict.,

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it was enacted that a maintenance order for the support of a child could be made after a final decree of divorce.

However, that statute did not become operative here, as it was passed subsequently to 19th November, 1858, and accordingly the governing law of this Province remains at is was in England in 1858 before the passing of the 1859 amendment. Our Divorce Rules unfortunately seem to have been formulated on the assumption the jurisdiction to make such an order after a final decree of divorce has existed here since 19th November, 1858. With respect, the law as it now exists in this Province, demands that effect be given to the jurisdictional objection.

Alternatively it was contended, that if the Divorce Rules, 1925, do, in the assigned particulars, include matters of substantive law without statutory authority, nevertheless they must be accepted to have the force of law, because they were confirmed by the Court Rules of Practice Act, *supra*. I do not think this contention was advanced with much confidence. The statute itself gives it no support. Section 4 (3) thereof, *supra,* which concerns the Divorce Rules, 1925, permits no other conclusion than that it relates exclusively to matters of practice and procedure. The Court Rules of Practice Act in confirming the Divorce Rules, 1925, confirmed them simply as rules of procedure and practice as was said by Stuart, J.A. in delivering the judgment of the Appellate Division of Alberta in *Paitson* v. *Rowan,* [1919] 3 W.W.R. 516, concerning Court Rules in that Province.

If there has crept into the Divorce Rules, 1925, provision for the doing of something beyond the jurisdiction conferred by statute, then the Court Rules of Practice Act cannot, simply by confirming such rules, be deemed thereby to have enacted the substantive legislation essential to establish jurisdiction for the offending rules. In the absence of statutory authority, and in the absence of a relevant jurisdictional enactment in the Court Rules of Practice Act itself, it must be held to confirm only such matters as it has expressed to be within its scope and object, *viz.*, practice and procedure in matters where jurisdiction already exists.

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I would give effect to the jurisdictional objection and quash the order appealed from. The appeal should be allowed and the cross-appeal dismissed accordingly.

Appeal dismissed and cross-appeal allowed, O'Halloran, J.A. dissenting.

Solicitor for appellant: *Garfield A. King.*
Solicitor for respondent: *Thomas A. Dohm.*

GARTLEY v. WORKMEN'S COMPENSATION BOARD.

S. C.
1932
Sept. 30;
Nov. 18.

C. A.
1933
Jan. 26, 27.

Mandamus—Servants of the Crown—Workmen's Compensation Board—Old-age pensions—Application to enforce payment of pension—R.S.C. 1927, Cap. 156, Secs. 8, 9 and 19—B.C. Stats. 1926-27, Cap. 50.

On the application of the claimant for *mandamus* to compel the Workmen's Compensation Board as administrator of old-age pensions to pay him a pension, it was held that the application should be dismissed on the ground that funds available for old-age pensions were Crown funds and no *mandamus* would lie against the Crown. The proper remedy is by petition of right.

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

Per MARTIN, J.A.: Subsections (*b*) and (*c*) of section 18 of the Regulations are within the scope of the power delegated to the Governor in Council by section 19, subsection (*e*) of the Old Age Pensions Act (Dominion), and the word "income" is to be viewed as intended to include those facilities for maintenance that the applicant for a pension already has, all his property and assets must be taken into consideration.

APPEAL by the claimant from the decision of MURPHY, J. dismissing a motion for a *mandamus* to compel the Workmen's Compensation Board as administrator of old-age pensions to pay him a pension. Heard at Victoria on the 30th of September, 1932.

R. D. Harvey, for the application.
Craig, K.C., contra.

Cur. adv. vult.

S. C.

1932

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18th November, 1932.

MURPHY, J.: In my opinion *The Queen* v. *Commissioners of Inland Revenue* (1884), 53 L.J.Q.B. 229 is decisive of this case. If the result of the old age pension legislation is, to impose a legal duty upon the Workmen's Compensation Board towards the claimant, to pay him a pension upon the scale he contends is the correct one, then, it follows that the claimant might maintain an action in which he would state that the statute had laid an obligation upon the Board to pay the money to him under the circumstances. If no such duty exists, then, the Board, in administering the Act, is performing a duty it owes to the Crown as servants or agents of the Crown. The Act charges the payment of pensions upon the Consolidated Revenue of the Crown. The proclamation committing the administration of the Act—B.C. Gazette, August 25th, 1927, p. 2733—directs the Board to pay pensions by bank cheque. When read with the Act the only inference that can be drawn, in my opinion, is that the funds to meet these cheques must come from the Consolidated Revenue Fund. It is unquestioned law that public funds cannot be reached by *mandamus*. The proper remedy, as the case cited shows, is by petition of right.

The application is dismissed.

From this decision the claimant appealed.

The appeal was argued at Victoria on the 26th and 27th of January, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Harvey, for appellant: For five years the claimant received a pension of $20 per month. He is 80 years old and had a one-half interest in a lot in Esquimalt valued at $1,250, where he lived, and a one-half interest in another valued at $1,000. In June, 1932, he made his return of income derived from manual labour, when he was cut off from pension. We are asking that the Board carry out its statutory duty. Section 19 (*e*) of the Act gives the Governor in Council power to provide for the manner in which "income" is to be determined. "Income" is not fixed by the statute. The regulations offend the statute: see *Grand Trunk Pacific Ry. Co.* v. *White* (1910), 43 S.C.R. 627;

Belanger v. *The King* (1916), 54 S.C.R. 265; *The King* v. *National Fish Co. Ltd.*, [1931] Ex. C.R. 75; *Jonas* v. *Gilbert* (1881), 5 S.C.R. 356; *The Queen* v. *Pharmaceutical Society*, [1899] 2 I.R. 132; *Corporation of Waterford* v. *Murphy*, [1920] 2 I.R. 165. Section 19 gives no power to the Governor in Council to define "income." When there is a statutory duty and no other adequate remedy we are entitled to *mandamus*.

Craig, K.C., for respondent: When a man is using property himself from which he receives benefit, it can be estimated as "income." Section 8 of the Dominion Act is a mere authority given to whoever is in charge, but does not give the right to enforce anything by law. In any case he has another remedy by petition of right and *mandamus* will not lie: see *The Queen* v. *Commissioners of Inland Revenue* (1884), 53 L.J.Q.B. 229. As to pensioner's right of action see *Thomas* v. *The King*, [1928] Ex. C.R. 26; *Nixon* v. *Attorney-General*, [1931] A.C. 184. If the Act confers a right of action on the pensioner then he can enforce it by a petition of right. We say this is a gift. Under no circumstances will *mandamus* lie to enforce payment of moneys from the revenues of the Crown: see *Rattenbury* v. *Land Settlement Board*, [1929] S.C.R. 52, at p. 60. You cannot reach the revenues of the Crown by legal process. Without the regulations at all it is competent for the Board to say when a man is in occupation of property that may be treated as "revenue" or income. Section 19 of the Act gives power to make regulations and the regulations so passed are valid.

Harvey, replied.

MACDONALD, C.J.B.C.: I think the appeal must be dismissed.

MARTIN, J.A.: That is my opinion. And I prefer to base my opinion primarily—without expressing an opinion finally, or indeed, at all, upon the second point, that *mandamus* does not lie —primarily, I say, upon this aspect of the matter—because it is really more satisfactory to this appellant to know that his appeal has been decided upon the merits—upon the primary ground that the regulations should have been attached; that is to say,

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(*b*) and (*c*) of section 18 are within the scope of the power delegated to the Governor in Council by section 19, subsection (*e*) of the main Act.

It is to be noted that the object sought to be attained by the section is determination of the manner in which the income of the pensioner is to be viewed, or weighed; with the intention of giving him a provision for his maintenance under section 8. And therefore the matter is approached from an entirely different consideration than that of the ordinary interpretation of income in taxation Acts, which are punitive measures, distinguished from one of this kind, which is a humane provision for his old age. From the very nature of the case it is necessary that somebody should determine the meaning of the word "income" used in its large sense, having regard to the object sought to be accomplished; and that, I think, is to be viewed from the point of view that income is intended to include those facilities for maintenance that the applicant for a pension already has. That is to say, whatever the facilities for his own maintenance, all his property or assets afford must be taken into consideration. That I think is the only way to prevent gross abuses in administration of this Act, and to restrict its application to the manifest intention of it, by having regard to its special subject-matter. It would be easy, of course, to give the illustrations of the really shocking abuses that would arise if any other method of construction were applied to this Act. Because it is simply unthinkable that the intention of Parliament would be that the income of a person should be regarded in a way that a rich miser, for example, could live in a valuable property and have a large sum of money in the bank, which would be more than sufficient to maintain and keep an ordinary family in affluence, and yet be entitled to come upon the country for an old-age pension. Before the Act is given a construction which would permit such a manifest abuse of the obvious intention of Parliament, we should be very sure that we are right in taking such an extreme view of it.

I feel, therefore, that the only view that we can take of the regulations consistent with the statute is that they are passed in accordance with the delegated powers. And once that is arrived

at, there is nothing more to be said about the case. Because the only other ground that was taken on what I may call the merits, or the non-application of the regulation itself, subsection (*c*), is that no due allowance was made for usual household furniture. But it is apparent that that is not so in this case, because all the personal effects, and all the household property were allowed to this man; therefore if he has got everything that he had, surely that cannot be unreasonable. And our attention was not directed to any evidence showing what this household furniture amounts to. And therefore appellant cannot complain, when it is not specified what his household furniture is, so that we could say that the action taken respecting it is unreasonable. Because if there is no furniture there is no lack of reason in the distribution of what does not exist.

McPHILLIPS, J.A.: As I have already indicated, I refrain from giving judgment on the merits of this appeal, because, in my opinion, there has been non-compliance with the provisions of the Constitutional Questions Determination Act, Cap. 46, R.S.B.C. 1924, particularly section 9. Counsel are not before us representing the Attorney-General for Canada and the Attorney-General for the Province, or intervention that there is no intention of appearing. Here the Parliament of Canada provided that regulations could be made by the Governor in Council, not inconsistent with the provisions of the Act, with regard to pensions. The Governor in Council did make regulations. And the contention on the part of the learned counsel for the appellant is that they are *ultra vires*, or, relatively, that they are inconsistent with controlling provisions of the Act. And if they are inconsistent, that they must go down. On the other hand, can any such contention be made? Section 20 of Cap. 156, Old Age Pensions Act, reads:

> All regulations made under this Act shall, from the date of their publication in the Canada Gazette, have the same force and effect as if they had been included herein.

So these regulations are written into the statute itself, and form part of it, and must be given effect to as if originally enacted, and a case supporting this view decided in the Privy Council has

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been called to my attention by Mr. *Craig*, that is binding on this Court; the later case in the House of Lords also referred to is not binding on this Court, and can be distinguished, anyway.

MACDONALD, J.A.: The regulations referred to are *intra vires*, and on the facts the appeal should be dismissed.

MARTIN, J.A.: I may say, in reference to the views expressed by my brother MCPHILLIPS, that section 9 of the Constitutional Questions Determination Act, Cap. 46, R.S.B.C. 1924, does not in my opinion apply to this case. And that is the only one that would prevent us from determining without the presence of the Attorney-General.

Appeal dismissed.

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Nov. 25, 26, 27, 28.
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SANSAN FLOOR COMPANY v. FORST'S LIMITED.

Contract—Installing tile floor—Construction of floor beneath under separate contracts—Buckling of tiles owing to escape of moisture from below—Reflooring necessary.

The defendant had under construction a large concrete mercantile building in Vancouver, with basement. He employed an architect to prepare the plans and specifications but had neither a supervising architect nor a master of works. The contract for the concrete shell of the building was given to one Vistaunet, and independent contracts were given for plumbing, heating, etc. The original specifications called for a laminated main floor and laminated second floor, in each case, covered with shiplap and masonite (laminated consists of planks two inches by six inches on edge). When the laminated portion was completed the defendant decided to surface the main and second floors with an asphalt floor tile instead of masonite. He then entered into a contract with the plaintiff company to put in the tiling. One Christie, manager of the defendant company and one Watt, manager of the plaintiff company, then had discussions as to the proper installation between the laminated and the tiling. It was necessary to sand the laminated in order to have a smooth surface. Watt quoted a price to the defendant for laying the three-ply, which price was to include a water-proof insulation of felt or tar paper between the laminated and three-ply, but he thought this should be done by Vistaunet. The contract was then given to Vistaunet, who did the sanding of the laminated and put in the three-ply but did not put water-proof insulation beneath the three-ply. Watt then laid

the tiles and he was paid $1,000 on account. The balance of $3,243.88 remained unpaid, because within two months of completion, owing to the moisture from the laminated seeping through into the three-ply, the tile surface buckled and cracked so badly that the whole floor had to be scraped down to the laminated and resurfaced. In an action for the balance due on the contract, it was held that the situation did not arise through fault in the plaintiff's conduct or workmanship, that the defendant chose to rely upon persons other than the plaintiff as to the installation of the foundation floors, and the plaintiff was entitled to recover.

Held, on appeal, reversing the decision of MANSON, J., that where a person is employed in a work of skill, the employer buys both his labour and judgment: he ought not to undertake the work if it cannot succeed, and he should know whether it will or not. A contractor who undertakes work which requires to be placed upon foundations or other works furnished by the proprietor, cannot excuse himself from the obligation to deliver his work to the proprietor in good condition by saying that the bad condition of his work was caused by the bad condition of works of other contractors upon which his work had been placed. The facts of this case fall within the principles enunciated, and the appeal should be allowed.

APPEAL by defendant from the decision of MANSON, J. of the 14th of June, 1941 (reported, 56 B.C. 391), allowing the plaintiff's claim for $3,243.88 and disallowing the defendant's counterclaim. The facts appear in the head-note and in the reasons for judgment.

The appeal was argued at Vancouver from the 25th to the 28th of November, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

A. Alexander, for appellant: This was a lump sum contract: see Halsbury's Laws of England, 2nd Ed., Vol. 3, p. 213, par. 358; Hudson on Building Contracts, 6th Ed., 162. There is an implied warranty that the work done would answer the purpose for which it was intended: see Hudson on Building Contracts, 6th Ed., 181; *Hall* v. *Burke* (1886), 3 T.L.R. 165; *Jones* v. *Just* (1868), L.R. 3 Q.B. 197; Halsbury's Laws of England, 2nd Ed., Vol. 3, p. 219, par. 374. There is also the implied warranty that the work should be done in a good workmanlike manner: see *Pearce* v. *Tucker* (1862), 3 F. & F. 136; *Duncan* v. *Blundell* (1820), 3 Stark. 6; and also implied warranty that the contractor was of skill reasonably competent to the task undertaken: see *Harmer* v. *Cornelius* (1858), 28

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L.J.C.P. 85. Where the work is useless there is no completion by the contractor and no obligation on the owner to pay: see *Farnsworth* v. *Garrard* (1807), 1 Camp. 38; *Basten* v. *Butter* (1806), 7 East 479; *Hill* v. *Featherstonhaugh* (1831), 7 Bing. 569; Halsbury's Laws of England, 2nd Ed., Vol. 3, p. 219, par. 374. It is no excuse for a contractor doing useless work that it could not be done otherwise, unless he can prove that the employer had knowledge of the impossibility: see *Denew* v. *Daverell* (1813), 3 Camp. 451; *Duncan* v. *Blundell* (1820), 3 Stark. 6; *Pearce* v. *Tucker* (1862), 3 F. & F. 136; *Combe* v. *Simmonds* (1853), 1 W.R. 289. It is the duty of the contractor to ascertain whether it is practicable to execute the work on the site: see *Chevalier* v. *Thompkins* (1915), 48 Que. S.C. 53; *Kumberger* v. *Congress Spring Co.* (1899), 53 N.E. 3; Hudson on Building Contracts, 6th Ed., 67 and 240; *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, at p. 658. A contractor should inform himself of all particulars: see *Thorn* v. *Mayor and Commonalty of London* (1876), 1 App. Cas. 120; *Bottoms* v. *York (Lord Mayor of)* (1812), Hudson on Building Contracts (4th Ed.), ii. 208, cited in 6th Ed., 186. Where the owner pays the contractor in ignorance of the facts he is entitled to a return of his money: see *Milnes* v. *Duncan* (1827), 5 L.J.K.B. (o.s.) 239; *Smith* v. *Johnson* (1899), 15 T.L.R. 179; *Donaldson* v. *Collins* (1912), 2 W.W.R. 47.

McAlpine, K.C., for respondent: He was to lay tile on a floor supplied by the owner. There was nothing defective in the installation of the tile floor. The defendants used their own judgment in building the floor. Watt, who represented the plaintiff, had nothing to do with the substructure: see *United States* v. *Gibbons* (1883), 109 U.S. 200. He is not liable for the defect for which the owner is responsible. Our contract is to lay tiles and that is all. The owner supplies the base. Watt is only liable if he knew of the defect: see *Sloane* v. *Toronto Hotel Co.* (1905), 5 O.W.R. 460; *Kellogg Bridge Company* v. *Hamilton* (1884), 110 U.S. 108; *Breen* v. *Cameron* (1916), 157 N.W. 500. There is no implied warranty that the floor beneath was fit for the work: see Hudson on Building

Contracts, 6th Ed., 181; *Chanter* v. *Hopkins* (1838), 4 M. & W. 399; *Hagar* v. *Hagar* (1902), 1 O.W.R. 78. On what constitutes negligence see Phipson on Evidence, 7th Ed., 102 and 104; *Juggomohun Ghose* v. *Manickchund* (1859), 19 E.R. 308; *Metallic Roofing Co.* v. *City of Toronto* (1904), 3 O.W.R. 646; *Cammell Laird & Co.* v. *The Manganese Bronze and Brass Co.*, [1934] A.C. 402; *Kumberger* v. *Congress Spring Co.* (1899), 53 N.E. 3, at p. 5.

Alexander, replied.

Cur. adv. vult.

On the 13th of January, 1942, the judgment of the Court was delivered by

MCDONALD, C.J.B.C.: This is an appeal from the judgment of MANSON, J., whereby he awarded the plaintiff judgment for $3,243.88, and disallowed the defendant's counterclaim for damages. The following statement of facts is taken largely from the careful judgment of the learned judge, and from the appellant's factum.

In the Spring of 1940 the defendant had under way the construction of a two-storey concrete mercantile building in the city of Vancouver. The defendant employed an architect to prepare the plans and specifications, but had no supervising architect nor master of works. The contract for the concrete shell of the building was let to one Vistaunet. Independent contracts were let to various contractors for painting, heating, glazing, and so on. The original specifications called for a laminated main floor and a laminated second floor, in each case covered with shiplap and a surface flooring known as masonite. On or about the 21st of February, 1940, defendant changed its plans and decided to use on its main and second floors, asphalt floor tile instead of masonite. Plaintiff and others were asked to quote on the cost of laying such type of floor. The plaintiff's business is the supplying and laying of a surface floor known as Ace-Tex Asphalt Type Tiles.

One, Christie, the office manager and financial controller of the defendant, interviewed Watt, the manager and a partner of the plaintiff firm, on several occasions. The Forst brothers, both

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directors of the defendant, took only a casual interest in these conversations. Watt quoted on three different qualities of tile—¼ inch, 3/16 inch and ⅛ inch. Finally, on April 1st, 1940, plaintiff offered in writing "to provide and lay ⅛" thick Ace-Tex Asphalt Type Tiles" at certain named prices. This offer was accepted by the defendant.

In the course of the discussions Watt was asked on what the Ace-Tex floor should be laid, and advised that he preferred a three-ply board floor to be laid between the laminated plank and the tile. He further advised that the three-ply floor should be nailed with resin-coated nails (which would hold the three-ply in place more firmly than ordinary nails), and that as he required a smooth surface on which to lay the tiles, the laminated planks should be smoothed with a sanding machine. Watt himself quoted a price to the defendant for laying the three-ply floor at a price of 5 cents a square foot, which price was to include a water-proof insulation of felt or tar paper or something of the kind, between the laminated floor and the three-ply floor, though there is nothing to show that Watt actually told defendant that his quotation included such water-proofing.

Watt was not anxious to obtain the contract for the three-ply, as he thought it was more in Vistaunet's line. Thereupon Vistaunet was asked to quote. Vistaunet quoted for sanding the laminated floor and laying the three-ply at a price of 5.8 cents per square foot, and his tender was accepted. No mention was made by either Vistaunet or the defendant as to any water-proof insulation. When Vistaunet's tender was accepted the architect amended his specifications as follows:

> Constractor shall lay down three ply 5/16" fir sheathing on top of laminated floors on first and second floors where marked "Masonite," for the tile contractor to lay asphalt floor tile.

It will be noted there is nothing here about water-proofing.

Laminated flooring, or mill construction as it is called, consists of planks 2" x 6" laid on edge. The only planks obtainable on the market in Vancouver contain a considerable degree of moisture. They are not air dried or kiln dried. All parties concerned were aware of this situation. The underside of the laminated floor is faced with lath and plaster to form the ceiling of

the rooms beneath, and the timber absorbs a certain amount of moisture from the wet plaster.

Vistaunet testified that he told Christie that he had not seen three-ply laid on a laminated floor—that if he were asked he would not recommend such an installation. The learned judge accepts Vistaunet as a truthful witness. The latter also testified that on one occasion he told Christie that he was not quite satisfied with the three-ply installation, but that if the defendant was satisfied he would lay it. He admits that Christie may have spoken to him about consulting with Watt and states that he did consult Watt about the laying of the three-ply, but not about the danger from dampness. This latter question was not raised in Vistaunet's conversation with Watt; no mention was made of the necessity for water-proof sheathing or of the danger to be expected from its lack. Christie says that Vistaunet made no mention to him of this danger, and it is common ground that Watt said nothing to the defendant on this subject.

Watt knew his business and held himself out as a man of skill, and, unfortunately, as I think, for himself, he admits that in his opinion it was not good practice to lay the three-ply without a water-proof insulation beneath; in fact, he stated on discovery that he considered such water-proofing necessary to ensure that the tile would remain smoothly in position when laid.

On 25th July, 1940, shortly after the tile had been laid, the defendant paid the plaintiff $1,000 on account. The remaining sum of $3,243.88 was withheld, because within two months of the completion of the work, the tile surface was badly buckled and cracked, so badly that the whole floor had to be scraped off and resurfaced. It is beyond dispute that the cause of the buckling was that, for want of a water-proof insulation, such as felt paper, the moisture from the laminated planks had seeped through into the three-ply.

Watt had seen Vistaunet on the premises when the latter was preparing to sand the laminated planks, but was not there again until a portion of the three-ply had been laid. He then saw that water-proof sheathing was not being laid beneath the three-ply, but he made no protest on this all-important matter either to the

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defendant or to Vistaunet. Watt knew of the danger; Vistaunet knew of it, but defendant, being quite without experience in such matters, did not.

On this state of facts the learned judge held that the defendant had superseded the plaintiff's skill and judgment in the matter, and that the plaintiff was therefore entitled to recover. Our task is to ascertain whether or not the learned judge drew the proper conclusions from the evidence and applied sound legal principles.

It should be pointed out (for it was argued on Watt's behalf) that the upper surface of the laminated planks appeared to be reasonably dry, as was evident from the fact that the sanding machine worked satisfactorily. However, no conclusion could be drawn from this that the inner body of the planks was not impregnated with moisture, which might reasonably be expected to exude into the three-ply.

Here I think I should set out the position taken by Watt on his examination for discovery and at the trial. On discovery these questions were put and answered:

Well, why do you specify tar paper in your particular job? Because I am then putting it on a sub-sub-floor you might say, and it is so cheap to put it in it is not worth leaving it out, for the protection it will give, and as a matter of fact when I came on the job I was quite surprised to see no tar paper there, but as the man who was laying it—who put in the laminated floor, was experienced, I took it for granted he knew what he was doing and knew the lumber and that it did not need tar paper, and if I had gone to him after he had got 10,000 or 12,000 feet of that down, he would have most likely told me to mind my own business.

Well, you will agree with me that on an old floor there is no need for tar paper? Yes.

It is only required on a new floor? Yes.

And you will also agree with me, Mr. Watt, that a large proportion of the timber used in a new building is not kiln dried or sun dried? Yes.

That is to say it is green? Well, I don't know. I suppose it is. It is air dried, a lot of it. I don't know much about lumber as I told you before.

Well, you know whether there is a risk of dampness? Yes, there is always a risk of dampness even in an old building. For instance, a pipe might have leaked; and there is always a risk of dampness.

Well, do you suggest you would have put tar paper between the three-ply and the old floor when you are laying it on an old floor? No, I don't.

So the risk of dampness on an old floor is so slight you ignore it? Yes.

But in a new building you do put tar paper between the three-ply and the laminated floor? Yes.

And the reason you do that is because there is a risk you cannot ignore? Yes.

At the trial he took a different position; this latter position is that which he maintained before us. It really amounts to this: That notwithstanding the fact that the lack of water-proofing cannot be said to be a latent fact, nevertheless he was entitled, even though he knew what was being done at a time when the danger could have been averted, to say this was no affair of his —that his sole concern was to provide and lay his tile on a smooth surface held down by resin-coated nails. I think his position is unsound.

We had the benefit of an able argument from respondent's counsel, who, it must be said, fought a brave battle. Nevertheless, his argument has not occasioned any doubt in my mind as to the rights of the parties to this action. Many authorities were cited by counsel and they all require examination. I have selected some of the most important, which I think establish that on the facts, the plaintiff's position is untenable.

The learned judge below cited the leading case of *Duncan* v. *Blundell* (1820), 3 Stark. 6, and quoted the short judgment of Bayley, J.:

> Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him choose to supersede the workman's judgment by using his own.

Manson, J. held that in this case the defendant chose to rely upon persons other than the plaintiff in the matter of the installation of the foundation floors. He chose to supersede the plaintiff in that very important matter.

When it was put to counsel before us to name the persons to whom the learned judge referred, he said, as he was obliged to say, that the reference must have been to either Vistaunet or the architect, or to both. He could not very well insist that it was Vistaunet, for the latter had warned the defendant against the danger from dampness. Nor can I understand on what ground it can be said that as to the sole question which we are discussing the defendant relied upon the architect, for the architect was not called upon to consider and did not consider the question of water-proofing at all, as will be seen from the amended specifications above quoted.

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With respect, I think the learned judge erred in putting this case within the exception rather than the rule in *Duncan* v. *Blundell*. In *Thorn* v. *Mayor and Commonalty of London* (1876), 1 App. Cas. 120, the often-cited case which arose out of the rebuilding of Blackfriars Bridge, Lord Cairns, L.C., at p. 129 said:

> If the contractor in this case had gone to the Bridge Committee [of the corporation who were] engaged in superintending the work, and had said: [to them]. You want Blackfriars Bridge to be rebuilt; you have got specifications prepared by Mr. Cubitt; [the supervising engineer] you ask me to tender for the contract; will you engage and warrant to me that the bridge can be built by caissons in this way which Mr. Cubitt thinks feasible, but which I have never seen before put in practice. What would the committee have answered? Can any person for a moment entertain any reasonable doubt as to the answer he would have received? He would have been told—You know Mr. Cubitt as well as we do; we, like you, rely on him—we must rely on him; we do not warrant Mr. Cubitt or his plans; you are as able to judge as we are whether his plans can be carried into effect or not; if you like to rely on them, well and good; if you do not, you can either have them tested by an engineer of your own, or you need not undertake the work, others will do it.

In *Pearce* v. *Tucker* (1862), 3 F. & F. 136, also a leading case, the plaintiff employed the defendant as a workman in this trade, to put up a new kitchen-range with an old boiler behind. It was proven that hot water could never be got from the boiler, as there were, in fact, no flues to carry the heat from the fire to and about the boiler. The defendant brought evidence to prove that flues were made as large as the space allowed of, but that the space was not large enough to make them effective, and so he could not make a good job of it. Erle, C.J. put it to the jury, in effect, that it was the duty of the defendant to tell the plaintiff that he could not do the work in a workmanlike manner and that in fact it would be throwing away money to have it done at all, as it must have been obvious to any competent workman that it could not be properly done. The learned Chief Justice further said that it was no excuse for the defendant to say that he could not do the work properly for it must be taken that a workman undertakes to do his work in a workmanlike manner.

> If the plaintiff had been told that it was impossible to do it, he might not have had it done, and if he had, then he could not have sustained the action. But *non constat* that he knew it, whereas the defendant must be taken to have known it:

pp. 137-8. The verdict was for the plaintiff.

It seems to me that it would be difficult to find a case more exactly fitting the case we have before us.

In 1900 the case of *Slowey* v. *Lodder,* 20 N.Z.L.R. 321 was heard by the Court of Appeal in New Zealand, and the same principles are there laid down. And again in 1915 the Superior Court of Quebec in *Chevalier* v. *Thompkins,* 48 Que. S.C. 53 put the matter in a nutshell when Archibald, J. said (p. 55):

> A contractor who undertakes work which requires to be placed upon foundations or other works furnished by the proprietor, cannot excuse himself from the obligation to deliver his work to the proprietor in good condition by saying that the bad condition of his work was caused by the bad condition of works of other contractors upon which his work had to be placed.

See also *Bottoms* v. *York (Lord Mayor of)* (1812), Hudson on Building Contracts (4th Ed.), ii., 208, cited in 6th Ed., 186.

Obviously, of course, each case must be decided on its own particular facts. I think the facts of this case fall within the principles enunciated in the cases which I have just cited.

I should deal briefly with the argument arising from certain evidence offered by the plaintiff to show that there was a usage in the trade in Vancouver to the effect that each contractor relied upon the efficacy of the work of all other contractors. The brief answer to such evidence is that such a usage, in so far as it relates to the facts before us, is not reasonable; it is contrary to well-established rules of law; and in any event, the evidence given to support it relates not to a case like this, but to the case of a general contractor who has sub-let contracts to the various trades.

The amount of damages suffered by the defendant is not in dispute. I would therefore reverse the judgment and enter judgment for the defendant on its counterclaim for $3,100, with costs here and below.

Appeal allowed.

Solicitors for appellant: *Wismer, Alexander & Fraser.*
Solicitor for respondent: *H. Richmond.*

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LEIGHTON v. LINES.

False arrest—Imprisonment—Arrest by police officer without warrant—Suspicion of committing an offence—Justification for arrest—Liability—Criminal Code, Secs. 30 and 205A.

Section 205A, subsection 1 (*c*) of the Criminal Code provides that: "Every one is guilty of an offence . . . who, while nude is found without lawful excuse . . . upon any private property not his own, so as to be exposed to the public view."

The defendant, a police officer, received a complaint that the plaintiff had committed an offence under said section, and after investigation ordered her and two other girls to accompany him to the police station. He questioned them and held them at the station pending his locating certain other witnesses. Then not being satisfied of the girl's guilt, he released her. In an action for damages for false arrest and imprisonment:—

Held, that the alleged offence under said section was not one of those enumerated in sections 646 and 647 of the Criminal Code as being one for which a police officer might arrest without a warrant. But the defendant was protected by section 648 of the Code, which authorizes a peace officer to arrest without a warrant anyone whom he finds committing any criminal offence. The nature of the suspected offence being one which called for prompt action, and the defendant having acted on reasonable grounds and without malice, he was justified in arresting and detaining the plaintiff. Under such circumstances it is immaterial that the plaintiff had not committed the offence since the defendant had believed on reasonable grounds that she had.

Held, further, that the defendant was protected by section 30 of the Criminal Code.

ACTION for damages for false arrest and imprisonment. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vernon on the 14th of November, 1941.

P. D. O'Brian, for plaintiff.

H. W. McInnes, for defendant.

Cur. adv. vult.

3rd January, 1942.

FISHER, J.: In this matter I have first to say that, where the evidence is contradictory, I accept the testimony of the defendant in preference to that of the plaintiff, Elizabeth Leighton, or that of the witnesses called on her behalf, except as hereinafter expressly stated. I am satisfied, and find, that before the defendant, who was at the time, and is still, a police officer, went to the house of the witness, V. P. Johnston, a complaint was made to him on the street by several boys along the lines stated by the

defendant in his evidence. I pause to note here that the evidence of the defendant on this phase of the matter is corroborated to a certain extent by the evidence of Alan Tomlin, a witness called in rebuttal on behalf of the plaintiff. I am also satisfied, and find, that the defendant, after receiving the complaint and after making the observations he says he made outside and inside the house, honestly and reasonably believed that the said plaintiff, whose age is eighteen, had committed an offence under section 205A, subsection 1 (*c*) of the Criminal Code, reading, in part, as follows:

> Every one is guilty of an offence . . . who, while nude, is found without lawful excuse for being nude upon any private property not his own, so as to be exposed to the public view, whether alone or in company with other persons.

The defendant suggests in his evidence that, when he was at the Johnston house, he merely asked the said Elizabeth Leighton and her two female companions, who were of about the same age as the plaintiff, to accompany him to the police office for questioning and that they all did so quite willingly. I cannot accept this evidence without qualification. I think it is a fair inference, and I find, that the defendant ordered them to accompany him to the police office for questioning and that the said plaintiff and her companions accordingly did so. In my view, however, it was a case where the plaintiff complied with the order without any objection and under all the circumstances I would find that there was no arrest or imprisonment until after the questioning at the police office. In my view also the defendant, being a police officer, acted under the circumstances in a reasonable manner in ordering the plaintiff to accompany him to the police office and in questioning her there instead of at the house where he had found her. After questioning the three girls at the police office the defendant detained them there, locking the outer door leading to the outside (the cell door remaining unlocked, as I find) until he had gone and brought the boys, whom he could not get by telephone, to the police office and had obtained statements from them there. In these statements the boys apparently did not stand by the complaint in every particular and the defendant being then in doubt, as he says, told the girls they could go and later got a car and drove the plaintiff home. I think I must find,

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as I do, that during the period beginning with the time when the defendant left the plaintiff at the police office with the outer door locked and the time when he told her she could go, the plaintiff was under arrest and imprisoned. This time was probably about one hour in all. I find, however, that until the defendant had obtained the statements of the boys at the police office, he continued to believe honestly and reasonably that the plaintiff had committed the offence as aforesaid. I also find that the defendant throughout acted without malice and with reasonable and probable cause.

The question arises whether upon the facts of this case the defendant is liable to the plaintiff in damages for false arrest and imprisonment. Counsel for the defendant relies especially upon the decision in *Cochrane* v. *T. Eaton Co.* (1936), 65 Can. C.C. 329 by Donovan, J., who apparently relied upon *Perry* v. *Woodward's, Ltd.* [41 B.C. 404]; [1929] 4 D.L.R. 751. From this decision it is argued that, where there are reasonable grounds for suspicion of a crime being or having been committed, reasonable detention of the suspected person, while further enquiries are being made before handing the person over to the authorities, will be considered justifiable. In each of the said cases the defendant was a department-store company but I would not think that, where the defendant is a police officer, he would be in any worse position. See the *Perry* case where MACDONALD, C.J.A. says at p. 752:

> When a private person either an individual or a corporation detains another and puts him under restraint, he does so at his peril, although the rule is not so strict when that is done by a peace officer.

It must be noted that in the *Cochrane* case it was a peace officer in regular employment with the defendant company who ordered the plaintiff in that case to accompany him to the office of a superintendent of the defendant's store and later detained her until further enquiry was made. Donovan, J., at pp. 329-334 says, in part, as follows:

> A peace officer in regular employment with the defendant company believing that the plaintiff was attempting to defraud, or was actually engaged in committing an offence under the Cr. Code, ordered her to accompany him to the office of a superintendent of the defendant's store. . . .
>
> On such of the evidence as I accept there was no assault, and there was no real detention in fact beyond the period beginning with the time when the peace officer seized her arm near the elevator, and the time when in the

superintendent's office she was told she might go. That time was probably some 15 minutes in all. . . . As I interpret the decision in *Perry* v. *Woodward's Ltd.* [41 B.C. 404]; [1929] 4 D.L.R. 751, there is a responsibility on those having a suspicion of a crime being or having been committed of further informing themselves before handing the person under detention over to the authorities. In that case one of the approved questions submitted to the jury was—"Did the defendant take reasonable care to inform himself of the true facts of the case?"

I understand then that further reasonable detention while such further enquiries were being made would have been considered justifiable. Here the detention was to get an explanation of suspicious circumstances created by the statement and conduct of the plaintiff which was left unexplained by her. . . .

In the result, as I view it, the peace officer had reasonable grounds for his suspicion and his conduct towards the plaintiff throughout was reasonable and justified under the circumstances.

The plaintiff has not, therefore, established her claim or any damage for which the defendant is liable, and the action is dismissed with costs.

. . . Sections 32, 33, 41, 42 and 44 of the Code also having a bearing on the case herein.

I agree that in the *Cochrane* case, Donovan, J. said a great deal that supports the argument of counsel for the defendant in the present case but I do not think that the decision goes far enough to be authority for the proposition of law which he contends for here. Having in mind particularly the sections of the Criminal Code referred to in the *Cochrane* case as aforesaid, I do not think that the Court in such case was laying down a general principle to be applied to circumstances such as I have in the present case where the offence for which a police officer has arrested a suspected person is not one of those mentioned in sections 646 and 647 of our Criminal Code as offences for which a peace officer may arrest without warrant. Counsel on behalf of the plaintiff submits that the defendant was not justified in arresting the plaintiff without a warrant, even though he was a police officer and even though I should find, as I have, that at the time he honestly and reasonably believed that the plaintiff had committed an offence under said section 205A of the Criminal Code. It is submitted that in Canada there is no authority at law for a peace officer arresting without warrant a person suspected of an offence other than those set out in sections 646 and 647 of the Criminal Code. In this connection counsel relies especially upon the decision of Hallett, J. in *Stevenson* v. *Aubrook,* [1941] 2 All E.R. 476. I come now, therefore, to

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consider such decision and some of the cases referred to therein, *viz., Trebeck* v. *Croudace* [1918] 1 K.B. 158; *Isaacs* v. *Keech,* [1925] 2 K.B. 354; *Ledwith* v. *Roberts,* [1936] 3 All E.R. 570 and *Gorman* v. *Barnard,* [1940] 3 All E.R. 453 (C.A.).

In *Gorman* v. *Barnard,* Clauson, L.J. said at p. 464:

I am prepared to accept *Trebeck* v. *Croudace* as authority for the following proposition which may well be (and, indeed, must, I think, in this Court be taken to be) the law—namely, that the natural construction of a section conferring a power of arrest upon an executive officer in case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable grounds that the offence has been committed, if the character of the offence is such that, in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for.

In the same case MacKinnon, L.J., who dissented in the Court of Appeal but was, in effect, sustained in the House of Lords, said at pp. 462-3 as follows:

In *Trebeck* v. *Croudace,* there was a claim for false imprisonment. . . . Bankes, L.J. said, at p. 167: ". . . the question . . . is whether a constable who arrests a person without warrant must prove in order to justify his action that the person arrested was actually guilty of the offence, or whether it is sufficient . . . to show that he acted without malice and with reasonable and probable cause." The Court held that the latter alone was the burden upon him.

A similar decision, on another statute, was arrived at in this Court in *Isaacs* v. *Keech.* In the course of his judgment, Bankes, L.J. said, at p. 360: "I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the Legislature has in mind is not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence." If that be correct, as I think it is, it appears to be not merely material, but also conclusive, in the present case.

It was suggested in argument that the authority of those two cases had been shaken or diminished by the later decision in this Court of *Ledwith* v. *Roberts.* The actual decision in that case was that the persons arrested did not come within the description of persons whose arrest was authorized by the statute involved. That was sufficient to decide the case, and any criticism of *Trebeck* v. *Croudace* or *Isaacs* v. *Keech* was irrelevant. Despite the postponement of this judgment, I have not managed to find time to read in any detail the inordinately lengthy judgments in *Ledwith* v. *Roberts.* I gather that the validity of the two earlier judgments was to some extent questioned or doubted, but, as all three cases were decided in this Court, I suppose that I am not constrained to agree with one view rather than the other. For my part, I think that *Trebeck* v. *Croudace* and *Isaacs* v. *Keech*

were rightly decided, and I think that the passage from the judgment of Bankes, L.J., which I have quoted was as sound in law as it is obviously grounded on common sense. In the result, differing unhappily from my brethren, I think that this appeal should be dismissed.

In the *Stevenson* case Hallett, J. said at pp. 479-482:

The question which arises is whether the detention was justified. The defendants have had, in substance, two points to meet. In the first place, it has been said against them, and said rightly, that there is no common law power to arrest for misdemeanour, and that, therefore, this arrest and detention must be justified, if at all, by reference to some statutory power of arrest conferred upon the defendants. The only place where such a statutory power can be found for this purpose is in the Vagrancy Act, 1824, s. 6, whereby it is made lawful ". . . for any person whatsoever to apprehend any person who shall be found offending against this Act . . ."

Then there is a penalty against any constable who shall refuse or wilfully neglect to take such an offender into custody.

The first point taken against the defendants is that the police officers did not find the plaintiff offending against the Vagrancy Act, 1824, inasmuch as they did not see anything done by the plaintiff which could constitute an offence. . . .

. . . , if this arrest is to be justified, the defendants must show that the power of arrest conferred by sect. 6 authorizes constables to arrest, if they suspect, and have reasonable grounds for suspecting that a person has been found committing an offence against the Vagrancy Act, 1824. With regard to that aspect of the matter, there is again a great deal of authority. I do not propose to refer to all the cases. . . .

. . . However, the difficulty with which I am faced is that, as it seems to me, in *Ledwith* v. *Roberts*, [1937] 1 K.B. 232; [1936] 3 All E.R. 570; 106 L.J.K.B. 20; 155 L.T. 602 the majority of the Court of Appeal have decided the question for me, and I am bound, sitting here as a judge of first instance, loyally to follow any guidance which has been afforded to me by that Court. . . .

I am not going to refer to the other facts in *Ledwith* v. *Roberts*, because with those also I am not concerned, nor am I going to refer to the historical review of the vagrancy legislation which Scott, L.J., provided, or to the desirability of its reform. However, when I come to the judgment of Greene, L.J., I find this passage at p. 256:

"There does not appear to me to be any such reason of emergency in the case of some, at any rate, of the offences mentioned in the Vagrancy Act, 1824, s. 4; and I do not think it would be permissible to construe sect. 6 as justifying an arrest on honest suspicion in the case of some of those offences and not in others—it must be all or none."

Then, after reading a passage from the judgment of Bankes, L.J., in *Trebeck* v. *Croudace*, [1918] 1 K.B. 158; 87 L.J.K.B. 275, 118 L.T. 141, Greene, L.J. said, at p. 257:

"I cannot myself read this decision as extending to cases other than those where the nature of the suspected offence requires prompt action."

I want to say quite plainly, with all possible respect to the Court above that, if I were asked whether the nature of the suspected offence here

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required prompt action, I should answer that question without an instant's hesitation in the affirmative. Here the suspected offence is a man riding round on a bicycle indecently exposing his person, and the matter certainly did, in my opinion, require prompt attention. I repeat what I said during the argument—namely, that, looking at this offence as a layman, I should not only say that the police were justified in taking the action they took in view of the information which they had received, but I should go further and say that, in the view of the ordinary man in the street, the police would have been lamentably failing in their duty if they had done anything else. . . .

For my own part, with all respect to those judges whose views are at least such that I do not feel justified in disregarding them, I feel much more inclined to agree with MacKinnon, L.J. in *Gorman* v. *Barnard*, [1940] 3 All E.R. 453 . . . It seems to me, however, that I am precluded by authority from deciding this case in favour of the defendants.

In the *Barnard* v. *Gorman* case, *supra*, as repoterd in [1941] 3 All E.R. (H.L.) 45 the head-note reads as follows:

The respondent, a ship's steward, arrived in Liverpool on July 4, 1938, from Burma. The two appellants were preventive Customs officers. On July 5, they detained the respondent, took him to the police court, and there charged him with knowingly harbouring uncustomed goods consisting of a box of cigars, with intent to evade the payment of duty thereon, contrary to the Customs Consolidation Act, 1876, s. 186. He was detained in custody for some hours before being released on bail. He came before the Liverpool stipendiary magistrate on July 7, when the charge was dismissed. The respondent then commenced proceedings to recover damages for malicious prosecution and false imprisonment, and the question arose whether, upon the true construction of the Customs Consolidation Act, 1876, s. 186, that section authorized the detention of a person suspected of offending against the section but not in fact guilty of the offence:—

HELD: the word "offender" in the Customs Consolidation Act, 1876, s. 186, is not restricted to an actual offender, and the section authorises the arrest of an alleged or suspected offender. The claim for false imprisonment, therefore, failed.

Decision of the Court of Appeal ([1940] 3 All E.R. 453) reversed.

In the same case it may be noted that the editorial note reads as follows:

The House of Lords have decided this case purely upon the construction of the section, and have, in effect, adopted the dissenting judgment of MacKinnon, L.J., in the Court of Appeal. The three difficult cases, *Trebeck* v. *Croudace*, [1918] 1 K.B. 158; 87 L.J.K.B. 272; 118 L.T. 141; *Isaacs* v. *Keech*, [1925] 2 K.B. 354; 94 L.J.K.B. 676; 133 L.T. 347 and *Ledwith* v. *Roberts*, [1937] 1 K.B. 232; [1936] 3 All E.R. 570; 106 L.J.K.B. 20; 155 L.T. 602, are discussed, and, to some extent, their Lordships have given their views upon the important matter arising upon them, but, as that matter did not directly arise in this case, those statements must be treated as *obiter dicta*. However, they do give some indication that, when the matter does finally come before them, the House will lend a friendly ear to the

suggestion that, where instant action is demanded by the needs of public safety, an honest belief that an offence is being or has just been committed will protect the constable making the arrest. The matter is one of great public importance, since there is no doubt that the police are often hampered in the efficient performance of their duty by the law as it stands at present, as was shown in the recent case of *Stevenson* v. *Aubrook* [1941] 2 All E.R. 476.

It may be noted that the decision in the *Stevenson* case was before the House of Lords decided the *Barnard* case, the latter case being decided purely upon the construction of the section of the statute involved in such case. It must also be noted that in the *Stevenson* case, Hallett, J. clearly states that he felt inclined to agree with MacKinnon, L.J. in the *Barnard* case but it seemed to him that he was precluded by the decision of the majority of the Court in the *Ledwith* case, which dealt with the same section of the statute which was relied upon by the defendants in the case before him. In the present case my view is that the arrest and subsequent detention of the plaintiff must be justified, if at all, by reference to some statutory power of arrest conferred upon the defendant and the only place where such a statutory power can be found is in our Criminal Code, section 648, reading as follows:

> A peace officer may arrest without warrant, any one whom he finds committing any criminal offence.

(Compare also section 35 of the Criminal Code.)

I have therefore to decide the question whether the said section 648 authorized and justified the arrest and detention under the circumstances as I have found them here. On this question I have in the first place to say, as Hallett, J. said in the *Stevenson* case, that if I were asked whether the nature of the suspected offence here required prompt action, I should answer that question in the affirmative and, looking at this offence as a layman, I would go on to say that the defendant was justified in taking the action he took in view of the information he had received. I have next to say that, looking at the matter, as I must, as one obliged to interpret section 648 as it stands in the light of the decisions in the very recent cases hereinbefore referred to, I reach the same conclusion. On the one hand it may be said, and said rightly, that our statutory provision as aforesaid has not been specifically dealt with but, on the other hand, it may be said, and I think also said rightly, that it follows that the question here has not already been decided for me and I am not

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therefore by authority precluded, as Hallett, J. thought he was in the *Stevenson* case, from deciding this case in favour of the defendant. Doing my best to interpret the section with the assistance of the cases referred to I decide that said section 648 authorized and justified the arrest and detention of the plaintiff by the defendant under the circumstances as I have hereinbefore found them in a case where the nature of the suspected offence was such that in the interests of public safety prompt action was called for. If I should be wrong in this decision and if further justification should be necessary then, in my view, it is found in section 30 of the Criminal Code as follows:

> Every police officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

Referring to this section MACDONALD, J.A. (later C.J.B.C.) said in *Whitworth* v. *Dunlop* (1934), 48 B.C. 161 (62 Can. C.C. 41, at pp. 47-49) in part, as follows at pp. 168-170:

> Even if all the elements of the offence were not observed or an honest mistake made in drawing conclusions the appellants are entitled to the protection of this section if a judge or jury on all the facts could reasonably so find. This section is not restricted to the offences outlined in section 646 or section 647; it also includes an offence within the purview of section 648 . . .
>
> It follows that in my opinion on the special facts in the case at Bar the appellants might arrest the accused without a warrant under section 648. Further, even if the true facts did not warrant the conclusion that the offence was committed, the acts of the appellants would be justified under section 30.

In the result, as I view it, the conduct of the defendant towards the plaintiff throughout was reasonable and justified under the circumstances. The plaintiff has not, therefore, established her claim and the action is dismissed with costs.

Having come to this conclusion I find it unnecessary to deal with the questions raised as to whether or not the plaintiff was required to give, and to plead specifically the giving of, the notice in writing of the action referred to in section 1144 of the Criminal Code of Canada and whether or not in any event such notice was given. I have to say, however, that I would refuse the application of the defendant to amend by pleading the lack of such notice.

Action dismissed.

THE KING v. CITY OF ARMSTRONG.

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1941
Dec. 18.
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Feb. 11.

Children—Protection of—Order for maintenance by corporation—Judge of the juvenile court—Right of appeal—R.S.B.C. 1936, Cap. 271, Secs. 4 (1) (b) and 77—R.S.B.C. 1936, Cap. 128, Secs. 51, 56, 57 and 82.

An order was made by a judge of the juvenile court committing certain children to the custody of the superintendent of neglected children, and required the city of Armstrong to provide weekly sums for their maintenance. On appeal to the county court, preliminary objection was taken to the jurisdiction of the Court to hear the appeal.

Held, that judicial functions under sections 56, 57 and 82 of the Infants Act are to be exercised by a "judge" and "judge" as defined by section 51 of said Act includes a judge of the juvenile court. Section 4 (1) (*b*) of the Summary Convictions Act provides that the Act shall be applicable to every case in which a complaint is made to a justice with respect to an act as to which the justice has authority to make an order, and section 77 of said Act provides for an appeal to the county court from a conviction or order made by a "justice." It should be noted that the word "justice" is used in both sections. "Justice" is defined by section 2 of the said Act and the definition includes justice of the peace, a stipendiary magistrate and police magistrate, but makes no mention of a judge of the juvenile court. It follows that there is no jurisdiction, and the appeal cannot be heard.

APPEAL by defendant to the County Court of Yale from an order of the judge of the juvenile court at Vernon, requiring the defendant to make certain weekly payments for the maintenance of certain children. The facts are set out in the reasons for judgment. Argued before WILSON, Co. J. at Vernon on the 18th of December, 1941.

Lindsay, for appellant.
Morrow, for respondent.

Cur. adv. vult.

11th February, 1942.

WILSON, Co. J.: This is an appeal under the Summary Convictions Act, Cap. 271, R.S.B.C. 1936, by the city of Armstrong against an order requiring that corporation to provide certain weekly sums for the maintenance of certain children.

A preliminary objection was taken to the jurisdiction of this Court to hear the appeal, and it is only to that objection that this judgment relates.

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Part III. of the Infants Act, R.S.B.C. 1936, Cap. 128, titled "Protection of Children" provides for the exercise of certain judicial functions including, under sections 56 and 57, the making of orders committing neglected children to the care of a children's aid society or the superintendent of neglected children, and under section 82 the making of orders against municipalities to provide certain weekly sums for the maintenance of such children. These judicial functions are to be exercised by a "judge." Judge, as defined in section 51 of the Infants Act includes a judge of a juvenile court and a stipendiary magistrate.

The order appealed from committed certain children to the custody of the superintendent of neglected children and required the city of Armstrong to provide weekly sums for their maintenance. The order is signed thus "William Morley, judge of the juvenile court for the North Okanagan Electoral District, and stipendiary magistrate acting on behalf of Job Zenas Parks, police magistrate in and for the city of Armstrong, by request." I must hold that Mr. Morley made the order as judge of the juvenile court. The further words describing him as a stipendiary magistrate are surplusage.

Counsel for the appellant bases his plea for jurisdiction on sections 4 (1) (*b*) and 77 of the Summary Convictions Act. It is unnecessary to comment on these sections otherwise than to say that the first of them provides that the Act shall be applicable to every case in which a complaint is made to a justice with respect to an act as to which the justice has authority to make an order, and that the second, section 77, provides for an appeal to the county court from a conviction or order made by a justice. It is to be noted that the word "justice" is used in both sections. "Justice" is defined in section 2 of the Summary Convictions Act. The definition includes a justice of the peace, two or more justices, a stipendiary or police magistrate, but makes no mention of a judge of the juvenile court.

The Juvenile Courts Act, R.S.B.C. 1936, Cap. 60, provides for the constitution, as Courts of Record, of juvenile courts, and the appointment of judges therefor. It is only necessary to say

that there is nothing in this Act to indicate that the description "justice" can be held to include a judge of the juvenile court.

Counsel for the appellant maintains that Mr. Morley was not in fact sitting as judge of the juvenile court, but as a stipendiary magistrate. He points out that the information, which was laid before Mr. Morley, was signed by him as stipendiary magistrate, acting on behalf of Job Zenas Parks, Esquire, police magistrate in and for the city of Armstrong, by request. This has no bearing on the matter. No Court's jurisdiction to hear a case is based on the taking of the original information, and, in fact, a great many trials are conducted by persons other than those who took the informations on which they are based. He says that no attempt was made on the trial to show that the judge had jurisdiction as judge of the juvenile court for the North Okanagan Electoral District. The question of jurisdiction does not appear to have been raised on the trial, but, if it had been, the judge could properly have found that the fact of Armstrong being within the North Okanagan Electoral District was sufficiently notorious to justify him in taking judicial notice of it (see *Rex* v. *Irwin* (1919), 27 B.C. 226; *Rex* v. *Zarelli* (1931), 43 B.C. 502, etc.).

I must hold that Mr. Morley acted as judge of the juvenile court, the capacity in which he signed the order appealed from. However dangerous it may be that a judge of a juvenile court should be able to make orders of the financial significance of the one appealed from without any recourse or right of appeal existing, it must be remembered that the legal presumption is against the right of appeal existing, unless it is provided in clear language. There is no such language here. It follows that I have no jurisdiction. The appeal cannot be heard.

Counsel for the respondent was instructed by the Attorney-General and appears for the Crown. The Crown Costs Act applies and there can be no order for costs.

Preliminary objection upheld.

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ITOKU MURAKAMI v. HENDERSON *ET AL.*

Damages—Negligence—Death of child hit by truck—Shortening of expectation of life—Quantum.

Refd to Stevenson v. (3a) 429 (BCCA)

The plaintiff's child, three years old, was struck and killed by a truck owned by the defendant company in mid-afternoon. There were no intervening or distracting conditions at the time. The driver's field of vision was in no way obscured, he had full control of the truck and could have easily avoided the child.

Held, that the driver owed a duty to the child to take care and he committed a breach of duty which was the sole cause of the fatality.

Held, further, on the question of damages, that the thing to be valued is not the prospect of length of days but the prospect of predominating happy life. The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of the measure of prospective happiness. The damages were fixed at $500.

ACTION for damages by Itoku Murakami as administrator of the estate of his daughter who was killed when run into by a truck driven by the defendant Windsor and owned by the defendant company. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 12th of February, 1942.

Denis Murphy, Jr., for plaintiff.
Bull, K.C., for defendants.

Cur. adv. vult.

16th February, 1942.

MORRISON, C.J.S.C.: Itoku Murakami, the father of the little 3-year-old girl, Hideko Murakami, lives with his family at Steveston, an insalubrious location, upon which is an agglomeration of small houses and shops, protected from the waters of the Fraser River by a dyke along which is the dirt road in question. Canneries and other buildings are strewn along. Inside the dyke is a sluggish, rather dead, insanitary looking ribbon of water, really a large ditch or small slough. The inhabitants are mostly Japanese fishermen and labourers. Many of them live along this dyke. It is somewhat congested. The father is a fisherman, at present out of employment owing to extraneous circumstances beyond his control. The child was with her little

brother on their way from kindergarten in mid-afternoon. There were no intervening, distracting conditions existing at the time. The driver's field of vision was in no way obscured. He had full control of his truck. He could have easily proceeded along avoiding the child or have as readily stopped, assuming I accept his evidence, that he was only going at the rate of three miles an hour.

The driver of the truck owed the child, who was killed, a duty to take care. The duty, a breach of which gives rise to a cause of action in negligence, is to take care under the circumstances. It is, of course, reciprocal. I find that the driver committed a breach of that duty, which was the sole cause of the fatality. I had a view of the place in the presence of counsel—without which it would be difficult, if not impossible, to visualize from snapshots produced at the trial the situation and to believe that anyone, having sense enough to be put in control of a motor-vehicle, would be so indifferent to the presence of the two children of whom he had a clear view. He was proceeding along a dirt road towards a plank thoroughfare, 54 feet wide, into which he intended to turn. He saw them on the road and sounded his horn, put variously up to some 40 feet away, whereupon they went off the road on to the wide plank road and stood some few feet in from the road and well to the side, all the time in clear view of the driver. When asked what signal, if any, he gave at the critical juncture, he indicated in the box, by putting up his hand, the usual signal. This with a view of indicating to the infant child his intention—as well do it to warn a little puppy which he had seen standing in the way. Had he instead sounded his horn even then they might not have escaped. He could as well have proceeded easily at least 20 feet along the dirt road before making his turn in that space of 54 feet. This appeared so obvious at the view. He made too short a turn, apparently disregarding the children's presence. With all deference to the young driver, who had only been driving a truck for two weeks, he impressed me as being just plainly stupid. I was not impressed by either the powers or opportunity of observation of the witness Chambers and particularly Larsen. The witness Shirakawa impressed me as being an impartial witness, notwithstanding counsel's submission to the contrary.

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Morrison, C.J.S.C.

As to the *quantum* of damages to which the plaintiff is entitled I am guided by the last word on that heading by the case of *Benham* v. *Gambling,* [1941] A.C. 157 in assessing the damages in this kind of case. I use the head-note, which puts the matter compendiously, supplemented by a few extracts from the case to show the basis of calculation:

> Damages given for the shortening of life should not be calculated, solely, or even mainly, on the basis of the length of life that is lost; they should be fixed at a reasonable figure for the loss of a measure of prospective happiness. If, however, the character or habits of the deceased were calculated to lead him to a future of unhappiness or despondency that would be a circumstance justifying a smaller award. No regard must be had to financial losses or gains during the period of which the victim has been deprived, damages being awarded in respect of loss of life, not of loss of future pecuniary prospects. In the case of a child, as in the case of an adult, the proper sum to be awarded should not be greater because the social position or prospect of worldly possessions is greater in one case than another.
>
> The thing to be valued is not the prospect of length of days but the prospect of predominantly happy life. . . .
>
> The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of Law.
>
> Stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead.

The speech of the Lord Chancellor ends by expressing a pious hope:

> I trust that the views of this House expressed in dealing with the present appeal may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy.

There will be judgment for the plaintiff for general damages, which I place at $500. The costs will be on the Supreme Court scale.

Judgment for plaintiff.

BRIDGE RIVER POWER COMPANY LIMITED v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

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Feb. 3, 4, 5, 6, 14.

App. Dismd [1943] 1 W.W.R. 413 59 B.C.R. 420 [1944] S.C.R. 196.

Negligence—Derailment of train—Plaintiff's crane on a car included in train—Crane improperly secured to car—Damages resulting—R.S.B.C. 1936, Cap. 241, Sec. 215 (2).

The plaintiff company, having its 20-ton gasoline locomotive crane at Bridge River, and wishing to ship the crane to Vancouver, entered into a contract with the defendant company for transportation of the crane from Bridge River to Squamish. The crane is built into its own car, and when transported by rail may be taken into a train and hauled along like any other car. The contract for carriage was verbal and made between one Newton, sole representative of the railway company at Bridge River, and one Grant, the crane operator. Grant said he would secure the crane and he secured the body of the crane to the frame of the car by passing wire through eyelet holes, making fast to its own part, and then tightening by twisting with a bar after the fashion of a Spanish windlass. This was done on both sides. A hardwood wedge was driven in at the rear end between the main body and the deck of the car. Grant and the superintendent of the plaintiff company inspected the crane fastenings and were satisfied the crane was secure. Newton and the conductor of the train were of the same opinion. There are many curves on the railway, and when the train reached about seven and one-half miles south of Bridge River the car with the crane derailed. It was found that the swinging of the crane car around these curves gradually slackened the wires and the increased play eventually broke the wires and dislodged the wedge, thus allowing the crane body to swing around at an angle to the car with the ballasted end outboard causing the derailment.

Held, that the cause of the derailment was the insecure fastening of the crane. The railway company had the duty of seeing that the crane was in proper condition for the journey. It is a transportation problem. The duty of securing the crane so as to make the train "railworthy" was upon the railway company.

ACTION for damages due to derailment of a train of the defendant company in the course of transportation, including a car upon which was secured the plaintiff's 20-ton gasoline locomotive crane. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 3rd to the 6th of February, 1942.

J. W. deB. Farris, K.C., and *Riddell*, for plaintiff.

Locke, K.C., and *Yule*, for defendant.

Cur. adv. vult.

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BRIDGE RIVER POWER CO. LTD. v. PACIFIC GREAT EASTERN RY. CO.

14th February, 1942.

SIDNEY SMITH, J.: This action for damages arises in consequence of damage sustained by the plaintiff's 20-ton gasoline locomotive crane while in the course of transportation by the defendant railway company from Bridge River to Squamish, due to derailment of the train. The crane body is built into its car which is provided with its own means of locomotion by gearing. When being transported by rail this gearing is disconnected and the crane may then be taken into a train and hauled along like any other car. The crane is swung by a turntable mechanism also operated by gearing. The weights to counterbalance the weight of boom and load are situated at the rear of the crane body.

The defendant company is governed by the provisions of the Railway Act, R.S.B.C. 1936, Cap. 241. Under section 215 (2):

> Every company shall be liable for the loss of or damage to goods entrusted to such company for conveyance, except that the company shall not be liable when such loss or damage happens:—
>
> (*a*.) Without actual fault or privity of the company, or without the fault or neglect of its agents, servants, or employees.

The contract for carriage was verbal. It was made rather casually between Newton, the checker and sole representative of the P.G.E. at Shalalth (which is the station for Bridge River, 1 mile away) and Grant, the crane operator. Grant told Newton that his company wanted to ship the crane to Vancouver. He requested a flat car to take the boom, and said he would secure the crane and boom for transportation. He secured the body of the crane to the frame of the car by passing a length of wire cable through eyelet holes, making fast to its own part and then tightening by twisting with a bar, after the fashion of a Spanish windlass. This was done on both sides. A substantial hardwood wedge was driven in at the rear end between the crane body and the deck of the car. The purpose of all this was to secure the crane body in position during shipment and prevent its rotating. The boom was then unshipped, but not dismantled, and stowed on the flat car. It overlapped the end of that car and subsequently another flat car (an idler) had to be placed ahead of that again to serve as a coupling.

Grant inspected the crane and was satisfied with the method of securing. Heinrich, the superintendent of the plaintiff com-

pany, also inspected the fastenings of the crane and was satisfied. They gave evidence that Newton (now deceased) also expressed himself to the same effect.

The train arrived at Bridge River at 10.05 a.m. on 7th July, 1937, and left again at 10.15 a.m. It was under the charge of an experienced conductor who had instructions to pick up the crane. He examined the crane and considered that it had been properly secured for shipment. He looked at the journal boxes and found they had been oiled. He thereupon coupled the crane assembly to the head of the train, which then consisted of the following: the engine, idler, boom car, locomotive crane, ten other cars of various descriptions, and finally the caboose.

The accident happened seven and one-half miles south of Bridge River, at 10.40 a.m. Leaving Bridge River the railway line is curving, containing about 50 or 60 curves to the place of derailment and having there a pronounced right-hand curve. I accept the opinion of Mr. Bates, the chief engineer of the defendant company, as to the cause of the accident. He says in effect that the swinging of the crane car around these curves gradually slackened the wires, and the increased play eventually broke the wires and dislodged the wedge, thus allowing the crane body to swing round at an angle to the car with the ballasted end outboard causing the derailment. I think there can be no doubt that the crane car was the first to leave the rails and that the cause of the derailment was the insecure fastening of the crane body to the frame of its car.

The question before me is whether the *onus* of securing the crane was on the plaintiff or on the defendant. In other words, whether the owner of the crane or the railway company had the duty of seeing that the crane was in proper condition for the journey it was about to undertake. In my opinion this duty is one for the railway company. It is a transportation problem. It does not concern the question of whether goods are properly packed. It is a matter of the railway company taking into its train something that imperilled the train itself. Adopting a term from the sea, by analogy, the train was "unrailworthy." I think there can be no doubt that the duty of securing the crane so as to make the train "railworthy" was upon the railway company.

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Sidney Smith, J.

I find that Grant, the crane operator, told Newton that he would prepare the crane for shipment. But that could not mean that the railway company was thereby relieved of all responsibility. Grant had had no experience with cranes other than at Bridge River with comparatively light loads. He had no special knowledge of the security required for transportation over a railway, and in particular over a railway like the P.G.E. which, according to the evidence, contains a great number of curves. Nor had Heinrich. The transportation difficulties were all peculiarly within the knowledge of the railway company and not within the knowledge of the plaintiff. And in my view the railway company recognized this responsibility. Both the conductor and Newton inspected the fastenings of the crane. So far as their knowledge and experience went they thought the crane was safe for travel. They were mistaken. It is true that the crane was perhaps an unusual article to transport. But for this very reason special care should have been taken, and the railway inspectors who were stationed at Lillooet and Squamish ought to have been called in. This was not done. In my opinion, therefore, the plaintiff is entitled to the damages claimed, $5,229.37, with costs. I am not sure whether the item $59.37 was admitted. If there is any doubt about this it may be spoken to. The counterclaim is dismissed.

By way of caution I might add that the book of instructions, Exhibit 11, was allowed in, not as evidence of the truth of what it contained but only as evidence that such a book existed and as material for cross-examination.

Judgment for plaintiff.

TERRY v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER.

MORROW AND MORROW v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER.

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App. Dism'd [1942] S.C.R. 391

Followed Hendrickson v. Mid-City Motors [1943] 3 D.L.R. 296

Automobile—Negligence of driver—Statutory liability of owner—"Consent express or implied" to driver's possession—Driver obtains possession of car through false representation—R.S.B.C. 1936, Cap. 195, Sec. 74A.

The plaintiffs were injured owing to the negligence of the defendant Walker when driving an automobile rented from the defendant company. Walker first rented a car but brought it back a few hours later owing to engine trouble, when he was given another car in substitution. He had no driver's licence and was given the first car by falsely representing he was one Hindle, whose licence he had in his possession and in whose name he signed the rental contract. On bringing the car back, the company's employee then on duty (not the same employee who carried out the original transaction) looked up the hire contract and asked Walker if his name was Hindle, to which Walker replied "Yes." The employee being then satisfied as to Walker's identity, delivered him the second car. It was held on the trial that possession of the car which injured the plaintiffs had been acquired by Walker with the "consent express or implied" of the defendant company within the meaning of section 74A of the Motor-vehicle Act, and both defendants were liable.

Held, on appeal, affirming the decision of MURPHY, J., that the defendant company gave a voidable consent to Walker having the car; that means a real consent and one sufficient to satisfy section 74A of the Motor-vehicle Act.

APPEAL by defendant Vancouver Motors U Drive Limited from the decision of MURPHY, J. of the 24th of June, 1941 (reported, 56 B.C. 460), in an action for damages resulting from the negligence of the defendant Walker when driving an automobile rented by him from the defendant Vancouver Motors U Drive Limited. The defendant Walker, a member of the Air Force, did not have a driver's licence. In February, 1941, Walker got possession of the driver's licence of one Hindle, also a member of the Air Force. The defendant company operate the business of renting cars to individuals who drive the cars themselves. On February 5th, 1941, at about 3 p.m., Walker went to defendant's premises and asked to rent a car. One

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Jardine, who was one of the company's service men, asked him his name and he replied "Hindle." He then asked him for his driver's licence and he produced Hindle's licence. Jardine made out the usual rental contract and Walker signed it, signing Hindle's name. Jardine compared the signatures and they appeared alike to him. Jardine then asked him if he had rented a car before and Walker said that he had, and on looking up the records Jardine found that Hindle had rented a car previously. He took a $10 deposit from Walker who then drove a car away. At 1 o'clock in the morning Walker drove back to the company's premises and said he had mechanical trouble and wanted another car. At this time one Tkatch, another employee of the defendant company, was looking after the premises. Tkatch, after making enquiries and changing the contract to another car, gave Walker the car and he drove away. Walker was driving this car when he injured the plaintiff. It was held on the trial that both Walker and the company were liable for the damages sustained by the plaintiffs.

The appeal was argued at Vancouver on the 28th of November, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

L. St. M. Du Moulin, and *A. M. Russell,* for appellant: Consent obtained by fraudulent misrepresentation is not consent at all. Fraud vitiates the contract: see *Roehrich* v. *Holt Motor Co.* (1938), 277 N.W. 274; *Liberty Mut. Ins. Co.* v. *Stilson* (1940), 34 F. Supp. 885, at p. 887. As to the definition of consent see Storey on Equity, 3rd Ed., 94, sec. 222; 15 C.J., 979 (footnote); *Heine* v. *Wright* (1926), 244 P. 955; Wharton's Law Lexicon, 14th Ed., 235; *Lake* v. *Simmons* (1927), 96 L.J.K.B. 621, at p. 630. On mistaken identity see 44 L.Q.R. 72; 56 L.Q.R. 238. Section 74A of the Motor-vehicle Act must be strictly construed: see *Weber* v. *Pinyan* (1937), 70 P. (2d) 183; *Gonzy* v. *Lees,* [1941] S.C.R. 262, at p. 264.

Bull, K.C., for respondent Terry: There are three branches in relation to the appeal. First, the decision of MURPHY, J. can be supported. Second, the "consent" is a *de facto* consent, and third, there was a consent sufficient to found a contract. The Motor-vehicle Act is a remedial Act, the purpose being to protect

the public against impecunious drivers: see *Levy* v. *Daniels' U-Drive Auto Renting Co.* (1928), 143 A. 163, at p. 164; *Folkes* v. *King,* [1923] 1 K.B. 282, at p. 305. Although there was fraud, Walker obtained a contract until discharged by return of the car. He paid $10 for the car and got physical possession of it. The contract is a contract until it is voided, and the consent exists until it is voided. A contract is good although induced by fraud until the contract is set aside: see Halsbury's Laws of England, 2nd Ed., Vol. 27, p. 98, pars. 138-9; *Musgrove* v. *Pandelis,* [1919] 2 K.B. 43; *Hardman* v. *Booth* (1863), 1 H. & C. 803; *Whitehorn Brothers* v. *Davison,* [1911] 1 K.B. 463; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Edmunds* v. *Merchants' Transportation Co.* (1883), 135 Mass. 283; *Lake* v. *Simmons,* [1927] A.C. 487. There was consent by an authorized person.

G. Roy Long, for respondent Morrow, referred to Chitty on Contracts, 19th Ed., pp. 9-10; *Sowler* v. *Potter,* [1939] 4 All E.R. 478.

Du Moulin, replied.

Cur. adv. vult.

13th January, 1942.

MCDONALD, C.J.B.C.: I think the learned trial judge came to the right conclusion, though I cannot altogether accept his reasons. This case involves the construction of section 74A (1) of the Motor-vehicle Act, by which the owner of any motor-car is liable for damage done by any person driving it with the owner's consent, express or implied.

The plaintiffs sue in respect of damage done by the appellant company's motor-car while it was being driven by defendant Walker, and the whole point on this appeal is whether Walker was driving with the company's consent.

The company makes a practice of renting motor-cars for short periods to persons who do their own driving, and often deals with complete strangers. The defendant Walker was such a stranger. The practice of the company was to require customers, who wished to rent, to produce drivers' licences, as the city by-law required. Defendant Walker wished to hire a car, but had no licence, and in some way got hold of the licence of a man named

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Hindle, who was also a stranger to the appellant company. Walker approached the company, stated that his name was Hindle, showed the licence and signed the usual rental contract in Hindle's name. Hindle had rented a car from the company at a date about a year earlier, but the employee whom Walker dealt with did not recollect him, and only learned that fact from the company's records. Walker obtained a car from the company as described, but had mechanical trouble, and some ten hours later returned the car to the company and asked for another. The employee from whom he had got the first car was off duty and he saw another. The latter, after looking up the contract and asking Walker if his name was Hindle, to which Walker said "Yes," gave him another car.

I think the transactions with the two employees should be regarded as one; for naturally the second employee would be guided by the fact that Walker had already satisfied the first employee when obtaining the first car.

While negligently driving the second car Walker injured the plaintiffs, and the question is whether the appellant company is responsible, which question is governed by the question whether Walker had possession with its consent. The learned trial judge has held that he did. As I read his reasons, he considered that the section was satisfied if the appellant had given its consent to Walker's possession *de facto,* which obviously it had. For my part I think it is going too far to say that *de facto* consent is necessarily sufficient. It would, I think, be impossible to say that a consent compelled, say at the point of a gun, would be within the section, whatever the form of words used in giving possession; and I do no think that duress is the only factor that can negative consent *de jure* where there has been consent *de facto.* On this point the learned judge has said [56 B.C. at p. 463]:

> In my opinion, in construing this section, no assistance can be obtained by considering decisions which deal with questions of contract or no contract or voidable contracts and contracts void *ab initio* or cases dealing with whether or not title to property has passed. Such consideration in my view merely tends to befog the real issue.

With respect, that is not my view. I agree that in many instances no question of contract enters into the question of

consent, as where gratuitous user of a car is allowed to relatives or friends, but where possession is given as an integral part of a contract or a supposed contract, and only because of it, then I think the reality of the contract in law has a very essential bearing on the reality of the consent in law. At the very least, the decisions on contracts furnish a valuable analogy, particularly those on the passing of title to property under a contract of sale induced by fraud.

There is no lack of such decisions, though I do not think it necessary to examine many. The general rule is that a contract of sale induced by fraud gives a voidable title to the property sold, which the fraudulent purchaser can pass on to a purchaser for value without notice, which means that the vendor's consent to the property's passing is a real consent, even though one that can be withdrawn, if withdrawn in time. But there is an exception to the general rule, in that if the fraud is of a particular kind, *i.e.*, one which deceives the vendor as to the identity of the purchaser, there may not be merely a voidable contract: there may be in law no contract at all. The leading case on this point is *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459. In general this principle only applies where the identity of the party is material. In *Lake* v. *Simmons*, [1927] A.C. 487, at p. 501, Lord Haldane, L.C. said:

> Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being a contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on the distinction to be looked for in what has really happened. Pothier (Traite des Obligations, section 19) lays down the principle thus, in a passage adopted by Fry J. in *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223, 230: "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

The difficulty is to apply this reasoning to particular facts.

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After quoting the above passage Lord Haldane went on to discuss Horridge, J.'s decision in *Phillips* v. *Brooks, Limited,* [1919] 2 K.B. 243, with apparent approval. There a rogue obtained goods from a jeweller by pretending to be a well-known person of credit, and by signing that person's name to a cheque. Horridge, J. held that the rogue thus obtained a title, though a voidable one. Though Lord Haldane, as I have said, appears to have approved that decision, I must say, with due respect, that the decision startles me a little. I should have said that that case fell within Pothier's first category, not the second, and I find it hard to reconcile the decision with *Cundy* v. *Lindsay, supra,* which Horridge, J. cited, but to my mind misapplied. I do not see any real distiction between that case and *Phillips* v. *Brooks, Limited,* except that in one case there was a physical meeting between vendor and purchaser, and none in the other. I cannot believe that that is the test. A merchant might easily have a customer of many years' standing, whom he trusted, but had never seen, and who could be impersonated by a person that appeared before him. I should think that *Cundy* v. *Lindsay* governs such a case. In fact the test of physical meeting seems to me to be negatived by the actual decision in *Lake* v. *Simmons, supra.* If *Phillips* v. *Brooks, Limited, supra,* is good law, then the appellant's case seems quite hopeless. It is weaker than that of the defrauded party there. But as Lord Haldane, in approving the decision, was speaking for himself, and not for the House of Lords, I do not feel like basing my decision on that case alone.

I therefore assume that if the name of Hindle had meant to the appellant a customer whom it knew and trusted, then it would have been entitled to succeed. Actually, however, this was not the situation. The name Hindle meant little more to the appellant than the name Walker; the only difference was that Hindle was the name appearing in a licence, and that no licence in Walker's name was forthcoming. Pretty obviously, if Walker could have produced a licence in his own name, the appellant was just as ready to deal with him as with Hindle. The misrepresentation of name, then, really amounted to no more than this, that Walker misrepresented that the licence produced was his. I do not think that state of affairs brings us within the principle

of *Cundy* v. *Lindsay, supra.* I think this case closely resembles *King's Norton Metal Company (Limited)* v. *Edridge, Merrett, and Company (Limited)* (1897), 14 T.L.R. 98 (C.A.). There a rogue carried on a correspondence with manufacturers under an assumed name. Neither name would have meant anything to the manufacturers, except that they had once filled an order under the assumed name and been paid. The influence of the rogue's procedure lay in this, that he appeared to be a firm, whose letterheads had a picture of a large and prosperous factory, though this was purely fictitious. The manufacturers were thus induced to part with goods on credit, which goods the rogue converted. It was held that he had acquired a voidable title. That case resembles this, in that the name assumed equally meant nothing to the party defrauded except the possession of supposed adventitious advantages. I think that equally here the appellant gave a voidable consent to Walker's having the car; that that means a real consent and one sufficient to satisfy section 74A (1) of the Act.

I have read the American cases cited. The strongest in appellant's favour seems to be *Roehrich* v. *Holt Motor Co.* (1938), 277 N.W. 274. As to that case I will only say that it does not seem to be in accord with English decisions.

I have not overlooked the fact that Walker was guilty of forgery, as well as of other fraud. Judicial statements have been made that "forgery may be more than fraud," but I do not think they help the appellant. They apply, I think, to cases where a party who must rely on title obtained from some rogue, cannot show that the latter had even a voidable title, but can only show a document of title to which the real owner's name is forged. The principle could only apply here if the only evidence of consent to possession was a forged rental contract. Actually, here, the forgery was only a matter of inducement, much as if Walker had given in his own name, supported by a forged licence in his own favour.

I think, therefore, that this appeal fails.

SLOAN, J.A.: In my opinion the decision of the learned trial judge was right and I am in agreement with the reasons given

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by him in support of the conclusion he reached. I would therefore dismiss the appeal.

O'HALLORAN, J.A.: On February 5th, 1941, Calvin Walker, a member of the Air Force and in uniform, came into the premises of the appellant Vancouver Motors U Drive Limited and applied to rent a motor-car. He gave the name of a fellow member of the Air Force one J. G. Hindle, and produced the latter's driver's licence. He signed the rental contract as "J. G. Hindle." Asked if he had ever rented a car from the company, he said he had. Jardine, the company official in charge, checked the company index and found that a J. G. Hindle had rented a car about a year before. Jardine testified the signature "J. G. Hindle" on the driver's licence and on the contract "looked very much alike to me." Walker paid the required deposit of $10, was given possession of motor-car licence No. 91-014 and drove it away shortly after 3 p.m.

About 1.30 a.m. Walker returned with the car, complained of mechanical trouble, and asked for another car. Tkatch the company man then in charge looked up the contract, checked the mileage on the incoming car and gave him car No. 91-006 in substitution which he drove away. Tkatch scratched out the licence number 91-014 on the contract and inserted No. 91-006, but did not have it signed; nor did he ask for Walker's driving-licence. It is common ground the second car was substituted for the first by consent, and that nothing turns upon it. Within an hour thereafter the three respondents suffered serious injuries caused by Walker's negligent driving of motor-car No. 91-006.

The three respondents sued the appellant company, alleging it was liable for Walker's negligence under section 74A of the Motor-vehicle Act as enacted by Cap. 54, B.C. Stats. 1937, Sec. 11, which reads in material part as follows:

> Every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; . . .

The learned trial judge MURPHY, J. found the appellant company liable. He said in material part, 56 B.C. 460, at p. 464:

Did his [Jardine's] mind go along with the act and assent to it? I hold that it did. Jardine intended to give possession of car licence No. 91-006 the individual with whom he was dealing. That individual was Walker and he did deliver possession to Walker. True he would not have done so but for his mistaken belief caused by Walker's fraudulent misrepresentation that Walker had a driver's licence. Nevertheless his consent to Walker's possession of car licence No. 91-006 was an existent fact at the time he handed it over to Walker. His mind went along with his act in delivering possession of car licence No. 91-006 to Walker and assented to that act. Section 74A makes the liability of the owner of a motor-vehicle dependent upon possession by the wrong-doer with the consent, expressed or implied, of the owner *simpliciter*. To give effect to the argument on behalf of the company on this phase it would in my opinion be necessary to introduce into section 74A of the Motor-vehicle Act after the words "with the consent, express or implied, of the owner of the motor-vehicle" some such phrase as "unless such consent is obtained by fraudulent misrepresentation."

It is manifest I think that the appellant company cannot be liable under section 74A, unless Walker had acquired possession of the motor-car with its "consent express or implied." But the existence of that consent must depend upon whether the "rental contract" which Walker signed in Hindle's name is a nullity or a contract. For it was under that document that Walker was given possession of the motor-car. If that document is a nullity, then there was no contract between Walker and the company and it cannot be said to have consented to his possession of the motor-car. On the other hand if that document is a contract, then the company's consent cannot be denied. For even if the company was induced to enter into it by Walker's fraud or misrepresentation, it would be a contract nevertheless, although it might be a voidable or an unenforceable contract.

In my view at least the answer to this interesting problem lies in the true appreciation of the *ratio decidendi* of *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, and *Edmunds* v. *Merchants' Transportation Co.* (1883), 135 Mass. 283. These decisions may be regarded as complementary to each other for present purposes. The latter decision refers to the former, and both decisions refer to *Hardman* v. *Booth* (1863), 1 H. & C. 803. The *Edmunds* case was decided by the Supreme Judicial Court of Massachusetts. Morton, C.J. gave the judgment of a Court of five members which included Oliver Wendell Holmes, J., later Chief Justice of the Court, and subsequently for 30 years an associate Justice of the

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Supreme Court of the United States, and widely known as an authoritative interpreter of the common law.

The *Edmunds* case was cited by counsel for the defendants in *Phillips* v. *Brooks, Limited,* [1919] 2 K.B. 243, and its reasoning adopted and applied by Horridge, J. in his judgment in that case. Viscount Haldane in giving the leading judgment of the House of Lords in *Lake* v. *Simmons,* [1927] A.C. 487, quoted the reasoning of Horridge, J. at p. 501, and at p. 502 we find reference again to Holmes, J. and his book on the common law. The case at Bar is of the kind (particularly in so far as it affects motor-car insurance) which prompts one to regard as *apropos* what was said by Lord Atkin in *Beresford* v. *Royal Insurance Co.,* [1938] A.C. 586, at p. 600, when he mentioned the importance of uniformity in result in the Courts of the United States and Great Britain (Canada in this case) in matters of strong mutual interest.

In the *Edmunds* case the three actions which were there considered together, divided themselves into two distinct classifications. In the first classification, a swindler representing himself to be Edward Pape of Dayton, Ohio, who was a reputable merchant of that place, appeared in Boston and bought the goods in question personally from the plaintiffs. In the second classification, however, the swindler introduced himself personally as a brother of Edward Pape and bought the goods in question from the plaintiff as the alleged agent of Edward Pape. In the first classification the Court held there was a sale to the swindler, since the property passed to the swindler because the vendor could not and did not believe he was selling to any person other than the person present and identified by sight and hearing. The sale was not nullified because the buyer assumed a false name or practiced any other deceit to induce the vendor to sell to him. It was a *de facto* contract as described by Lord Cairns, L.C. in *Cundy* v. *Lindsay* and there referred to.

In the second classification, however, the Court held that no sale took place, since the property did not pass to the swindler. That was so because (1) the sale was not to the person present since he represented himself as buying agent for Edward Pape; and (2) there could be no sale to Edward Pape through the

agency of the swindler since the swindler did not have any authority from Edward Pape. This second classification is very like *Hardman* v. *Booth, supra,* and there referred to, where the manufacturer called personally at the place of "Gandell & Co." and transacted business personally with the swindler Edward Gandell who represented himself as the agent of Gandell & Co.

In *Phillips* v. *Brooks, Limited, supra,* in which the first classification in the *Edmunds* case was applied, one North came into a jewellery store, and representing himself to be a well-known man named Sir George Bullough, purchased jewellery to the value of £3,000 including a diamond ring valued at £450. He gave in payment a cheque which he signed "George Bullough." The jeweller asked him if he would take the jewellery with him. North suggested the cheque be cleared first but said he would like to take the ring as it was his wife's birthday the next day. He was handed the ring which he pledged later with the defendants for £350. The cheque was dishonoured and North was convicted of obtaining the ring by false pretences. Horridge, J. considered *Cundy* v. *Lindsay* and the *Edmunds* case and held there was a *de facto* contract.

The facts of the present case bring it within the first classification in the *Edmunds* case. Walker did not buy the motor-car it is true, but by renting it he did buy its use for a limited period. The appellant company did not and could not believe it was renting the car to any person other than the applicant in person and identified by sight and hearing, no matter how he might describe himself. It does not nullify the contract of rental because Walker assumed a false name and practiced deceit to induce the company to rent the motor-car to him. There was a *de facto* contract, purporting to pass, and by which the appellant company intended to pass and did pass the possession of the motor-car to the applicant present in person.

Cundy v. *Lindsay* supports that view as was pointed ont in the *Edmunds* case. In that case the swindler Blenkarn in effect forged the signature of a well-known London firm of W. Blenkiron & Co., and by letters purporting to be written by W. Blenkiron & Co., induced Lindsay & Co., Belfast linen manufacturers, to send goods to W. Blenkiron & Co., at an address which enabled

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Blenkarn to get possession of them. At no time were Lindsay & Co. able to identify Blenkarn by sight and hearing. Four law Lords heard the appeal. Lord Chancellor Cairns, Lord Hatherley and Lord Penzance gave judgments and Lord Gordon concurred in the result. While Lord Hatherley and Lord Penzance referred to *Hardman* v. *Booth,* Lord Cairns did not mention it.

In my view a careful reading of the judgments discloses that the *ratio decidendi* of the decision clearly was, that there could not be a contract because there never was more than one contracting party to the transaction. Lord Cairns stated the factual analysis at p. 465:

> . . . Blenkarn— . . . —was acting here just in the same way as if he had forged the signature of Blenkiron & Co., . . . , to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods . . . and . . . the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself but, the firm of Blenkiron & Co.

That Lords Hatherley and Penzance were of the same mind, despite what must be regarded as ambiguous references to *Hardman* v. *Booth,* is fairly well settled by their exceptive statements (later referred to). Viewed in that light it followed as Lord Cairns pointed out (1) there was no sale to Blenkarn because Lindsay & Co. knew of no such person, and (2) there was no sale to Blenkiron & Co. because the latter had never authorized Blenkarn to order the goods. That was the result also in *Hardman* v. *Booth* it is true, but on entirely dissimilar foundational facts, since as already pointed out, the manufacturer in that case negotiated personally with the swindler. If the swindler Blenkarn instead of forging Blenkiron & Co.'s name to the order for goods, had gone to Belfast and in personal negotiations with Lindsay & Co. had represented he was the agent of Blenkiron & Co., then we would have the case of *Hardman* v. *Booth,* and the second classification in *Edmunds's* case.

That this distinction was recognized and preserved in *Cundy* v. *Lindsay,* is amply evidenced in what was said by Lord Cairns, Lord Hatherley and Lord Penzance. At p. 464 the Lord Chancellor said (and *vide* also p. 466):

> If it turns out that the chattel has come into the hands of the person . . . , by a *de facto* contract, . . . the purchaser will obtain a good

title, even although afterwards it should appear that there were circumstances . . . , which would enable the original owner . . . to set it aside, ...

Lord Hatherley at pp. 468-9 distinguishes *Cundy* v. *Lindsay* from a hypothetical case where the swindler had gone personally to the firm from whom he wished to obtain the goods, and had obtained goods on the representation that he was a member of one of the largest firms in London. That hypothetical case bears more than a casual resemblance to *Hardman* v. *Booth,* and illustrates the second classification in *Edmunds's* case.

Lord Penzance preserves the distinction in the clearest language. In fact he described the first classification in *Edmunds's* case in apt language when he said at p. 471:

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands.

Lord Penzance pressed the distinction further when he said it was not necessary to express an opinion thereon because

none of such cases can I think be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contact with Alfred Blenkarn.

It is I think an inevitable conclusion that *Cundy* v. *Lindsay* does not govern the decision of the case before us. But while that case as Lord Cairns put it at p. 466 "ranges itself under a completely different chapter of law," nevertheless its *ratio decidendi* points definitely to acceptance of the distinctions embraced in the two classifications in the *Edmunds* case. As already shown Lord Hatherley recognized the second classification as outside *Cundy* v. *Lindsay,* Lord Penzance similarly recognized the first classification, while Lord Cairns's wider statement also embraced the first classification.

The foregoing examination of *Cundy* v. *Lindsay* and the *Edmunds* case, indicates the broad line of distinction which exists in the law of contract between delivering possession of goods, (1) on a forged order through the mails purporting to be from a person of credit and stability, and (2) on a verbal misrepresentation by a swindler representing himself to be someone else of credit and stability. In the first case the existence of the swindler as a person is unknown to the seller. There is in fact

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no representation by him as a person. The goods are not delivered to him as a person. There is in essence but one party to the transaction; hence it cannot be a contract. It is a nullity.

Not so in the second case, where we have two parties personally present and negotiating. The swindler induces the seller to enter into the contract by falsely representing he is someone else of credit and stability. It is a *de facto* contract, voidable it is true, but nevertheless just as much a contract as if he gave his real name but falsely represented himself to be a person of credit and stability. The minds of the seller and the swindler present before him, meet and agree upon all the terms of the sale, the things sold, the price and time of payment, the person selling ("I"), and the person buying ("you"). The mind of the seller rests on the man in front of him identified by sight and hearing. If the seller did not accept the buyer's representation, be that representation as to name, credit, payment or anything else, he may not have delivered the goods. But the fact of delivering the goods to the swindler negotiating in person points to acceptance of his representation, which in itself is conclusive evidence of the *de facto* contract. If this were not so, there would be no such thing as a voidable contract in our law. For then no transaction between two parties induced by deceit could be a contract at all. It would always be a nullity. Contract would then become a metaphysical concept governed by subjective limitations, instead of a practical and workmanlike objective device for carrying out the innumerable forms of daily commercial dealings between one man and another, and the subsequent dealings by each of them with third and innocent parties.

For the reasons stated it follows that the "rental contract" must be regarded as a contract and not as a nullity. Consequently Walker had possession of the motor-car with the consent of the appellant company within the meaning of section 74A of the Motor-vehicle Act.

We were referred to *Sowler* v. *Potter,* [1940] 1 K.B. 271 which should also be read in [1939] 4 All E.R. 478. It is a decision of Tucker, J. declaring void at the suit of the landlord, a cafe lease to one Ann Potter when it was discovered she was formerly Ann Robinson who had been convicted of permitting

disorderly conduct in a tea room she had once conducted. She negotiated the lease in the name of Ann Potter which she had later assumed by deed poll. The *ratio decidendi* is not clear. It would seem to rest upon some special consideration thought to arise out of the relationship of landlord and tenant not applicable here. But if it does not, it is in my view at least, contrary to the convincing reasoning of *Edmunds's* case, and to what plainly flows from a correct reading of *Cundy* v. *Lindsay*.

Counsel for the appellant referred us also to *Lake* v. *Simmons*, [1927] A.C. 487, and *Roehrich* v. *Holt Motor Co.* (1938), 277 N.W. 274, the latter a decision of the Supreme Court of Minnesota. But neither decision furnishes a counterpart of facts which are of assistance in this case. In *Lake* v. *Simmons* a woman obtained physical possession of two pearl necklaces from a jeweller by fraudulently representing she was the wife of a well-known man and that she wished to show the necklaces to him and a fictitious prospective brother-in-law for their approval with a view to possible purchase by them. Instead she sold the necklaces for her own benefit. In effect she stole the necklaces.

In the *Roehrich* case a boy gave a fictitious name to au automobile dealer and posing as a wealthy prospective purchaser, obtained physical possession of the motor-car by the false statements he wished to drive it over to a nearby hotel to obtain his father's approval to its purchase. Instead he took the car for a long pleasure ride during which he negligently caused injuries to plaintiff's intestate from which death resulted. In effect the car was stolen or converted as the necklaces were in *Lake* v. *Simmons*. Moreover in both cases the subject-matter was used for an entirely different purpose than that for which it was obtained. In the case at Bar, there was no theft or conversion and the car was used for the purpose it was rented, and the respondents' injuries were negligently caused in the course of that use.

The learned trial judge found as a fact that the company official Jardine intended to give and did give possession of the motor-car to the individual present before him. That is supported by the evidence. The appellant company does quite a large business in renting "drive yourself" cars to the public.

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The manager said they averaged 40 contracts a day. In another place he said 40 to 50 thousand cars per year—which would average more than 100 contracts per day. I obtain the definite impression from the evidence that the personal or individual identity of the person applying to rent a car is not a determinative element at all.

A motor-car is rented to a member of the public, in much the same way a shirt is sold in a store. It is true a driver's licence must be produced, but its production is accepted as formally conclusive, without enquiry, or at least without serious enquiry, as to its validity, or the personal or individual identity of the person producing it. When the manager of the appellant company was asked if his operators compared the signature on the drivers' licence with the signature on the contract, he replied "I think so. They are instructed to do so." He had previously said "as a rule the signatures are compared." "I think so" and "as a rule" point to a practice casual and incidental in its nature, and manifestly inconsistent with a contention that ascertainment of the personal or individual identity of the applicant is a condition precedent to, or a decisive element in renting a motor-car.

Whatever enquiries may be directed to identification, they seem to be of a casual and superficial character. Certainly no identification is required such as would show by independent reliable evidence that the applicant is in truth the person he represents himself to be. The manager said the applicant has to "prove identification." When asked how, he said by some sort of a record explaining "A civilian usually has a registration card and a soldier has a regimental number he can show." But there is no evidence that Walker was asked to show his Air Force identification record. Nor does the rental contract provide any place or blank for the insertion of identification records.

It is true the appellant company was not likely to rent a motor-car without production of a driver's licence. But neither would it be likely to rent a car without payment or satisfactory guarantee of the deposit required. If Walker had applied in his own name and paid in a forged ten dollar bill, or produced a forged driver's licence in his own name, no doubt would exist that it was a *de facto* contract. In either case Walker would have gotten

possession of the car by deceit. The appellant company in fact was not concerned with his name or identity so long as he appeared in person, paid the required deposit, signed the contract and produced a driver's licence coinciding with the name he gave. The cash in advance method of doing business with the public, did away with any commercial necessity of obtaining more than formal information concerning the person applying for immediate possession of a motor-car.

This is not a case where personal identity or individuality is a fundamental ingredient to the formation of the particular contract, as illustrated by such decisions as *Smith* v. *Wheatcroft* (1878), 47 L.J. Ch. 745; *Gordon* v. *Street* (1899), 69 L.J.Q.B. 45; *Whurr* v. *Devenish* (1904), 20 T.L.R. 385 and *Said* v. *Butt* (1920), 90 L.J.K.B. 239.

The nature of the appellant's business with the public, and the manner in which that business was transacted in this case with an individual member of the public, point unmistakably and undeniably to the formation of a *de facto* contract, which in my view no one would be heard to question now, did not section 74A impose a consequential civil liability quite foreign to the principles of liability at common law. But the statute does not purport to make a contract where one does not already exist at common law. All the statute does is to add to the consequential liability which flows from a contract already existing at common law.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Tiffin, Russell, Du Moulin & Brown.*
Solicitor for respondent Terry: *W. W. Walsh.*
Solicitor for respondents Morrow: *G. Roy Long.*

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Practice—Appeal to Supreme Court of Canada—Motion to the Court of Appeal for special leave—Matter of public interest—Important question of law—R.S.C. 1927, Cap. 35, Sec. 41.

The defendant Walker, whose negligent driving resulted in an accident, obtained the car from his co-defendant by falsely representing that he was one Hindle, and he produced Hindle's driver's licence, the possession of which he had obtained. The point for discussion on the appeal was the proper construction to be placed on section 74A of the Motor-vehicle Act, namely, as to whether or not Walker acquired possession of the car with the consent, express or implied, of its owner. On motion for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal pronounced in favour of the plaintiff Terry:—

Held, that leave to appeal should be granted for the reason that the case involves a "matter of public interest" and an "important question of law."

MOTION to the Court of Appeal by the defendant Vancouver Motors U Drive Limited for leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 13th of January, 1942 (reported, *ante*, p. 251). Heard at Vancouver on the 16th of February, 1942, by MCDONALD, C.J.B.C., SLOAN and FISHER, JJ.A.

L. St. M. Du Moulin, for the motion.
Bull, K.C., for plaintiff Terry.

Cur. adv. vult.

On the 17th of February, 1942, the judgment of the Court was delivered by

FISHER, J.A.: The plaintiff Terry brought action against the defendant, Vancouver Motors U Drive Limited, hereinafter referred to as the company, as operator of the business of renting motor-cars to individuals, to be driven by such individuals. The defendant Walker obtained a motor-car from his co-defendant upon a false representation that he was one Hindle, who possessed a motor driver's licence, which Walker did not. The plaintiff Terry and the plaintiff Margaret L. Morrow, wife of the plaintiff

Morrow, were pedestrians, who were injured through the negligence of Walker, while driving said car. Terry issued a writ through one solicitor, and later Morrow and his wife began another action, through another solicitor. These actions were later consolidated upon the application of the company. On the trial Terry recovered an amount less than $2,000, while each of the Morrows had judgment for an amount exceeding $2,000. This judgment was upheld by this Court, though the members thereof did not base their conclusions on the same grounds.

An appeal has been taken in the Morrows case to the Supreme Court of Canada, and the company applies to this Court for special leave to appeal against the judgment held by Terry. I think that this leave should be granted for the reason that the case involves a "matter of public interest" and an "important question of law."

The point for discussion was the proper construction to be placed on section 74A (enacted by 1937, Cap. 54, Sec. 11) of the Motor-vehicle Act, R.S.B.C. 1936, Cap. 195, the close and difficult point being whether or not in this case Walker acquired possession of the car with the consent, express or implied, of its owner. This the Courts have found to be a very difficult question of law and, inasmuch as we have throughout Canada many businesses of this kind carried on, the matter must be of great concern to the public at large.

In reaching my decision, therefore, I am applying the principles applied in *Doane* v. *Thomas* (1922), 31 B.C. 457 and *Lloyd* v. *Milton & Derkson (No. 2),* [1938] 1 W.W.R. 95. In the latter case special leave to appeal was granted in a Saskatchewan case where the defendant's application was based on the ground that the Court erred in finding that his motor-car which caused the damage in question, was not wrongfully taken out of his possession by his co-defendant within the meaning of section 85 of The Vehicles Act, 1935; Sask. Stats. 1934-35, Cap. 68. In such case the Court of Appeal in Saskatchewan came to the conclusion that the ground which the defendant put forward as the basis of his application satisfied the requirement that the applicant is ordinarily required to show that the case involves matters of public interest or some important question

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of law. Said section 85 of the Saskatchewan Act is not the same as our said section 74A but the point involved is somewhat similar and in my opinion the application of the same principles leads to the same result.

I have approached the case as if Terry were the sole plaintiff suing in respect of the accident in question. It was suggested during argument that Terry might consent to being bound by whatever judgment was given by the Supreme Court of Canada in Morrows's case, but his counsel felt unable to give that consent. It would seem that, if my first approach to the matter is sound, then the only argument that could be advanced against the right of appeal would be that the important question of law involved will in any event be settled in Morrows's case. This I think is not a sound answer. For all one knows, Morrows's case might in some way be settled, and the appeal in such case might never be heard, in which case the defendant would be saddled with a judgment which I think on principle it ought to have the right to argue against in the Supreme Court of Canada.

The costs of the application will be costs in the appeal.

Motion granted.

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Jan. 28, 29, 30.
Feb. 2, 6.

BARNES v. CONSOLIDATED MOTOR COMPANY LIMITED *ET AL.*

Negligence—Pedestrian run down by motor-car—Damages—Three companies associated for display and sale of used cars—Separate branch and premises for purpose—Partnership—Instructions to driver from branch premises—Liability.

The plaintiff, while crossing Georgia Street at its intersection with Bute Street in the city of Vancouver, was run into by the defendant Hall who was held to be solely responsible for the accident. For the purpose of disposing of their used cars, the three defendant companies became associated in an organization called Distributors Used Car Branch. The branch appointed and paid a manager, salesmen and other employees, its object being the display and retail sale of used cars. During the winter months the cars were kept overnight for their own protection upon the premises of one or more of the defendant companies, and in

the morning they were driven by the employees of the branch from such premises to the separate premises occupied by the branch. Hall was instructed by the manager's assistant of the branch to drive this particular car (owned by the consolidated company) to the premises of the branch, and it was during the progress of this drive that the accident happened.

Held, that the business of the branch was conducted on behalf of all three companies for their mutual benefit, and that it contained all the necessary ingredients of a partnership. The motor-car was being driven by Hall as a servant of the branch and in the course of his employment as such. It follows that the defendants are all liable in damages.

ACTION for damages resulting from injuries sustained by the plaintiff when run down by a motor-car driven by the defendant Hall. The facts are set out in the reasons for judgment. Tried by SIDNEY SMITH, J. at Vancouver on the 28th, 29th and 30th of January, and the 2nd of February, 1942.

McAlpine, K.C., and *John L. Farris*, for plaintiff.

Locke, K.C., and *Yule*, for defendant Consolidated Motor Co. Ltd.

Tysoe, for other defendants.

Cur. adv. vult.

6th February, 1942.

SIDNEY SMITH, J.: The plaintiff is a widow 59 years of age, and was employed as supervisor of typists in the Vancouver office of the Inspector of Income Tax. About 9 a.m. on the 3rd of December, 1940, she was on her way to work and was crossing Georgia Street from south to north at the intersection of Bute Street and on the east side thereof. The day was fine. Georgia is a through street under a city by-law. Another city by-law reads as follows:

10. (1) The driver of every vehicle shall give the right of way to any pedestrian crossing the roadway within any mark or designated crosswalk or within any unmarked crosswalk at the end of any block except at such intersections where the movement of traffic is regulated by police officers or traffic control signals.

Before leaving the sidewalk the plaintiff looked ahead and saw a car stopped at the stop sign on the west side of Bute Street, and a second car a little behind it also stopped. She then looked to the west and to the east and saw that all was clear in both directions. She proceeded to cross Georgia Street, and when she

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was just over the centre line she glanced to her left and saw the said second car (which had just taken a left-hand turn into Georgia Street), about two or three feet away from her. She jumped back, but too late. She was knocked down and injured. Meanwhile and prior to the accident the first car had also made a left-hand turn, and had proceeded easterly along Georgia Street, passing behind the plaintiff.

The car in question was being driven by the defendant Hall. He agrees substantially with the story of the plaintiff. He did not see her until too late to avoid the accident. He is unable to account for not having seen her earlier. He was proceeding in low gear going into second and estimated his speed at 15 miles an hour.

It was scarcely disputed at the trial that Hall was negligent in that he was not keeping a proper look-out, but it was strongly urged upon me that the plaintiff was also negligent, and for the same reason. In the circumstances I am unable to agree with this view. She was crossing the roadway and had the right of way. She had no reason to apprehend danger from Hall's car. On the contrary she had every reason to expect that Hall would not start his car and run her down. I find defendant Hall alone to blame (*Alter* v. *Soloway* (1931), 66 O.L.R. 610).

The three defendant companies are engaged at Vancouver, B.C., in the sale of well-known makes of automobiles. In the course of their respective businesses they had assembled stocks of used cars traded in as part of the purchase price of new cars. For the purpose of disposing of these used cars they became associated in an organization which they called Distributors Used Car Branch. This had been formed in 1936 by the defendants, Consolidated Motor Company Limited and Dan McLean Motor Company Limited. Later in 1938 the defendant J. M. Brown Motor Company Ltd. had joined the organization. The object of the branch was the display and retail sale of used cars. The branch appointed and paid a manager, salesmen and other employees. During the winter months the cars were kept over night, for their own protection, upon the premises of one or more of the defendant companies. In the morning they were driven by employees of the branch from such premises to the separate

premises occupied by the branch. Hall was not one of the regular branch employees, but had been instructed by the manager's assistant to drive this particular car (which happened to be owned by the Consolidated Company) to the premises of the branch. It was during the progress of this drive that the accident happened.

I was impressed by the argument of Mr. *Tysoe* that the association of the three defendant companies did not in law amount to a partnership. But upon reflection I find that I cannot give effect to it. They had joined together for their mutual benefit for the purpose of managing, caring for and selling their used cars. They made improvements on their leased premises, had a bank account, did considerable advertising in the newspapers, had large signs displayed, engaged and dismissed employees and gave used car service bonds—all in the name of the branch. There was evidence that they had bought and sold four used cars but this practice was allowed to lapse before the Brown Company entered the organization. They were financed by the three defendant companies in proportion to the sales of each company's cars. The purchase price less certain commissions went to the company owning the car sold. But all negotiations leading to the sale were carried on by the manager and salesmen of the branch. It is true that the sale was carried through upon the stationery of the company owning the car, but this was for convenience in financing.

I have considered the various authorities, but they do not give a great deal of assistance. The question of partnership or no partnership is a mixed question of law and fact. It depends on the circumstances of each case, and the terms of the arrangement must be fairly considered as a whole. Giving the matter the best consideration I can, I think that the business of the branch was conducted on behalf of all three companies for their mutual benefit and that it contained all the necessary ingredients of a partnership (Lindley on Partnership, 10th Ed., 104; Halsbury's Laws of England, 2nd Ed., Vol. 24, p. 398 *et seq.*; Partnership Act, R.S.B.C. 1936, Cap. 213, Sec. 4).

I find also that the car was being driven by the defendant Hall as a servant of the Distributors Used Car Branch, and in the

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course of his employment as such. It follows that in my opinion the defendants are all liable in damages.

As to these. The plaintiff's injuries were severe. She was over six months in hospital. Her left knee will be permanently injured and to some extent her right arm will have permanent limitation of movement. She suffered great pain and it is altogether likely will continue to suffer intermittent pain from the injuries for the rest of her life. I am satisfied that she will not again be able to earn her own livelihood. She was earning a salary of $145 per month. Taking these and the other relevant facts into consideration I think the proper amount of damages to allow is as follows: Special, $4,315.27; general, $8,500. The plaintiff will also have her costs.

In view of these findings I need not deal with the third-party proceedings other than to say that the judgment may contain a term with respect to contribution amongst the defendant companies.

Judgment for plaintiff.

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Sept. 16; *Dec.* 31.

ATTORNEY-GENERAL OF CANADA v. HIGBIE *ET AL.*

Constitutional law—Public harbour—Foreshore—Right to—Crown grant of waterfront lot "with the appurtenances"—Whether foreshore included.

Allowed S.C.R. 1943

The Dominion and Provincial orders in council passed in 1924, whereby it was agreed between the Dominion and the Province that Burrard Inlet should be considered a public harbour within the meaning of Schedule 3 of the British North America Act, 1867, and should be considered to have been and to be the property of the Dominion, were effective to vest title to Burrard Inlet and the foreshore thereof in the Crown in the right of the Dominion, notwithstanding previous disputes as to whether Burrard Inlet was to be considered a public harbour.

A Crown grant of a lot facing on the waterfront of a public harbour contained in the *habendum* clause the words "with the appurtenances."

Held, that these words were not sufficient to include the foreshore in the grant, especially in a grant from the Crown, which must always be construed most favourably to the Crown.

ACTION for a declaration that the plaintiff is the legal and beneficial owner of the foreshore in front of lot 6, block 64,

district lot 185, group 1, New Westminster District, plan 92, and entitled to possession thereof. The facts are set out in the reasons for judgment. Tried by MANSON, J. at Vancouver on the 16th of September, 1941.

A. B. Macdonald, K.C., A. M. Russell, and *Brockelbank,* for plaintiff.

McLelan, for defendant Higbie.

Ian A. Shaw, and *H. D. Arnold,* for defendant Albion Investments Ltd.

Cur. adv. vult.

31st December, 1941.

MANSON, J.: The plaintiff claims to be the legal and beneficial owner of the foreshore in front of lot 6, block 64, district lot 185, group 1, New Westminster District, plan 92, and to be entitled to possession thereof. The aforementioned lot originally abutted on Coal Harbour. Lot 185 extended across the peninsula leading from what we now know as the downtown part of the city of Vancouver to Stanley Park. It was bounded on the north by Coal Harbour and on the south by English Bay. The defendants concede that in 1792 the then King of Great Britain and Ireland acquired title by right of conquest. The plaintiff maintains that a conveyance of district lot 185 in 1867 from the Crown to Messrs. Brighouse, Hailstone and Morton did not include the foreshore in front of the said lot and that, the title to the foreshore remained in Her Majesty in right of Great Britain and Ireland during the Colonial days of what is now the Mainland of British Columbia, and thereafter passed to Her Majesty in right of Canada by virtue of the British North America Act, 1867, Sec. 108, when British Columbia entered Canada as a Province on 20th July, 1871, or alternatively, to Her Majesty in right of British Columbia where, in the latter event, it remained until by the combined effect of Provincial and Dominion orders in council passed in May and June, 1924, respectively, it passed to His Majesty in right of Canada.

Judgment has been entered by default against the defendants Marine Sales & Service Limited, and against Vancouver Shipyards Ltd. The defendant Higbie owned lot 6 from June, 1936,

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to November, 1939, when he conveyed to the defendant Albion Investments Limited. The defences put forward by these two defendants may be treated as identical on the major issue, namely, title to the foreshore in front of lot 6. They say in answer to the plaintiff's allegations in regard to title that the 1867 grant, containing, as it does, in the *habendum* clause the phrase "with the appurtenances," included the foreshore, alternatively that the predecessors in title of the defendant Albion Investments Limited and the said defendant acquired title by prescription, alternatively that Coal Harbour was not a public harbour within the meaning of section 108 of the British North America Act, 1867, on 20th July, 1871, and that therefore title did not pass to Her Majesty in right of Canada, but remained in Her Majesty in right of British Columbia, who is not a party to this action, and, in the further alternative, that the orders in council above referred to have no validity, being without statutory sanction.

It was contended by the defendants that Coal Harbour was not part of Burrard Inlet. All the evidence is to the contrary. It is simply an indentation along the westerly reaches of Burrard Inlet to the north of the peninsula above referred to, and to the east of Stanley Park. In *Attorney-General* v. *C.P.R.* (1904), 11 B.C. 289, at p. 291, DUFF, J. (now Sir Lyman Duff, Chief Justice of Canada) observed:

> . . . at the time of the admission of British Columbia into Canada, that part of Burrard Inlet between the First and Second Narrows was a public harbour, . . .

That finding of fact was not disturbed on appeal to the Full Court. Coal Harbour was part of a public harbour on 20th July, 1871, and as such became by virtue of section 108 of the British North America Act, 1867, the property of Canada.

Next to be considered is the defendants' contention that the phrase "with the appurtenances" which is found only in the *habendum* clause of the deed of 1867, is sufficient to include the foreshore in the grant. Grants from the Crown are construed, not most strongly against the grantor as in the case of grants by subjects, but most favourably to the King. There was no express grant of the foreshore, and a grant of the foreshore will not be implied. I find no ambiguity in the deed of 1867, and there is no

occasion to look at the user of the foreshore by the grantees. Indeed, if there were, the evidence led to establish user in the years between 1867 and 1888 is of no assistance to the defendants. Upon the evidence it is quite impossible to say that during the years mentioned there were long continued and uninterrupted acts of ownership of the foreshore by the grantees, nor any usage whatsoever.

Thirdly to be considered is the defendants' contention that the title to the foreshore in front of lot 6 was acquired by the owners of lot 6 by prescription. The *onus* of establishing title by adverse possession lies upon the person asserting such possession. Having regard to the evidence it is unnecessary to consider whether the prescription statutes have application. The evidence does not substantiate the claim that there was uninterrupted use or occupation of the foreshore in front of lot 6 by the owners of lot 6 as far back as 1881. The evidence indicates that there was no use or occupation of the foreshore in front of lot 6 for some years after 1881. Prescriptive title has not been established. Title remained in the Crown.

In *Attorney-General* v. *C.P.R.*, on appeal to the Judicial Committee, [1906] A.C. 204, Sir Arthur Wilson said at p. 208:

> Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province, of British Columbia.

The foreshore "in question" was the foreshore of Burrard Inlet in front of the townsite of Vancouver city. At page 209 the view was unequivocally expressed that the Dominion Parliament had power to legislate for any land which formed part of a public harbour which became the property of the Dominion upon its entry into the Confederation by virtue of section 108 of the British North America Act, 1867. Question arises as to whether the foreshore in front of lot 6 formed part of a public harbour which became the property of the Dominion upon the entry of British Columbia into Confederation. Coal Harbour was a part of such a harbour. The foreshore in front of lot 6 formed part of the margin of Coal Harbour. Did it form part of Coal Harbour? Was it under the administrative control of the Dominion or of the Province?

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In *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700, at p. 712 (a reference case) it was said:

> Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

That was not the view of the Supreme Court of Canada in *Holman* v. *Green* (1881), 6 S.C.R. 707. In that case the view was expressed that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low-water mark, being also Crown property, likewise passed to the Dominion. Their Lordships of the Privy Council noted that they were departing from the view held in the Supreme Court of Canada. The new and, if I may say so with great respect, the somewhat novel view adopted by the Judicial Committee in 1898 was followed in the *C.P.R.* case in 1906. The rule laid down by the Judicial Committee had very confusing and unfortunate results. Competition arose as between the governments of the Dominion and the Province as to which should exercise administrative control of parcels of the foreshore along the margin of Burrard Inlet. Both governments issued leases of foreshore. In accordance with the ruling of 1898 the question whether the foreshore at any particular point along the margin of the inlet formed part of the harbour became a question of fact. The witnesses who could speak with regard to the user of a parcel of foreshore prior to 1871 have become fewer and fewer until, as in the case at Bar, none survive. The resulting, but logical, situation is that a parcel of foreshore which was part of a public harbour prior to 1871 loses its character as such when it becomes impossible to prove its early user for harbour purposes. One finds it difficult to believe that the Fathers of Confederation ever intended the construction put by the Judicial Committee upon section 108 and The Third Schedule of the British North America Act, 1867. Be that as it may, it became necessary to correct the highly unsatisfactory situation which ensued.

Negotiations between the Province and the Dominion in 1923 and 1924 culminated in the reciprocal orders in council referred to above. Neither of them had legislative authority or ratification. The language of the paragraphs numbered 4 is identical in each of the orders. The paragraphs mentioned read in their relevant parts as follow:

That as the result of conferences between the representatives of the two governments it has been mutually agreed that the harbours of . . . Burrard Inlet . . . , as described in the schedule attached hereto marked "A" and as shown by the respective maps annexed thereto were and are public harbours within the meaning of Schedule 3 of the B.N.A. Act, and became and are the property of Canada thereunder.

The relevant portion of the schedule marked "A" is quoted hereunder:

BURRARD INLET

All the foreshore and bed of Burrard Inlet and the area adjacent to the entrance thereto lying east of a line drawn south astronomically from the south-west corner of the Capilano Indian Reserve Number Five (5) to high-water mark of Stanley Park.

Not only were the orders in council acts of highest authority but they have been acted upon for more than seventeen years. No public service can be served by a declaration of invalidity. Such a declaration should be avoided unless it is inescapable.

The Courts had held that it was a question of fact whether the foreshore about a harbour formed part of it. Paragraph 4 in the Provincial order was in effect an unequivocal admission that the foreshore of Burrard Inlet formed part of a harbour in this Province which became the property of the Dominion when British Columbia entered Confederation. Was it open to the Province by its Executive Government to make that admission of fact, or could that only be made by the Legislature? In my view the power so to do is part of the residual prerogative of the Crown, and I hold that it was open to the Province to make the admission by its Executive Government.

The King administers Crown lands by different Executive Governments in Canada, sometimes by the Dominion Government, sometimes by a Provincial Government. Transfer of administrative control from one Executive Government to another is not appropriately effected by conveyance. The King may convey to a subject, but he does not convey to himself. *Vide*

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Attorney-General of British Columbia v. *Attorney-General of Canada* (Precious Metals Case) (1887), 14 S.C.R. 345, at p. 357, and on further appeal (1889), 14 App. Cas. 295; *Esquimalt and Nanaimo Railway Company* v. *Treat*, 121 L.T. 657; [1919] 3 W.W.R. 356; *Reference re Saskatchewan Natural Resources*, [1931] S.C.R. 263, at p. 275. In the latter case Newcombe, J., long the Deputy Minister of Justice of Canada, an eminent constitutional lawyer and an able jurist, used this language at p. 275:

"It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that the Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

There are in the orders in council words of conveyance. They are not apt words for the accomplishment of the major purpose obviously intended. The orders clearly intended that the Dominion Government should have and should be deemed to have had from 1871 onwards in six harbours of British Columbia the sole control of the harbours themselves and of their marginal foreshores, and that in all other harbours in British Columbia the Province should have and be deemed to have had the sole control of those other harbours and of their marginal foreshores.

The admission of fact above referred to concluded as between the parties the matter of the right to administer the foreshore in front of lot 6 and the land beneath the inlet beyond that foreshore. The Courts have determined the transfer of administrative rights over Crown lands is effectively passed from one branch to another of the King's government by order in council. In my view the orders in council are valid.

The plaintiff led evidence to show that lot 6 was no longer a riparian lot—that an artificial fill had been made below the original northern boundary of lot 6, that is, below the old high-

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water mark. I accept the evidence of the witness McElhaney that some artificial fill has been made in front of lot 6. The present mean high-water mark is below the old mean high-water mark which constituted the northerly boundary of lot 6. Lot 6 is no longer a riparian lot.

The occupants of the foreshore in question and of the bed of the sea beyond the foreshore have no title. They are trespassers. They are liable for *mesne* profits to the Crown. Reference will be had to the district registrar of this Court to take an account of the *mesne* profits due from the defendants to the plaintiff.

Counsel were good enough to let me have a transcript of the evidence and to let me have their very able and comprehensive arguments in writing. Their courteous assistance has been appreciated.

Judgment for plaintiff.

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Dec. 9, 19.

Habeas corpus—Arrest of a person as a deserter from the armed forces of an allied state– Legality of his detention—Foreign Forces Order, 1941, P.C. No. 2546.

A citizen of the Netherlands received notice from the Netherlands Government in January, 1941, requiring him to report to the Netherlands forces in Canada for military service. He reported and served in said forces for a short time, when he received an indefinite leave of absence. In July, 1941, he received notice that his leave had expired and requiring him to report for duty. He failed to return and the officer commanding charged him with desertion and pursuant to the Foreign Forces Order, 1941, P.C. No. 2546, and the general order of the Minister of National Defence, he was arrested and detained by military police of the Canadian army pending his delivery to the Netherlands forces for trial on the charge of desertion. He applied for his discharge on *habeas corpus* proceedings.

Held, that although the Netherlands Government had no authority to compel the applicant to report for military service, he had by so reporting and serving become a member of the Netherlands forces. Whether he was such a member was a question of Netherlands law to be determined by expert evidence, and the Court would accept the evidence of the Netherlands officer as being such evidence, and as being adequate proof that the applicant was a member of the Netherlands forces. Therefore the

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Foreign Forces Order, 1941, and the General Order of the Minister of National Defence applied to him, and his arrest and detention were legal. The writ must be discharged.

APPLICATION by way of *habeas corpus* proceedings for the discharge of one Adrianus N. H. de Bruijn, arrested and detained by the military police of the Canadian army pending his delivery to the Netherlands forces in Canada on the charge of desertion. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 9th of December, 1941.

J. A. Grimmett, and *D. A. Freeman,* for the application.
van Roggen, and *McClorg,* for the Netherlands Government.
T. Todrick, for the Canadian Military representative.

Cur. adv. vult.

19th December, 1941.

FISHER, J.: This is an application by way of *habeas corpus* proceedings for the discharge of one Adrianus N. H. de Bruijn. Notice of the application was served upon Captain F. T. Macdonald Lake as officer commanding 21A Provost Company, Canadian Provost Corps of the Canadian army and in my view notice should also have been served under the circumstances upon the officer commanding the Netherlands forces in Canada and in this connection reference might be made to the parties served in the case frequently referred to in the argument, *viz.,* that of *In re Amand* (1941), 110 L.J.K.B. 524, especially at p. 525. However, the application undoubtedly came to the attention of such commanding officer and I have heard counsel on his behalf and have also admitted affidavits filed on his behalf, though it was objected on behalf of the applicant that counsel could not be heard and that the affidavits could not be used as they had been filed without the endorsement required by our Crown Office Rule 15. I ordered that they might be endorsed, as they were on the 11th instant, and I pause here to say, in case it may hereafter be held that I had no power to so order, that I direct that such affidavits may be filed and used whether endorsed or not and in any event, therefore, I treat them as part of the material before me for consideration.

According to the return made by Captain Lake the applicant, on orders and instructions received by him as officer commanding as aforesaid, was arrested by him

on the 22nd day of October, 1941, and held in custody pursuant to the provisions of the Foreign Forces Order, 1941, as being a deserter from the forces of a foreign Power, *viz.*, the Netherlands, and as being a person to whom the provisions of the said Foreign Forces Order, 1941, applies and was so arrested and held in custody for the purpose of being handed over to the proper authorities of the said foreign Power, pursuant to the provisions of the said Foreign Forces Order, 1941.

Dealing with the merits of the application I have to say that to justify the applicant's arrest and detention on Canadian soil authority must be found in the law of this country and such arrest and detention are said to be warranted by our Foreign Forces Order, 1941, P.C. No. 2546, dated the 15th of April, 1941, and the order of our Minister of National Defence—General Order 125, 1941—made pursuant to said Foreign Forces Order, 1941, and dated at Ottawa the 26th of June, 1941. Part of the material before me is a letter from the Secretary of State for External Affairs, dated at Ottawa, December 4th, 1941, and reading, in part, as follows:

The Government of Canada recognizes the Government of the Queen of the Netherlands, as now constituted in the United Kingdom, as the *de jure* Government of the Netherlands, including the whole of the Netherlands Empire whether in enemy occupation or otherwise.

The Government of Canada recognizes the Government of the Netherlands as an ally in the present war.

The Netherlands force now present in Canada, and in particular at Stratford, Ontario, and under the command of Colonel G. J. Sas, is present in Canada with the consent of the Government of Canada. The said Netherlands force is recognized by the Canadian Government as being a "foreign force" within the meaning of the Foreign Forces Order, 1941.

The said General Order reads, in part, as follows:

Pursuant to section 8 of the Foreign Forces Order, 1941, and for the purpose of enabling the service courts and service authorities of Belgium, Poland and the Netherlands, respectively, to exercise the powers conferred upon them by the said order, I, the undersigned Minister of National Defence, having been requested, on behalf of the Governments of Belgium, Poland and the Netherlands, respectively, so to do, do hereby issue this General Order to the Canadian army and direct the members thereof to arrest, at the request of the officer commanding the Belgian forces, Polish forces, and the Netherlands forces, as the case may be, members of the foreign forces concerned, serving in Canada, who are alleged to have been guilty of offences against the law of the foreign Power to which said foreign force belongs,

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and to hand over any person so arrested to the appropriate authorities of the foreign force concerned.

Pursuant to section 10 of the Foreign Forces Order, 1941, I, the undersigned Minister of National Defence, upon the request made on behalf of the officer commanding the Belgian forces, the Polish forces, and the Netherlands forces, respectively, serving in Canada, do hereby authorize any member of the said foreign forces, who is sentenced by a service court in Canada of the foreign Power to which the force belongs to penal servitude, imprisonment or detention, to be temporarily detained in custody in a prison or detention barrack in Canada and, if sentenced to penal servitude or imprisonment, to be imprisoned during the whole or any part of the term of his sentence in a prison or detention barrack in Canada.

It might appear from some of the evidence and argument on behalf of the applicant that counsel on behalf of the Netherlands Government was contending that a non-British country has the right and power to enforce within Canada Acts, Decrees, Regulations, etc., made or issued by its Government ordering its Nationals domiciled in Canada to undertake compulsory service in its armed forces. I am satisfied, however, that there is no such contention here and if I follow correctly the argument of counsel appearing on behalf of the Netherlands Government, it is admitted that, even though a foreign Government may have a legal system imposing compulsory military service on its Nationals abroad, and can under existing international practice provide for calling them up, and through its representatives, can bring the call to the attention of the Nationals, neither such foreign Government nor its representatives can exercise any compulsion within Canada in order to induce them to respond to the call and that the National of the foreign Government can refuse to respond to the call, without incurring any penalties within this country. I have only to add on this phase of the matter that whether such admission is made or not I hold that such is the case and wish to make this perfectly clear. On the other hand I agree that under our Foreign Forces Order, 1941, being order in council No. 2546, made the 15th of April, 1941, the forces of certain allied countries, including those of the Netherlands Government, are enabled to maintain their own discipline and internal administration and for such purposes they can arrest members of their own forces within this country and can call upon Canadian civilian and military police to assist them in maintaining their own discipline, subject, however, to

the provisions of the order, which make it clear that the measures of compulsion do not apply to a person who while in Canada has been called up for service under the law of a foreign Power and who has failed to comply with such call or to be enrolled in its service. In this connection reference might be made to the recital clauses of said order in council and to the statement therein contained:

"That it is also considered desirable that provisions similar to certain of those provisions contained in The Visiting Forces (British Commonwealth) Act, 1933, being Chapter 21 of the Statutes of 1932-33, should be made with respect to such forces."

The question for my determination therefore is whether the applicant was at the time of his arrest and detention a member of the Netherlands military force and in determining this question I have to have in mind the provisions of said Order No. 2546, especially 2 (*e*), hereinafter more particularly referred to. In order to determine this question it is necessary to know what the facts are. Reference might first be made to the affidavit of G. Jacobus Sas, Commanding Officer of the Royal Netherlands Troops in Canada, stationed at Stratford, Ont., sworn the 21st day of November, 1921, and the exhibits referred to therein and I have to say that I not only accept the evidence of Lieutenant-Colonel Sas, as that of a truthful witness, but I also find that he is qualified as an expert to give the evidence required to prove what is a question of fact, namely, foreign law—in this case Netherlands law. In paragraphs 2, 26, 27, 28 and 29 of his affidavit Mr. Sas says as follows:

2. That by virtue of a Royal Decree of Her Majesty the Queen of the Netherlands, dated at London, England, the 8th day of August, 1940, all Netherlands male subjects in the Dominion of Canada born between the 1st day of January, 1904, and the 1st day of January, 1921, became liable to immediate call for service in the manner prescribed by the Minister of Defence of the Kingdom of the Netherlands.

26. That under Netherlands law a soldier upon enlistment is not required to sign an attestation or take an oath.

27. Under Article 6 of the said Royal Decree of August 8th, 1940, a soldier or destined soldier, under Netherlands law, is deemed to be a member of the armed forces of the Netherlands upon and by virtue of his being called up or summoned for military service.

28. A person, or person destined to be a soldier becomes a member of the armed forces of the Netherlands or the Royal Netherlands Troops, in fact, at least, upon his enrolment therein.

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29. The said Adrianus N. H. de Bruijn is and has been a member of the Royal Netherlands Troops in Canada at least since the 15th day of January, 1941.

It is apparent that the decree, a copy or translation of which is exhibited to the affidavit, is the same as that referred to in the *Amand* case, *supra*. In such case the question was raised as to the validity of the decree according to Netherlands law but no such question has been seriously raised here and I have no hesitation in holding that it was valid according to Netherlands law and upon the material before me I would also hold that it applied to the applicant while resident in this country. I still have for determination, however, the question whether according to Netherlands law the effect of the decree, as aforesaid, together with the facts as hereinbefore or hereafter found is to make the applicant a member of the armed forces of the Netherlands or the Royal Netherlands Troops in Canada at least since the 15th of January, 1941, as alleged in the affidavit of Mr. Sas.

As to the facts it must be noted that the applicant admits having received in January, 1941, a summons to report from the Netherlands forces in Canada at Stratford, Ont., and that he did report on the 15th of January, 1941. He also states that he received a similar summons dated July 22nd, 1941. I find that he received a letter dated 9th July, 1941, a copy of which is Exhibit "D" to the said affidavit of G. Jacobus Sas, and that in reply to such letter he sent the letter dated 18th July, 1941, the original of which is Exhibit "E" to such affidavit and a copy of which, undated, is Exhibit "B" to the applicant's affidavit, sworn 23rd October, 1941. As already indicated I accept as true the statements of fact contained in the said affidavit of Mr. Sas, corroborated as some of them are by the other affidavits filed on behalf of the said Commanding Officer. Such statements include the following allegations as set out in paragraphs 4, 5, 6, 7, 8, 9, 10, 13, 19 and 22:

4. That the applicant for a writ of *habeas corpus* herein, Adrianus N. H. de Bruijn, was called up for military service with the Royal Netherlands Troops in Canada in manner prescribed by the Minister of Defence, pursuant to the said Royal Decree, was medically examined in the city of Vancouver, in the Province of British Columbia, and summoned to report for military duty on the 15th day of January, 1941.

5. That on the said 15th day of January, 1941, the said Adrianus N. H.

de Bruijn presented himself and reported for military service at Princess Juliana Barracks, Stratford, Ontario, an armed camp of the said the Royal Netherlands Troops in Canada, and on such date was enrolled as a member of the Royal Netherlands Troops for active service.

6. That on such date the said Adrianus N. H. de Bruijn was assigned Regimental or Control Number 16, and commenced to serve in the armed forces of the Netherlands in the capacity of or the rank of a private.

7. He was uniformed and equipped and served actively as a solider in the said force continuously from the 15th day of January, 1941, until the 20th day of January, 1941, when he was granted indefinite leave of absence on account of ill health.

8. That during his service as a soldier at Stratford aforesaid, he became entitled to, received and accepted pay and allowances from the said force, as shown by a true and correct extract from the pay sheet of the said force, and the translation into the English language thereof thereto attached, now produced and shown to me and marked exhibit "B" to this my affidavit.

9. That after being summoned for military service and before reporting therefor, as aforesaid, the said de Bruijn applied to the said force for dependant's allowance; and now produced and shown to me and marked exhibit "C" to this my affidavit is the original application for such allowance filed by the said de Bruijn, purporting to have been signed by him, together with a true and correct translation thereof into the English language.

10. That by virtue of his enrolment and service in the said force, the said de Bruijn became entitled to and was granted dependant's allowance and a certain sum or sums was or were paid to his wife, pursuant to such grant and as such allowance.

13. That on the 9th day of July, 1941, the said de Bruijn was by letter, duly despatched, summoned to report back for service with the said force and his leave terminated; and now produced and shown to me and marked exhibit "D" to this my affidavit is a true and correct copy of the said letter despatched to him at New Westminster, British Columbia.

19. That from the day of the receipt by the said de Bruijn of the letter, a true copy whereof is marked exhibit "D" to this my affidavit, the said de Bruijn became and still is a deserter from the said the Royal Netherlands Troops in Canada, the said the Royal Netherlands Troops in Canada being a foreign force within the meaning of subsection (*b*) of section 2, of the Foreign Forces Order, 1941.

22. Pursuant to section 8 of the said, the Foreign Forces Order, 1941, I requested the issue of a General Order by the Minister of National Defence, which said General Order was duly issued by him on or about the 27th day of June, 1941, and is known as General Order Number 125, 1941.

. . . .

Exhibit "K" to said affidavit should also be noted, being a certificate pursuant to section 6 (2) of the said Foreign Forces Order, 1941, which provides that

a certificate under the hand of the officer commanding a foreign force that a member of that force is being detained for either of the causes aforesaid

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shall be conclusive evidence of the cause of his detention, but not of his being such a member,

and such certificate, amongst other things, certifies:

That the said Private Adrianus N. H. de Bruijn is presently detained in the custody of the home forces within the meaning of subsection (*d*) of section 2 of the Foreign Forces Order, 1941, in the city of Vancouver, British Columbia, upon official instructions under said Foreign Forces Order, 1941, and the General Order No. 125, 1941 (issued by the Minister of National Defence of the Dominion of Canada on the 27th day of June, 1941), pending the determination by a service court of the Netherlands (being a foreign Power within the meaning of subsection (*c*) of said section 2 of said Foreign Forces Order, 1941) of a charge of desertion or absence without leave brought against him.

With respect to the contradictory evidence before me I have to say that I accept the evidence of Mr. *M. A. van Roggen,* corroborated as it is to a certain extent by the evidence of Miss Hilda Pell, and find that no threat was made and no compulsion was exercised by the Netherlands Government or its representatives to induce the applicant to respond to the call or obey the summons. I pause here to add that I would make this finding even if the applicant had received a copy, or knew the contents, of the document which was marked as Exhibit 1 in another case, now pending before me, *viz.,* that of *In re Romeijnsen* [*post,* p. 295]. In this connection reference might be made to what was said by Singleton, J. delivering the judgment of the Court in the *Amand* case, *supra,* 524, at p. 530:

> . . . It goes without saying that no conscription by the law of a foreign Power of the personal services of a person within the United Kingdom can be enforced against him while in this country. "The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or political law of a foreign State" (Dicey's Conflict of Laws, 5th ed., at p. 212). But that is no reason for holding that a foreign Government cannot by appropriate measures legislate with regard to the duties of its subjects even while they are within the United Kingdom.
>
> I therefore think the decree was valid according to Netherlands law, and that it applied to the applicant while resident in this country.
>
> It was not contended by counsel on behalf of the applicant that, assuming the decree to be valid, its effect together with the calling-up notices is not to make the applicant by conscription a member in Netherlands law of the Netherlands army. The decree and notices clearly have that effect. . . .

In the present case, as hereinafter indicated, I hold that the effect of the said decree of August 8th, 1940, and the calling-up notice or summons to report of January, 1941, was to make the applicant by conscription a member of the Netherlands military

forces according to Netherlands law and, as I have already indicated, the representatives of the Netherlands Government can bring the call to the attention of the Nationals. In my view they are at liberty in so doing to remind them of their duty to their country and their position according to Netherlands law without being guilty of exercising any compulsion within Canada in order to induce them to respond to the call.

Before going any further I will deal with section 7 of said Order 2546, reading as follows:

> No proceedings in respect of the pay, terms of service or discharge of a member of a foreign force shall be entertained by any court of Canada.

Counsel on behalf of the Netherlands Government stated that he relied upon said section, though apparently not primarily but as a last resort. I hold, however, that such section, even if applicable to the proceedings herein, does not preclude this Court from deciding, but makes it necessary first to decide, whether the applicant is a member of a foreign force. See *Shin Shim* v. *The King,* [1938] S.C.R. 378. In any event, therefore, I have to decide such question and apart from section 2 (*e*) of said Order 2546, the effect of which I still have to consider, I have to say, with all respect, that I agree with what is said in the judgment in the *Amand* case that it is the law of the foreign Power alone that can make a man a member of the military forces of a foreign Power. Apart from said section I have also to say that in my view it necessarily follows that it is the law of such foreign Power alone that determines whether a man, having become a member of its military forces by its law, continues to be such until his discharge notwithstanding indefinite leave of absence having been granted and later terminated. I, therefore, have first to decide the question as to whether the applicant is a member of the Netherlands military forces according to Netherlands law and, if so, then to consider the effect of said section 2 (*e*). Dealing with such question and having in mind the judgment in the *Amand* case I have to say that I hold it immaterial whether the applicant at the time he obeyed the summons did so believing he had no other choice as upon the evidence before me, including the evidence of Mr. Sas as to what the Netherlands law is, I hold that the effect of the said decree and calling-up

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notice of January, 1941, was to make the applicant by conscription a member of the Netherlands military forces according to Netherlands law on or about the 15th of January, 1941. Whether according to Netherlands law he continues to be such a member until his discharge, notwithstanding the leave of absence granted, and therefore was at the time of his arrest and detention on the 22nd of October, 1941, and has been ever since, a member must be proved by evidence as it is a question of fact, *viz.*, foreign law and the only evidence before me is that of Mr. Sas, which I have accepted, as already indicated. His evidence is that the applicant is and has been a member of the armed forces of the Netherlands in Canada at least since the said 15th of January, 1941, and that after the receipt of the letter of July 9th, 1941, as aforesaid, the applicant was considered a deserter according to Netherlands law. I find, therefore, subject to consideration of the effect of said section 2 (*e*), that the applicant is still a member of the Netherlands military forces.

I come now to consider the effect of section 2 (*e*) of said Order 2546, reading as follows:

"Member" in relation to a foreign force includes a person who, being a member of another force of the same foreign Power, is attached to the foreign force, but a person shall not be deemed to be a member of the forces of a foreign Power, unless he serves in the armed forces of that Power, in a capacity corresponding to that of an officer or other rating or rank of the home forces;

I may say in the first place that I do not think the argument, that the order in council is not retrospective, assists the applicant. It surely cannot be argued successfully that said section 2 (*e*) means that no person shall be deemed to be a member of the forces of a foreign Power who was serving in the armed forces of that Power in the capacity mentioned on the day the order in council was passed, *viz.*, April 15th, 1941, and yet most, if not all, of those serving on such date would be persons who had commenced to serve before the passing of such order. It is interesting to note here that in the judgment of the Court in the *Amand* case, *supra*, it is said (p. 527):

The Allied Forces Act did not receive the Royal Assent until August 22. Therefore, when the applicant received the calling-up notices no means existed according to the law of the United Kingdom by which any compulsion could have been applied to make him become a member of the Netherlands

forces. Still, he may have become a member by virtue of the decree and calling-up notices, especially when these were taken in conjunction with the facts I have mentioned as to his actual service in the army. . . .

In my view the provisions of said Order 2546 obviously applied and apply to persons who on the said 15th of April, 1941, were members of the armed forces of the Netherlands serving in such forces as well as to those who thereafter became such. In such case my view is that all that section 2 (*e*) of Order 2546, as aforesaid, does for the applicant is to state that he shall not be deemed to be a member unless he serves in such armed forces. The question therefore resolves itself into whether the applicant was on the said 15th of April, 1941, and has been ever since a person who should be deemed to be a member of the forces of a foreign Power, *viz.*, the Netherlands, within the meaning of such words as used in the section or a person belonging to the class exempted by such section. It may be noted that the General Order, 125, 1941, as aforesaid, uses the word "serving" and directs the members of the Canadian Army

to arrest, at the request of the officer commanding the Belgian forces, Polish forces and the Netherlands forces, as the case may be, members of the foreign forces concerned, serving in Canada, who are alleged to have been guilty of offences against the law of the foreign Power to which said foreign force belongs, and to hand over any person so arrested to the appropriate authorities of the foreign force concerned.

It is clear from the recitals of said Order 2546 that the object of the order and the intention of its framers was to make provisions so that military forces Courts of the Netherlands Government might, subject to certain conditions, exercise within Canada in relation to members of its forces in matters concerning discipline and internal administration all such powers as are conferred upon them by the laws of that foreign Power and to make, with respect to such forces, provisions similar to certain of those provisions contained in the said Visiting Forces (British Commonwealth) Act, 1933. This brings me back again to the facts, as I find them, *viz.*, that the applicant sometime before or at least on January 15th, 1941, became a member of the Netherlands military forces by virtue of the said decree and calling-up summons according to Netherlands law. The Netherlands Government did not have the right or the power to enforce within Canada such decree ordering its Nationals in Canada to under-

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take compulsory service in its armed forces. No representative of the Netherlands Government could, or did, as I have found, exercise any compulsion within Canada in order to induce the applicant to obey the summons and respond to the call. He was not compelled to do so and, if he believed that he had no other choice, I hold that this is quite immaterial—see *Amand* case, *supra*. Though these were the circumstances then existing the applicant, nevertheless, on the 15th of January, 1941, presented himself and reported for military service at an armed camp of the Royal Netherlands Troops at Stratford, Ontario, and on such date was enrolled as a member of the said troops for active service. There can be no doubt, and I find, that he then commenced to serve in the armed forces of the Netherlands in the capacity of or the rank of a private. He wore the uniform, took the pay and accepted the discipline of the Netherlands army by applying for leave of absence and in every other way (except in absenting himself without leave or continuing to be absent after his leave had been terminated) and took advantage of the provision made by the Netherlands authorities for his wife. Here again it is submitted that he did all this because he believed that he had no other choice. I am not finding that this is so but, assuming for a moment that it is, I hold that this also would be quite immaterial and would not make any difference in my findings of fact. On the 20th of January, 1941, the applicant was granted indefinite leave of absence on account of ill health, the said applicant requesting that his leave be extended for such a period of time as would enable him to remain at his home until after the birth of an expected child. On the 9th of July, 1941, his leave was terminated by the letter which he received on or before the 18th of July, 1941.

After careful consideration of such facts and all the material before me, I have to say that, if the submission of counsel for the applicant were adopted and it should be held that the effect of said section 2 (*e*) of said order in council 2546 is that under the circumstances here the applicant had ceased to be a person serving in the armed forces of the Netherlands and therefore was no longer to be deemed a member of such armed forces simply because he had been granted leave of absence as aforesaid, though

the granting of such leave of absence did not make him cease to be a member of such armed forces according to Netherlands law, or because he is alleged to have been guilty of an offence of desertion against the Netherlands law, then, in my opinion, the object of said order and the intention of its framers as aforesaid, clearly expressed and carried into effect by the language used, would be defeated and the said order in council and said General Order, No. 125, 1941, would be nugatory and of no assistance to the service courts and service authorities of the Netherlands in relation to members of the armed forces of the Netherlands in Canada in matters concerning discipline and internal administration. As intimated, I think the language used is clear and unequivocal and its meaning plain but it is interesting to compare the language used in section 12 (3) of said order which says that the provisions of said section shall not apply to any person, who while in Canada, has been called up for service under the law of a foreign Power and who has failed to comply with such call or to be enrolled in the foreign forces of that Power. It would seem to me to be a reasonable inference that the intention of the framers of both section 2 (*e*) and 12 (3) was to exempt the same class of persons from the measures of compulsion. My conclusion, therefore, on this phase of the matter is that the applicant ever since the said 15th of January, 1941, has been, and therefore at the time of his arrest and detention on or about the 22nd of October, 1941, and the return herein was a person who should be deemed to be a member of the forces of a foreign Power, *viz.*, the Netherlands, within the meaning of such words as used in said section 2 (*e*) and that the said order in council authorized the arrest and detention of the applicant as a deserter or absentee without leave and the only question still to be determined is whether the proper procedure was followed. Counsel on behalf of the Netherlands Government submits, and I find, that the applicant was arrested by members of the Canadian forces under section 8 of the said Foreign Forces Order, 1941, P.C. No. 2546, which reads as follows:

For the purpose of enabling the service courts and service authorities of a foreign Power to exercise more effectively the powers conferred upon them by this Order, the Minister of National Defence, if so requested by the officer commanding a foreign force or by the Government of the foreign Power to

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which the force belongs, may from time to time by general or special orders to any home force direct the members thereof to arrest members of the foreign force alleged to have been guilty of offences against the law of that Power and to hand over any person so arrested to the appropriate authorities of the foreign force.

Reference may be made here particularly to the return made by Captain Lake, as hereinbefore mentioned, to the affidavit of Lieutenant-Colonel Sas, especially paragraph 22, as hereinbefore set out, and to the General Order, No. 125, 1941, therein referred to and hereinbefore set out in part. Upon the material before me I have no hesitation in holding that the applicant was properly arrested as a deserter or absentee without leave in one of the ways provided for by said order in council. It must be noted as already intimated that under section 6 (2) the certificate Exhibit "K" to the said affidavit is conclusive proof of the cause of his detention but not of his being a member.

I pause here to add, as said section 12 (3) of said Order has been relied on by counsel for the applicant that, in my view, said subsection (3) would not make the provisions of section 12 inapplicable to the applicant as I find he is a person who, while in Canada, has been called up for service under the law of a foreign Power, *viz.*, the Netherlands, and has complied with such call and has become enrolled in the foreign force of that Power.

In the final result I hold that the applicant was, and is now, in legal custody and properly detained for the purpose of being handed over to the appropriate authorities of the said foreign Power, *viz.*, the Netherlands. The application for the discharge of the applicant, Adrianus N. H. de Bruijn, is, therefore, refused. The writ of *habeas corpus* issued is discharged and the applicant must remain in custody. Order accordingly.

Order accordingly.

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Habeas corpus—Arrest and detention as deserter from forces of allied state—Legality of detention when he is a British subject—Foreign Forces Order, 1941, P.C. No. 2546.

The facts are similar to those in *In re de Bruijn* (*ante*, p. 281), except that the applicant had, after his alleged desertion, received a certificate of naturalization as a British subject.

Held, that as the applicant was a member of the Netherlands forces, the fact that he was a British subject did not exempt him from the operation of the Foreign Forces Order, 1941, P.C. No. 2546. The writ of *habeas corpus* must be discharged.

APPLICATION by way of *habeas corpus* proceedings for the discharge of one Daniel Johannes Romeijnsen, arrested and detained on a charge of desertion from the Netherlands forces in Canada. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 9th of December, 1941.

J. A. Grimmett, and *D. A. Freeman*, for the application.
van Roggen, and *McLorg*, for the Netherlands Government.
T. Todrick, for the Canadian Military representative.

Cur. adv. vult.

19th December, 1941.

FISHER, J.: In my reasons for judgment delivered this day in the case of *In re de Bruijn* [*ante*, p. 281] I discuss all the vital questions in this case except the one hereinafter referred to. I refer to such reasons in order to avoid repetition of the basis of my judgment herein.

In this case I have to deal with the question raised by the contention made on behalf of this applicant that in any event he is entitled to be discharged from custody because he is now a naturalized British subject. It would appear that on the 15th of January, 1941, the applicant presented himself and reported for military service at an armed camp of the Royal Netherlands Troops in Canada and on such date was enrolled as a member of such troops for active service. On the 4th of May, 1941, he

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was granted one day's leave of absence and at the expiration of his leave he failed to return or to report back for duty. According to his evidence he applied thereafter in Vancouver, B.C., for naturalization and obtained a certificate of naturalization, dated the 7th of November, 1941.

Dealing with this contention I have to say that it follows from my conclusions in the *de Bruijn* case hereinbefore mentioned that the applicant has been ever since the 15th of January, 1941, a member of the armed forces of a foreign Power, *viz.,* the Netherlands, serving in such forces unless it should be held that he has ceased to be such through being naturalized as a British subject. At the outset, therefore, it must be noted that the question is not whether the applicant at any time after the said 15th of January, 1941, ceased to be a national of the Netherlands for if I assume for a moment, without finding, that he did cease to be such, the question still remains whether he ceased to be what I have found he had become on the said 15th of January, 1941, *viz.,* a member of the Netherlands force serving in such force. This, therefore, is the question. I pause here to point out, though it may not be necessary to do so, that one of my conclusions in the *de Bruijn* case was that the question of whether one, who has become a member of the forces of a foreign Power—in this case the Netherlands—is still a member thereof must be determined by Netherlands law and evidence is required to prove what is a question of fact, namely, foreign law. In the present case the only evidence before me as to this is that of G. Jacobus Sas whose evidence as an expert I accept. He says in paragraph 27 of his affidavit, sworn herein on the 21st of November, 1941, that the applicant is and has been a member of the Royal Netherlands Troops in Canada at least since the 15th of January, 1941. I note that the said affidavit of Mr. Sas was sworn after the date of the said certificate of naturalization but it is not apparent that Mr. Sas knew that the applicant had become a naturalized British subject. As already indicated, this is the only evidence before me as to whether or not the applicant was a member of the Netherlands force at the time of his arrest and detention on October 22nd, 1941, and at the time of the return herein as aforesaid which was made on the 10th of December, 1941. It is a

fair inference, however, from said affidavit, taken along with Exhibit 1 herein, signed for the Netherlands Minister of Defence by Mr. Sas as the Lieutenant-Colonel, that according to Netherlands law the applicant did not cease to be a member of the armed forces of the Netherlands upon naturalization as part of Exhibit 1 reads, in part, as follows:

> Even if you have applied for Canadian nationality you must enlist. This is a definite obligation. If naturalization should be granted while you are already under arms you will be dismissed.

On the material before me I must find, as I do, that the applicant is still a member of the Netherlands armed forces serving therein and therefore before I could make an order discharging him from the custody of Captain Lake, which is the order I am being asked to make on this application, I would first have to make an order discharging the applicant from said forces so that he would no longer be a member of a foreign force. There are no proceedings before me in respect of the discharge of a member of a foreign force from such force and if there were section 7 of said order in council 2546 provides that such proceedings shall not be entertained by any court of Canada.

Counsel for the Netherlands Government while relying on said section 7 states that it is not the policy of such Government to allow nationals of another country to be enrolled or become a member in Canada of their armed forces. In view of what is said in Exhibit 1, as hereinbefore set out, therefore it may be that the appropriate Netherlands authorities will discharge the applicant from the force but that is not for this Court to determine.

In the final result I hold that the applicant was, and is now, in legal custody and properly detained for the purpose of being handed over to the appropriate authorities of the said foreign Power, *viz.*, the Netherlands. The application for the discharge of the applicant, Daniel Johannes Romeijnsen is, therefore, refused. The writ of *habeas corpus* issued is discharged and the applicant must remain in custody. Order accordingly.

Order accordingly.

Power - A.G.
WR 657

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In Chambers
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Dec. 6.
1942
Jan. 24.

THE KING *EX REL.* LEE v. WORKMEN'S COMPENSATION BOARD.

Mandamus—Workmen's Compensation Board—Old-age pension—Whether mandamus lies to compel Board to pay—Whether Board special or general agent of Crown—R.S.C. 1927, Cap. 156, Sec. 9 (3)—R.S.B.C. 1936, Cap. 208.

The applicant Lee was paid an old-age pension by the Board for six or seven years prior to the 1st of September, 1941. His pension was discontinued on the ground that he had divested himself of an equity in lot 3 of lot 29, Nanoose District. He seeks a *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension from September 1st, 1941, as required by the Old Age Pensions Act (Dominion) and the Old-age Pension Act (Provincial), and the regulations thereunder.

Held, that there is nothing in either Act or the regulations thereunder to support the action taken by the Board, and the applicant is a person entitled to a pension within said statutes and regulations.

Held, further, that the Board is not a general agent of the Crown but a special agent constituted by statute to administer the old age pensions legislation, and *mandamus* lies to compel it to make payments to persons entitled to pensions.

Held, further, that it was no objection to the issue of *mandamus* that the Board was distributing public funds, since the funds used by it for the payment of pensions had been specially allocated for the purpose by the Legislature.

APPLICATION by Henry Richard Lee for a *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension from the 1st of September, 1941, under the Old Age Pensions Act (Dominion) and regulations made thereunder, and the Old-age Pension Act (Provincial) and regulations made thereunder. The facts are set out in the reasons for judgment. Heard by MANSON, J. in Chambers at Vancouver on the 6th of December, 1941.

Cunliffe, for the application.
J. A. MacInnes, contra.

Cur. adv. vult.

24th January, 1942.

MANSON, J.: Henry Richard Lee seeks a *mandamus* to compel the Workmen's Compensation Board to pay to him an old-age pension from the 1st day of September, 1941, and to continue

the same as required by the Old Age Pensions Act, R.S.C. 1927, Cap. 156, and the regulations made thereunder, and the Old-age Pension Act, R.S.B.C. 1936, Cap. 208, and the regulations made thereunder. Lee was paid an old-age pension by the Board for six or seven years prior to the 1st of September, 1941. His pension was discontinued on the ground that he had divested himself of his equity in lot 3 of lot 29, Nanoose District, plan 2105. Prior to the 14th of July, 1941, Lee and his brother, another old-age pensioner, were the registered owners of lots 4 and 5, and part of lot 3 of said lot 29. The brothers were indebted to Mr. and Mrs. Matterson in a sum in excess of $2,500 which money had been loaned to them from time to time and had been used in part for the payment and discharge of a mortgage upon the aforementioned land, for the payment of taxes against the said lots, for the payment of hospital bills and other miscellaneous purposes. On 14th July, 1941, the Mattersons were pressing for repayment—they had been pressing for some time—and had engaged the services of a solicitor for the purpose of taking proceedings to recover against Lee and his brother. As result of negotiations between the parties it was agreed that the Lees would transfer to the Mattersons as joint tenants the portion of lot 3 which they owned, reserving to themselves or their survivor a life interest. The transfer was made and in consideration thereof the Lees were given a release and discharge by the Mattersons. The transfer was not a voluntary transfer. It was not a transfer within Dominion regulation 23 (6)—*vide* Exhibit 2. The parcel of land transferred appears not to have had a value of more than $2,000. Lots 4 and 5 were not affected by the transfer to the Mattersons and are still registered in the names of Lee and his brother. The two lots contain approximately 68 acres. The brother died on 22nd August, 1941. It does not appear whether the brothers were joint tenants or tenants in common. The sole ground for discontinuing Lee's pension was the above referred to transfer.

On 13th November, 1941, the pensioner was advised by the Old-age Pensions Department of the Workmen's Compensation Board by letter reading in part as follows:

> This is to advise that your claim has had the attention of the Board and

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we are required to cancel your pension payments as from September 1st, 1941.

In explanation of this, we would advise that the Old-age Pension Act does not allow the transfer of property, and as you divested yourself of your equity in lot 3, we are without authority to continue pension payments.

The letter quotes for the information of the pensioner section 9, subsection 3 of the Old Age Pensions Act, R.S.C. 1927, Cap. 156. That section does not support the action taken by the Board in the particular circumstances, nor, indeed, does any section of the relevant statutes Dominion or Provincial. Regulations under the Dominion Act must be "not inconsistent with the provisions" of the Act—*vide* section 19. So, too, regulations under the Provincial Act—*vide* section 7 (1). There is nothing in the regulations, Dominion or Provincial, that supports, or could support, the action taken.

Is there an obligation upon the Board to continue the pension? Section 8 of the Dominion Act reads in part as follows:

> 8. Provision shall be made for the payment of a pension to every person who, at the date of the proposed commencement of the pension . . .

The Board found Lee to be a person entitled to a pension within the statutes and regulations. The Board, having so found, was under obligation to pay him a pension.

Will *mandamus* lie? In my view the Board is not a general agent of the Crown, but an agent constituted by statute to do a particular act—*vide* R.S.B.C. 1936, Cap. 208, Sec. 4 (1):

> 4. (1.) Notwithstanding the provisions of the "Workmen's Compensation Act," the Workmen's Compensation Board shall, . . . , be charged with the administration of this Act, including the consideration of applications for old-age pensions and the payment of old-age pensions.

There can be no doubt that, if the Board were a mere general agent of the Crown, *mandamus* would not lie. *The Queen* v. *Lords Commissioners of the Treasury* (1872), 41 L.J.Q.B. 178, at p. 182, is only one of many authorities supporting the proposition just stated. But the rule is different where a servant of the Crown has been constituted by statute to do a particular act. In *The Queen* v. *Secretary of State for War* (1891), 60 L.J.Q.B. 457, Charles, J. observed at p. 461:

> Now, there are, no doubt, cases where servants of the Crown have been constituted by the statute agents to do particular acts, and in those cases a *mandamus* would lie against them as individuals designated to do those acts.

In Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 762, it is said:

Where, however, Government officials have been constituted agents for carrying out their duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects, a writ of *mandamus* will lie for the enforcement of such duties.

In *The Minister of Finance* v. *The King, at the Prosecution of Andler et al.* [1935] S.C.R. 278, at 285, Davis, J. observed:

But a classic statement of the distribution between a Minister acting as a servant of the Crown and acting as a mere agent of the Legislature to do a particular act is that of Sir George Jessel when counsel in *The Queen* v. *Lords Commissioners of the Treasury* case (1872), L.R. 7 Q.B. 387, at 389: "Where the Legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a *mandamus* might lie against them as mere individuals designated to do that act; but in the present case, the money is in the hands of the Crown or of the Lords of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of right. If the Court granted a *mandamus*, they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner."

In the case at Bar there was a legal obligation upon the Board to continue payment of the pension to the pensioner. It is not clear that a remedy is open to the pensioner other than the one now sought. In *The King* v. *The Company of Proprietors of the Nottingham Old Water Works, ex parte Turner* (1837), 6 L.J.Q.B. 89, at p. 92 it was said by Patteson, J., with the approval of his colleagues:

I am not prepared to say whether it can, or whether it cannot, be so enforced; but unless a clear remedy is preserved to the party, we are bound to enforce the performance of what the Act of Parliament has directed to be done by *mandamus*.

In *The Mayor and Assessors of Rochester, in re The Parish of St. Nicholas* v. *The Queen* (1858) 27 L.J.Q.B. 434, at p. 437 it was said by Martin, B.:

That Court [the Court of Queen's Bench] has power, by the prerogative writ of *mandamus*, to amend all errors which tend to the oppression of the subject or other misgovernment, and it ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute . . . Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it is our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.

Vide etiam Re Kendrick and Milk Control Board of Ontario (1935), 63 Can. C.C. 385, at p. 386.

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Section 3 of the Provincial Act, R.S.B.C. 1936, Cap. 208, provides that the Lieutenant-Governor in Council may by order, authorize and provide for the payment of old-age pensions to the persons and under the conditions specified in any Act of the Dominion passed relating to old-age pensions and the regulations made thereunder. The Legislature provided the machinery for implementing the legislation in a convenient and prompt fashion. The Dominion Act had not yet been passed when the Provincial Act was assented to on 7th March, 1927. The Provincial Act was duly proclaimed and brought into operation on 17th August, 1927—*vide* B.C. Gazette, 1927, p. 2732. Section 3 is a directory and not a permissive section. The legislation was implemented and old-age pensions have been paid since September, 1927.

One other submission by counsel for the Board remains to be discussed. It is submitted that the Board in paying old-age pensions is distributing general public funds. It is to be remembered that the Dominion does not pay these pensions. It reimburses to the Provinces 75 per centum of the net sums paid by them under Provincial statutes providing for the payment of such pensions—*vide* R.S.C. 1927, Cap. 156, Sec. 3 (1). The fund to be used by the Province for old-age pensions is set up in the "estimates" under the Department of Labour as an item "authorized by statute" and forms part of the gross estimates of that Department—*vide* Exhibit 3, p. U. 67. An annual Supply Act is passed by the Legislature—*vide* B.C. Stats. 1940, Cap. 50. The preamble makes reference to the estimates. Section 4 reads as follows:

> 4. From and out of the Consolidated Revenue Fund they may be paid and applied as set forth in Schedule C a sum not exceeding in the whole twenty-nine million nine hundred and forty-seven thousand two hundred and seven dollars and thirty-three cents, towards defraying the several charges and expenses of the Public Service of the Province for the fiscal year ending the thirty-first day of March, 1942.

Section 6 reads as follows:

> 6. The said aids and supplies shall not be issued or applied to any purpose other than the purposes for which they are appropriated as set out in said Schedules and in the detailed estimates and votes upon which said Schedules are based, respectively.

In Schedule C will be found an item:

Department of Labour.....$949,708.41.

That item includes the item set up in the Estimates, p. U. 67, for old-age pensions. The situation then is this: The Legislature has specifically appropriated the necessary moneys for payment of old-age pensions for the fiscal year 1st April, 1941, to 31st March, 1942—*vide* section 4, and it has stipulated that the moneys so appropriated may be used for no other purpose—*vide* section 6. It was not necessary that the Legislature should have appropriated by the Supply Act the moneys necessary for the payment of old-age pensions, for by section 5 of the Old-age Pension Act, R.S.B.C. 1936, Cap. 208, it is provided as follows:

> In the absence of any special appropriation of the Legislature available for the purposes of this Act, all moneys necessary to meet the old-age pensions payable under this Act and the salaries and expenses necessarily incurred in the administration of this Act shall be paid out of the Consolidated Revenue Fund.

The Legislature, however, did not choose to rely upon section 5 but appropriated the specific sum which it deemed necessary for the payment of old-age pensions for the fiscal year 1941-1942. The moneys paid out by the Board for pensions are moneys specifically voted by the Legislature to be administered by the Board in a particular manner.

In *Gartley* v. *Workmen's Compensation Board* (1931-32) [*ante,* p. 217], Murphy, J. drew the inference that the funds against which pension cheques were drawn were part of the Provincial Consolidated Revenue Fund. That may well have been, but it did not follow that the funds in question were merely general public funds—portions of the Consolidated Revenue Fund may be appropriated or ear-marked by the Legislature for specific purposes. It would appear that the attention of the learned judge was not drawn to the fact that the funds for old-age pensions are specifically appropriated by statute and can be expended for no other purpose. That case was reviewed in the Court of Appeal. While the dismissal of the application for a *mandamus* in the Court of first instance was supported, the reasons given in that Court were not discussed by any of the learned judges of the Appellate Court. MARTIN, J.A. (as he then was) very explicitly refrained from expressing an opinion as to whether a *mandamus* would lie. Instead he rested his judgment upon the merits. It can scarcely be said that the

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decision in the Court of Appeal precludes me from taking the view that a *mandamus* will lie. With great respect, I cannot agree with the view taken by MURPHY, J. as to the nature of the funds administered by the Board.

Holding the view that the statute has put upon the Board an obligation to make payment of an old-age pension to a person qualifying under the statute and it appearing that Lee qualified, and being of the opinion that the Board has been created a servant under the statute to do a particular act, and that the moneys to be used by the Board in the discharge of their duties are moneys specifically appropriated for the purpose and for no other purpose, I direct a *mandamus* as asked to compel the Board to do the very thing authorized by the Legislature and for which the Legislature specifically provided the money.

Application granted.

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Jan. 26; March 3.

IN RE TAXATION OF COSTS AND *IN RE* LOCKE, LANE, NICHOLSON & SHEPPARD, SOLICITORS.

Solicitors—Solicitor and client's bill of costs—Bill presented in lump sum charge—Allowed by taxing officer—Reference back to tax item by item—R.S.B.C. 1936, Cap. 149, Sec. 82; Cap. 249, Sec. 4 (6)—Appendix M.

The solicitors delivered a solicitor and client bill of costs to the clients and consented to an order for the taxation thereof. The bill of costs was drawn under the provisions of section 82 of the Legal Professions Act and sets out a lump sum fee and a detailed statement of disbursements. On the taxation the taxing officer ordered and obtained further details of the services rendered, and at the request of the solicitors he heard evidence from outside counsel as to the nature and extent of the services. The bill was taxed in the lump sum claimed with disbursements and the costs of taxation. On the application of the clients for an order to review the taxation it was held that the bill must be taxed in accordance with the established practice, namely, item by item, and the taxing officer must be governed by Appendix M and no higher fees than those set out in that Appendix be allowed in any case.

Held, on appeal, affirming the order of SIDNEY SMITH, J., that section 82 of the Legal Professions Act makes no change in the practice with the exception that it enables the solicitor to make the lump sum charge

in the first instance but as soon as the bill comes before the taxing officer he would at once require particulars of charges. The section made no change in the method of taxation. The bill must be taxed item by item.

Held, further, that there was error in the taxing officer receiving evidence of the type given on the reasonableness of the bill taken as a whole.

APPEAL by Messrs. *Locks, Lane, Nicholson & Sheppard* from an order made by SIDNEY SMITH, J. on an application heard by him in Chambers at Vancouver on the 4th, 5th and 8th of December, 1941, whereby it was held that the bill of fees, charges and disbursements delivered by said firm to the party charged therewith, and containing a statement or description of the services rendered with a lump sum charge therefor should have been taxed item by item and not as a lump sum bill, and that on the taxation of the said items the taxing officer must be governed by Appendix M of the Supreme Court Rules, 1925, and no higher fees or further allowances than those set out in said Appendix M should be allowed by the taxing officer. The facts are set out in the judgment of the learned trial judge.

Donaghy, K.C., for the application.
R. H. Tupper, and *W. S. Lane, contra.*

Cur. adv. vult.

20th December, 1941.

SIDNEY SMITH, J.: In this matter Messrs. *Locke, Lane, Nicholson & Sheppard*, solicitors of this Court, delivered a solicitor and client bill of costs to the appellants and consented to an order for the taxation thereof. Thereupon an order was made by the learned Chief Justice on the 27th of August, 1941,

that the bill of fees, charges and disbursements delivered to the applicants (appellants) by the above-named solicitors be referred to the taxing officer to be taxed.

The bill contains some 130 items. It was drawn under the provisions of section 82 of the Legal Professions Act, and sets out a lump sum fee and a detailed statement of disbursements. The learned deputy district registrar at Vancouver, before whom it came for taxation, ordered and obtained further details of the services rendered. In addition he heard at the request of the said solicitors evidence from outside counsel as to the nature and

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extent of the services. These were complicated and prolonged.

The taxing officer taxed the bill as presented. The appellants now come before me claiming error on the part of the taxing officer in three respects:

(a) For taxing and allowing all the items of the fees and charges at a lump sum instead of in accordance with the provisions of Appendix M and the Supreme Court Rules; (b) for hearing and acting upon evidence given by counsel called as a witness who gave his opinion in regard to the amount which should be allowed; (c) for taxing and allowing the said fees and charges at the amount which was taxed.

Section 82 aforesaid first appears as section 78A of the Legal Professions Act as enacted by B.C. Stats. 1930, Cap. 30. Since then there have been two applications to the Court for a review of taxation made under it. One such application was before MURPHY, J., at Victoria on 24th June, 1935, in the case of *Robertson* v. *McAlpine*. The other application was before MCDONALD, J. (as he then was) at Vancouver on 28th June, 1935, in the case of *Rostein* v. *Canadian National Steamship Co. Ltd. et al.* Both decisions are unreported. I have examined the records in each case, both at Victoria and Vancouver. There is nothing to show in either of them that the points now before me were dealt with or considered by either of these learned judges. No other authority was brought to my attention, nor have I been able to find any. I therefore take it that the matter is now one of first impression.

Section 82 of the Legal Professions Act reads as follows:

> 82. A solicitor's bill of fees, charges, and disbursements shall be sufficient in form if it contains a reasonable statement or description of the services rendered, with a lump sum charge or charges therefor, together with a detailed statement of disbursements; and in any action upon or taxation of such bill, if it is deemed proper, further details of the services rendered may be ordered.

I think this section means just what it says, *viz.*, that a bill showing a lump sum charge shall be sufficient in form. It does not deal with the method of taxing the bill, but only with its form. In my opinion the bill must be taxed in accordance with the established practice, namely, item by item. I think this view is confirmed by the last sentence providing that further details may be ordered.

I am further of opinion that in taxation of the items the taxing officer must be governed by Appendix M and that no higher fees than those set out in that Appendix shall be allowed in any case.

I think this is sufficiently clear from a consideration of the Court Rules of Practice Act, R.S.B.C. 1936, Cap. 249. Section 4 (6) of that Act is as follows:

4. (6.) Notwithstanding anything contained in the Supreme Court Act or in this Act, the taxation of costs as between party and party or solicitor and client shall be governed by, and the Registrar in any taxation of costs shall allow all such costs, fees, charges and disbursements as are prescribed in Schedules Nos. 4, 5 and 6 of Appendix M, and Appendix N of the said Supreme Court Rules, 1925, or in any tariff in amendment thereof or substitution therefor prepared and approved from time to time by Judges of the Supreme Court.

And also from Order LXV., r. 8, which states that:

8. In all causes and matters the fees allowed to solicitors shall be those set forth in Appendices M and N, as therein provided, and no higher fees shall be allowed in any case, except such as are by these Rules provided for.

Appendix N sets out the tariff of costs as between party and party. Appendix M covers all other costs.

It was urged upon me that the taxing officer was not bound by Appendix M but could make "such further allowances as [he] . . . shall consider proper." There was cited as authority for this view an order in council of 11th October, 1938, under which rules 8, 9 and 10 of Order LXV. of the Supreme Court Rules, 1925, were struck out and the following substituted for rule 8:

8. In all causes and matters where costs are payable and are subject to taxation such costs shall be taxed as follows:—

(*a*) Where costs are payable between party and party they shall be taxed in accordance with the provisions of Appendix N: Provided that in any cause or matter the Court or a Judge may direct that the costs payable to any party shall be taxed either under Appendix M or as between solicitor and client.

(*b.*) In all other cases where costs are payable, including costs as between solicitor and client, such costs shall be taxed in accordance with the provisions of Appendix M, with such further allowances as the taxing officer or, in the case of a review of taxation, the Judge or the Court shall consider proper.

In my opinion 8 (*a*) is effective but 8 (*b*) is not. This seems to follow from the fact that at the time of the passing of this order in council the new Appendix N with which 8 (*a*) deals was approved by the Judges of the Supreme Court. But there was no new Appendix M which in its relevant Schedules 4, 5 and

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6 remained the same as it was in 1925, except for the introduction of the new provision comprised in 8 (*b*), to wit:

> With such further allowance as the taxing officer or, in the case of a review of taxation, the Judge or the Court shall consider proper.

In my opinion this new provision thus sought to be added to Appendix M, not having been approved by the Judges of the Supreme Court, is null and void.

I think the taxing officer is governed by Appendix M and has no discretion as to the amounts to be allowed other than that given to him under some of the items mentioned in the said Appendix. I think too that the taxation must be conducted item by item in accordance with the principles outlined by Riddell, J., in *Re Solicitors* (1918), 44 O.L.R. 273.

I am not overlooking the case of *Re Boscowitz* (1916), 10 W.W.R. 948, where GREGORY, J. held that the taxing officer was not bound by Appendix M, but could

> allow a reasonable sum for the services rendered, using the scale M only as a guide to enable him to fix what amount is reasonable.

But the learned judge came to that conclusion after a consideration of Order LXV., r. 27 (29), which is no longer in the rules. The case therefore cannot now be considered an authority.

I see no objection to the hearing of expert evidence by the taxing officer if he thinks it will be helpful to him. He, of course, must come to his own independent conclusion on the various items submitted to him for taxation. As to that I might repeat what was said by Riddell, J. in the aforesaid case at p. 276:

> We may assume that the taxing officer will do his duty in the premises, and that he needs no instructions from us.

Upon the hearing counsel submitted that, on the question of amount, argument be deferred until after they had had an opportunity to consider these findings, and it was so agreed.

From this decision the solicitors appealed. The appeal was argued at Victoria on the 26th of January, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Bull, K.C., for appellants: This case involves a short point under section 82 of the Legal Professions Act. Mr. *Locke* was retained by the late Dean Spencer in July, 1940, with relation to the administration of the Spencer estate. The retainer ter-

minated in April, 1941. The bill was presented in a lump sum form and the question is whether the solicitor can render a lump sum bill and have it taxed as such. Further details of services may be ordered. The lump sum of $4,000 charged, was allowed by the taxing officer. As to Order LXV, r. 8, the work included in this bill was not in a cause or matter so it has no bearing on this case. Section 82 of the Legal Professions Act should be exercised in a proper case. The registrar must tax on a *quantum meruit*: see *Re Solicitors* (1918), 44 O.L.R. 273. Under section 82 of the Legal Professions Act we may render a bill and tax it in a lump sum, and there is error in saying we are limited to Appendix M of the Supreme Court Rules.

Donaghy, K.C., for respondents: As to section 82 of the Legal Professions Act, a bill of costs in a lump sum is sufficient in form, but it does not say how it is to be taxed. There is no bill of costs unless it is set out in sufficient particularity. The common law requires a description of the services rendered. There should be set out the number of hours spent in each of the services. He has confused the Rules of Court and the statutes. The taxing officer must deal *sereatim* with each item: see *In re Grant, Bulcraig & Co.*, [1906] 1 Ch. 124, at p. 128. Section 4 (6) of the Court Rules of Practice Act is the authority for using Appendix M.

Bull, replied.

Cur. adv. vult.

3rd March, 1942.

MCDONALD, C.J.B.C.: This appeal by solicitors raises the question whether on a solicitor and client taxation the registrar can allow a lump sum, without in any way showing what items he allowed or disallowed, or how he arrives at that sum. On the taxation reviewed by SIDNEY SMITH, J. the registrar refused to go through individual items, and heard the evidence of an independent solicitor, called as an expert on costs, that the charge made for the whole bill was a reasonable charge for the services shown in the bill. The learned judge has held that this is not the proper procedure, but that the registrar must go through the bill item by item.

From my first approach to this subject, I have been struck by

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the anomaly that practically all provisions governing the taxation of solicitors' costs, even in matters which are non-contentious and have nothing to do with any Court, should be found in an Act governing Court rules, or in the rules themselves. It is of course to be expected that a taxing officer of the Court would be the tribunal appointed to tax, even non-contentious costs, since he is especially qualified, and he has a solicitor and client scale of costs already available for taxations between party and party on a solicitor and client basis. But though the Legal Professions Act, in which one would expect to find a complete code on the relations between solicitor and client, does provide for referring bills for taxation, either by solicitor or client, and has some incidental directions, the Act, putting aside section 82, which I shall mention later, contains absolutely nothing to regulate how costs shall be taxed or what principles or scales shall govern remuneration or allowances.

Similarly the Court Rules of Practice Act, R.S.B.C. 1936, Cap. 249, Sec. 4 (6) (assuming that it touches costs between solicitor and client, a matter to which I shall refer later) refers all matters of taxation and *quantum* to the Supreme Court Rules, and I find it as anomalous to go to an Act governing the Court procedure as to the rules themselves.

Turning now to these rules, we find that Appendix M contains, among other things, a Schedule (No. 5) relating specifically to "non-contentious" costs, and perusal shows that it covers such matters as drawing wills, searching titles, conveyancing, etc., matters that have nothing to do with the practice of the Court. That this is no accident is shown by Order LXV., r. 26A, which expressly authorizes the Supreme Court or a Judge to order solicitors to deliver bills or to order taxation "notwithstanding that such bills relate to non-contentious proceedings."

Likewise, Order LXV., r. 8 (*a*) as passed by order in council of 1938, seems to refer to non-contentious costs. It actually speaks of costs "as between solicitor and client," which ordinarily I would take to mean costs between litigants on the solicitor and client scale. But as such costs are already covered by r. 8 (*a*) it seems necessary to read r. 8 (*b*) as referring to "costs between solicitor and client,"—the "as" being redundant and loosely

used. Rule 8 (*b*) then provides that such costs "shall be taxed in accordance with the provisions of Appendix M," and Appendix M assigns separate allowances for each item of service.

I feel it distinctly anomalous that rights between solicitor and client should be legislated on by order in council under the guise of regulating the procedure of a court, with which there is no real connexion. Except for confirming legislation, I should feel strong doubt of the validity of this way of regulating taxations. The logical way would be for the Legal Professions Act itself to provide that Appendix M of the rules should govern solicitor and client taxations. However, the Supreme Court Rules, 1925, are expressly confirmed by the Court Rules of Practice Act, Sec. 4 (3), and Sec. 4 (6) of that Act itself appears directly to enact that the rules shall govern taxations.

The only doubt I feel on section 4 (6) is whether it is meant to embrace solicitor and client taxations. Grammatically it seems to refer to taxations "as" between solicitor and client, and ordinarily I would take this to mean "as if" between solicitor and client, and therefore to refer to taxations between party and party on a solicitor and client basis. However, I find the expression "as between solicitor and client" frequently used by various Legislatures and Courts as meaning "between solicitor and client" (r. 8 (*b*) is an instance) and on the whole I think it is so used in section 4 (6). The reference in section 4 (5) to Schedule 5 of Appendix M which relates entirely to non-contentious charges, shows that the Act covers more than costs between party and party, and throws light on the scope of section 4 (6).

Rule 8 (*b*), after applying Appendix M, goes on to provide that in solicitor and client taxations the registrar is not confined to the specific charges allowed in Appendix M, but that he may add

> such further allowances as the taxing officer or, in the case of a review of taxation, the Judge or the Court shall consider proper.

SIDNEY SMITH, J. has held that this added provision is *ultra vires* and I agree with him. The Supreme Court Rules were confirmed by the Court Rules of Practice Act, Sec. 4 (3), but only as they stood in 1925. Section 4 (6) requires that costs shall be taxed in accordance with the Appendices in the rules, but

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these extra allowances are not suggested to be in any Appendix; they are additional, and that makes r. 8 (*b*) conflict with section 4 (6). That section does indeed allow amendment of the Schedules, but only by the judges, and they have not amended it. Moreover, as I have said, r. 8 (*b*) purports to sanction allowances outside the Appendices. This it cannot do while section 4 (6) stands as it is.

I do not overlook that the previous r. 8, as amended in 1930, read in the same way; but it was equally in conflict with section 4 (6) and, I think, equally ineffective.

The first part of r. 8 (*b*) is not open to the same objection; it indeed goes little farther than section 4 (6) of the Court Rules of Practice Act, except that it is somewhat more specific. This part makes Appendix M govern solicitor and client taxations and Appendix M is a collection of itemized allowances for specified services. Apart then from section 82 of the Legal Professions Act, all points to the need for itemized bills, and the need for justifying every item by some allowance in Appendix M.

The appellant, however, contends that section 82 completely alters the situation. That section reads as follows: [already set out in the judgment of the learned trial judge.]

This section is taken from legislation passed in Ontario and Saskatchewan in 1920. There are several decisions upon it from Ontario, but they are not directly in point, and all are decisions of single judges only (though if I may respectfully say so, of able judges); so it seems desirable to consider the matter at large before examining those decisions.

Section 81 of our Legal Professions Act is directed to the rendering of a signed bill as preliminary to an action, and section 82 itself seems to be directed primarily to that, though the contingency of taxation is not overlooked. Actually, section 82 deals with lump sum charges not lump sum taxation. Though procedure under it might easily take one of several forms, section 82 is consistent with the construction that lump sum charges can only be allowed on taxation if the registrar, assigning the scale charge to each of the disclosed items, can bring the total up to the lump sum charged.

The taxation of solicitor and client charges dates back to an

Act of 1728 (2 Geo. II. c. 23, s. 23); but this did not apply to non-contentious services, unless charges therefor were included in a bill with contentious charges. The right to tax a strictly non-contentious bill was given by section 37 of the Solicitors Act, 1843.

In England, where there is no legislation like our section 82, the decisions all seem to negative any right to charge lump sums, except under special contracts; and equally lump sum taxation is unknown except (at the client's instance) under the English Order LXV., r. 27 (38A). In Ontario no departure from English practice is admitted (up to the amendment of 1920), but I find it very hard to reconcile the Ontario and English decisions. I attribute this to solicitors in Ontario being employed to do more non-legal work than in England, and apparently to the absence of any scale in Ontario to cover most non-contentious work.

In England the rule is that work not characteristically professional work (*e.g.*, collection of rents) cannot be included in a solicitor's bill at all, and hence cannot be taxed: *In re Shilson, Coode & Co.*, [1904] 1 Ch. 837.

This rule does not seem to have been applied in Ontario, and in order to make taxation practicable under legislation similar to the English Act of 1843, bills and allowances for such work have perforce had to be on a lump sum basis: see for instance, *Re R. L. Johnston, a Solicitor* (1901), 3 O.L.R. 1 and *Re Solicitors* (1911), 27 O.L.R. 147. However, the English practice seems to have still been followed where practicable, as where services and charges were clearly capable of being itemized and brought under a scale: see *Lynch-Staunton* v. *Somerville* (1918), 44 O.L.R. 575, where both types of services are considered. I refrain from deciding whether that decision can be reconciled with the English authorities.

So, even before the amendment of 1920, the Ontario Courts sanctioned the making of lump sum charges for certain services not within any scale, and by inference their being taxed on a lump sum basis. How far these decisions should be followed here, where we have the express provisions of section 4 (6) of the Court Rules of Practice Act and Order LXV., r. 8 (*b*), need

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not be decided because here the appellants, by delivering a fully itemized bill (when ordered by the registrar to furnish further details of the services rendered), and showing that there is no difficulty in applying the scale, have shown that the *ratio decidendi* of those cases is inapplicable. The Ontario decision in *Re Solicitors* (1918), 44 O.L.R. 273 decided during the same month as *Lynch-Staunton* v. *Somerville, supra,* shows that once a bill is itemized, it must be taxed item by item.

I turn next to the Ontario decisions on the 1920 amendment, from which section 82 of our Legal Professions Act is copied. In *Re Solicitor* (1922), 22 O.W.N. 476; (1923), 23 O.W.N. 633, lump sum allowances seem to have been made. But the case is of little help, since the appeals were taken by the solicitor, and the propriety of this procedure was not in dispute.

In *Re Solicitor* (1922), 53 O.L.R. 34, Orde, J. held a lump sum bill bad for insufficiency of particulars, and he held that the amendment had not changed the old rule requiring the bill to give enough particulars to enable the client to get another solicitor's opinion on its reasonableness. He intimated that in certain cases lump fees might be taxable.

In *Re Solicitors* (1926), 58 O.L.R. 389, solicitors had rendered eight bills giving exhaustive particulars of services, but not itemized charges. The Master ordered itemized charges to be inserted in all. Grant, J. reversing him, distinguished (p. 395) between the different types of bills, and explained *Re R. L. Johnston, a Solicitor, supra,* and other cases where lump sum charges and allowances were made, as cases of (p. 395)

> services of a general nature or character in respect of matters to which the tariffs prescribed by the Rules have no application.

Three bills covered such services, and he held that full particulars of the services having been given, itemized charges need not be inserted, there being no tariff applicable. He pointed out that four bills related to actions and required the solicitors to set out the tariff charges for each item in these, but he permitted lump sum figures for additional charges taxable by statute, but not in the tariff. He held that the eighth bill which covered proceedings for probate, should itemize charges according to the tariff.

In *Petty* v. *Murphy* (1926), 59 O.L.R. 209 the solicitor had rendered a bill covering the purchase and exchange of several properties, with the baldest and barest outlines, and a lump sum charge for each purchase or exchange. Wright, J. said (pp. 212-3):

> As stated in some of the authorities, one test is whether or not the bill affords sufficient information to the client to enable him to submit the matter to another solicitor for advice as to whether it is a reasonable bill or not. This bill entirely fails to meet that test.
>
> . . . The taxing officer held . . . that the delivery of . . . particulars cured the defect in the bill.
>
> I do not read the amendment of 1920 in that way . . .
>
> I think the whole object of the amending Act was to render it unnecessary to give in the first instance details of charges or items such as the time occupied in consultations, folios contained in a conveyance, detailed statements of the different attendances, searches, etc., or to allot a separate charge to each item, but it was never intended to relieve the solicitor from the duty to render the client a bill giving such a general statement of the services rendered as would afford any other solicitor sufficient information to advise the client as to the propriety or reasonableness of the bill.

My conclusion from these decisions on this Ontario legislation corresponding to our section 82, is that it made no change whatever in the Ontario practice, with the one exception that it enabled the solicitor to make the lump sum charge in the first instance in every case, but as soon as the bill came before a taxing officer he would at once require the same particulars of charges that would have been necessary for a good bill before the amendment. There is no suggestion whatever that the amendment made any change in methods of taxation.

This is the conclusion that I should have come to, apart from the Ontario decisions. My conclusion thus is that SIDNEY SMITH, J. was right in ordering that the bill be taxed item by item. I would point out that any other method would render the right to appeal from the registrar to a judge practically nugatory.

It follows that the registrar was wrong in receiving the evidence of the type given by Mr. *Montgomery* on the reasonableness of the bill taken as a whole. Expert evidence may indeed be receivable in certain cases on services not itemizable, or perhaps on the merit of particular work where the scale is not rigid, but that point has not so far arisen.

The respondent has been given costs below. Since the judge's

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ruling may give the respondent no ultimate gain when the taxation is finished, I should have been inclined to make these costs await the outcome. Legal success is not in winning an argument, but in obtaining tangible gain. However, I do not think we can interfere; the appellants did not raise the point; and presumably the costs before us must follow the event.

I would dismiss the appeal.

MCQUARRIE, J.A.: I agree that the appeal should be dismissed.

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

O'HALLORAN, J.A.: I agree the appeal should be dismissed.

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

Appeal dismissed.

Solicitor for appellant: *R. H. Tupper.*
Solicitor for respondent: *D. Donaghy.*

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IN RE IMMIGRATION ACT.

IN RE MARY C. CARMICHAEL AND ROY CARMICHAEL.

Immigration — Deportation order — Habeas corpus — Canadian domicil— R.S.C. 1927, Cap. 93, Secs. 18, 23, 40 and 42.

The petitioner's husband came to Canada from Scotland in January, 1926, and was followed by his wife and son in July, 1926. They resided at Powell River, B.C. until November, 1933, when they returned to Scotland, where the husband remained. The wife with her infant son returned to Canada in August, 1935, without the knowledge or consent of her husband, but was refused entry at Quebec and deported by order of a Board of Inquiry at that port. In June, 1938, she again came to Canada with her son without the knowledge or consent of her husband, using a British passport and securing entry to Canada as a visitor. She stated in her affidavit that she secured entry on a visiting passport to test out whether or not she and her son were Canadian citizens or had Canadian domicil. On the 6th of October, 1938, a board of inquiry at Vancouver ordered that she and her son be deported under sections 40 and 42 (3) of the Immigration Act, she being a person other than a Canadian citizen or a person having Canadian domicil. An

appeal from this order to the Minister was dismissed. On petition for a writ of *habeas corpus* and for an order quashing said order:—

Held, on the evidence, that the husband abandoned his Canadian domicil, and that being so the domicil of the petitioner and her son changed with that of her husband, so that when they applied for entry into Canada in 1938 neither one of them had Canadian domicil.

PETITION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by COADY, J. in Chambers at Vancouver on the 17th of March, 1942.

Castillou, K.C., for petitioners.

Elmore Meredith, for the Immigration Department.

Cur. adv. vult.

25th March, 1942.

COADY, J.: By order, dated October 6th, 1938, of a board of inquiry held at Vancouver, B.C. under the Immigration Act, Mary Crawford Carmichael was ordered deported under sections 40 and 42, subsection 3 of the Immigration Act, she being a person other than a Canadian citizen or person having Canadian domicil who entered Canada after having been rejected, without the consent of the Minister, contrary to section 42, subsection 5 of the Immigration Act.

The said order likewise includes her infant son, Roy Carmichael, now age 19 years, under section 42, subsection 6 in that he is a dependant member of her family.

From this order an appeal was taken to the Minister. This appeal was dismissed. The parties now petition for a writ of *habeas corpus* and for an order quashing the said order for deportation.

This Court under section 23 of the Immigration Act has no jurisdiction to review the findings of the board unless the petitioners are Canadian citizens or have Canadian domicil. By section 18 Canadian citizens and persons who have Canadian domicil shall be permitted to land in Canada as a matter of right. The parties here claim to be Canadian citizens and to have Canadian domicil.

Mark Homer Carmichael, husband of the petitioner, Mary Crawford Carmichael, and father of the infant petitioner, Roy Carmichael, came to Canada from Scotland in January, 1926.

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He was followed by his wife and son in July, 1926. The family resided at Powell River, B.C. until November, 1933, when they returned to Scotland. The wife, being dissatisfied with residence in Scotland and wishing to return to Canada, left Scotland with her infant son in August, 1935, without the knowledge or consent of her husband, and came to Canada. The money for her trip, or at least some part of it, was furnished by or through friends in Powell River. She was refused entry at Quebec and was deported by order of a board of inquiry at that port. On her examination there she denied that funds were furnished her as aforesaid. The passport on which she travelled along with her infant son was the passport issued in Canada in 1933 when the family returned to Scotland. In June, 1938, the petitioner again came to Canada, again assisted by finances received from or through friends in Powell River, and again without the knowledge or consent of her husband. On this occasion she used a British passport and secured entry to Canada as a visitor. She frankly states in her affidavit that she secured entry on a visiting passport for the purpose of testing out whether or not she and her son were Canadian citizens or had Canadian domicil. In due course a Board of Inquiry was held in Vancouver with the result as above mentioned.

It is admitted by counsel that Carmichael and his wife and son had Canadian domicil in 1933 when they left Canada to return to Scotland. This was then their domicil of choice—their domicil of origin was Scotland. The short point now is whether the petitioners had Canadian domicil in 1938 when they again entered Canada. If they had they are entitled to remain and the order of the board should be quashed.

Counsel for the petitioners bases his submission on two grounds: First, the domicil of the petitioners was Canadian in 1933 and that Mr. Carmichael returned to Scotland temporarily only with the intention of returning to Canada, his domicil of choice. That intention counsel submits he never abandoned and, consequently, he retained his Canadian domicil and did not revert to his domicil of origin with the result that his wife and son both retained the domicil they had in 1933. Second, Mrs. Carmichael had under the Immigration Act acquired a domicil,

separate and apart from her husband, and was, consequently, in 1938 entitled to enter and remain in Canada and her son, as a dependant member of her family, is likewise entitled to enter and remain.

There is some conflict of evidence as to whether the husband of the petitioning wife abandoned his domicil of choice in 1933, or subsequent to that time, and resumed his domicil of origin. The evidence of Mr. Carmichael was taken herein on commission in Scotland and in it he states very definitely that when he left Canada he was "going home to Scotland for good." Before he left Powell River he sold his house and furniture and when he applied for a passport to return to Scotland he stated that he was returning to Scotland permanently. He further states in his evidence that his domicil is Scotland; that he abandoned his Canadian domicil when he left Canada. Witnesses were called on this hearing who stated that when Mr. Carmichael left Powell River he advised them that he was going back to Scotland but that he expected to return again to Canada. He had been on relief and things were not going well with him. It would clearly appear, however, that he had expressed no intention of returning to Western Canada but, if such intention were ever expressed, it was rather an intention to return to Eastern Canada. He did write to a friend in Powell River within a few months after his return and asked for the address of this friend's son in Toronto with the intention, apparently, of communicating with that son. The address, however, was not furnished to him. While this might indicate that Carmichael was still considering returning to Canada it must be noted that this letter was written before he secured steady employment in Scotland and there is no evidence of any intention on his part to return to Canada after that time except the evidence of the petitioners herein and that is not very definite. If there was any doubt about his early intentions it would seem that once having secured regular employment in Scotland there was then a definite settled conviction in his mind to remain there and that there was then, if not before, a definite abandonment of his Canadian domicil. Mrs. Carmichael on her examination before the board of inquiry at Quebec in August, 1935, when she was deported, was asked the following questions and gave the following answers:

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What was your intention at the time of leaving Canada in 1933? To stay home.

Was there any special reason why you left Canada at that time? No, my husband just wanted to go back to Scotland.

And he disposed of all property he had in Canada? Yes.

Were you agreeable to returning to Scotland at that time with your husband? Well, I could not do anything; what he said I just had to do.

But you were aware at that time that it was the intention of your husband to make his permanent home in Scotland? Yes.

This confirms the evidence of Mr. Carmichael taken on commission herein. On the evidence, therefore, I am forced to the conclusion that Carmichael abandoned his Canadian domicil and that being so the domicil of the petitioner and her son changed with that of the husband, so that when they applied for entry to Canada in 1938 neither one of them had Canadian domicil.

As to the second submission of counsel for the petitioners that Mrs. Carmichael acquired under the Immigration Act a domicil separate and apart from her husband, I cannot agree. It would take very clear and explicit language indeed to grant to a wife domicil separate and apart from her husband. If such were the intention of the Act it would be set forth in the most express terms. I see nothing in the Act to support the contention. Moreover, counsel can refer to no authority in support of his submission. Counsel for the Crown further points out that in any event whether Mr. Carmichael intended to maintain his Canadian domicil or not he lost it under section 2, subsection (*e*) (iii) of the Immigration Act. Likewise if Mrs. Carmichael had a separate domicil she likewise lost it by reason of the same provision of the statute. In that connection I am referred to *In re Immigration Act and Santa Singh* (1920), 28 B.C. 357. Inferentially, at least, this case supports that view. Since, therefore, in my opinion neither of the petitioners were Canadian citizens or had Canadian domicil in 1938 this Court has no jurisdiction to interfere with the order of the board and the application of the petitioners is refused.

While this Court has no jurisdiction to interfere with the order made herein by the board, yet one cannot help but express the hope that under all the circumstances here that the enforcement of the deportation order may be indefinitely deferred and that this woman and son may be allowed to remain in Canada.

Application refused.

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April 1;
May 20.

Libel—Divorce—Maintenance—Order that husband file financial statement —Non-compliance—Committal order—Published in defendant's paper— Discovered next day that statement had been filed—Neglect of registrar's office—Correction and apology by defendant.

A divorce absolute had been granted the plaintiff's wife, and subsequently an order was made directing the plaintiff to pay $100 per month for maintenance. Being in arrears in his payments an order was made on December 16th, 1935, in the Supreme Court, directing the plaintiff to pay $45 per month and to furnish the petitioner's solicitor every three months with a statement of his receipts and disbursements during the previous three months. The plaintiff not having furnished a statement as directed, a summons was issued for an order to commit on the return of which he was directed by MANSON, J. to deliver a statement of his affairs by the 22nd of March, 1939, to the registrar of the Court, and the application was adjourned for a week. On a search being made in the registrar's office on the 27th of March it was found that no such statement was filed. Neither the plaintiff nor his solicitor appeared on the hearing of the adjourned application, and an order was made that he be committed to gaol for forty days. The court reporter of the defendant then telephoned his principals the substance of the order, which was published in the late edition of the paper, to which was added in the office the caption "Husband jailed on wife's plea." On the following morning the defendant's court reporter was told in the registrar's office that a mistake had been made and that the plaintiff had in fact filed a statement. The court reporter then telephoned his principals of the mistake and the story was not published in any other issue. On being informed of the mistake the learned judge rescinded the order committing the plaintiff. The defendant published a correction and apology as to the publication. The plaintiff's action for damages for libel was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the learned Chief Justice, sitting as a jury, must be presumed to have held that the report was substantially accurate, that what is stated inaccurately is not the gist of the libel, and that it did not mislead the public mind.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 25th of October, 1940, dismissing an action for libel arising out of a publication in an edition of The Vancouver Daily Province of March 27th, 1939, of a report of judicial proceedings in the Supreme Court at Vancouver against the plaintiff. The plaintiff has practised dentistry in Vancouver since 1933

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In February, 1933, his wife commenced divorce proceedings and a decree absolute was granted the petitioner with the custody of her three children. One month later the plaintiff married the co-respondent. The first wife then brought proceedings for maintenance and he was ordered to pay her $100 per month. In March, 1939, he was in arrears in his payments under said order in the amount of $2,715. In 1935 an order was made by FISHER, J. directing the plaintiff to pay $45 per month, and every three months to furnish a statement of his receipts and expenditures during the previous three months to the petitioner's solicitor. He then paid $40 a month but did not deliver any statement of his receipts and expenditures as directed. In March, 1939, the petitioner took out a Chamber summons for an application to commit the plaintiff, and MANSON, J. directed him to deliver a statement of his affairs to the registrar of the Supreme Court by the 22nd of March, 1939, and adjourned the application for one week. He did not file the statement, and at the adjourned hearing neither he nor his counsel appeared. MANSON, J. then made an order that he be committed for 40 days. The court reporter employed by the Province then telephoned to the defendant, with the exception of the caption, what appeared in the evening paper, which was as follows:

HUSBAND JAILED ON WIFE'S PLEA

Committal for forty days to Oakalla jail was ordered by Mr. Justice Manson in Supreme Court of Clinton Harry Vroman, dentist, 4446 Dunbar, on the application of Mrs. Clara Vroman, 2831 West Third, who divorced him in 1933.

The committal was ordered for Vroman's failure to obey an order of the Court requiring him to file a statement of receipts and disbursements in connection with payment of $45 per month alimony to Mrs. Vroman.

On the next morning a clerk in the Court registry office informed the court reporter of the Province that a mistake had been made and that the plaintiff had in fact filed a statement. The court reporter then telephoned The Province office and the story was not published in any other issue of the paper. MANSON, J. then rescinded the order committing him. The defendant published a correction and apology on April 15th following.

The appeal was argued at Vancouver on the 1st of April, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Shannon, for appellant: In the case of libel, when the words tend to lower him in the estimation of right-thinking men, or cause him to be shunned or avoided, or expose him to hatred, contempt or ridicule, see Gatley on Libel & Slander, 3rd Ed., 1, 2 and 14. The article falsely stated that the appellant was imprisoned. The order was made owing to a mistake in the Court registry office. The statements made tend to cause the appellant to be shunned or avoided: see *Gray* v. *Jones,* [1939] 1 All E.R. 798; *Richards* v. *Anderson* (1915), 10 W.W.R. 893; *Hough* v. *London Express Newspaper,* [1940] 3 All E.R. 31. The statement that he was a dentist and had been imprisoned for 40 days affected his business. A newspaper is liable for publication of an untrue statement likely to do damage to a person's business: see *Ratcliffe* v. *Evans,* [1892] 2 Q.B. 524; *Calgary Herald Ltd.* v. *Barnes Corporation,* [1929] 1 W.W.R. 428. Appellant proving a statement which is defamatory and not answered by justification, privilege or fair comment is entitled to damages: see Halsbury's Laws of England, 2nd Ed., Vol. 20, pp. 510-11; *Hobbs* v. *Tinling. Hobbs* v. *Nottingham Journal,* [1929] 2 K.B. 1; *Farmer* v. *Hyde* (1937), 106 L.J.K.B. 292. In the case of *Sim* v. *Stretch* (1936), 52 T.L.R. 669 there is nothing in it which changes the law in respect of words which were formerly actionable *per se*: see *Holdsworth* v. *Associated Newspapers, Ltd.,* [1937] 3 All E.R. 872, at pp. 876 and 880; *Bryne* v. *Deane,* [1937] 1 K.B. 818; at p. 827; *De Stempel* v. *Dunkels,* [1938] 1 All E.R. 238. The defence of "fair comment" does not arise in this case. There is no comment, it is a statement of fact: see Gatley on Libel & Slander, 3rd Ed., 371. In order to be privileged the report must be fair and accurate. Where there is a substantial inaccuracy the report is not privileged. They immediately learned of the mistake but did not correct it: see *Lewis* v. *Clement* (1820), 3 B. & Ald. 702, at p. 710; *Blake* v. *Stevens* (1864), 11 L.T. 543; *Mitchell* v. *Hirst, Kidd & Rennie, Ltd.,* [1936] 3 All E.R. 872; *English & Scottish Co-operative* v. *Odhams Press,* [1940] 1 All E.R. 1. An apology is not a defence but may be in mitigation of damages: see Gatley on Libel & Slander, 3rd Ed., 696. Loss of business is special damage sufficient to support an action: see Gatley on

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Libel & Slander, 3rd Ed., 83; *Riding* v. *Smith* (1876), 1 Ex. D. 91; *Ratcliffe* v. *Evans,* [1892] 2 Q.B. 524. Where the words are incapable of any but a defamatory meaning and published of the plaintiff, and a jury have found a verdict for the defendant this Court should set it aside as perverse and order a new trial: see Gatley on Libel & Slander, 3rd Ed., 730; *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461; *Leech* v. *Leader Publishing Co., Ltd.* (1926), 20 Sask. L.R. 337.

Locke, K.C., for respondent: The article read as a whole is not defamatory, and the learned judge found as a fact that the words complained of were not defamatory. It is not contended that the text of the article or any part of it was untrue. The whole ground of complaint lies in the words of the caption "Husband jailed on wife's plea." This is not defamatory of anyone: see Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 395, par. 483; *E. Hulton & Co., Lim.* v. *Jones* (1909), 79 L.J.K.B. 198, at p. 200. The test is whether under the circumstances reasonable men to whom the publication was made would be likely to understand it in a libellous sense: see *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, at p. 745. The innuendo in the statement of claim that the plaintiff was living with a woman not his wife is supported by the evidence and the learned judge has so found. It is a question of fact and the judgment should not be disturbed on appeal: see *Nevill* v. *Fine Art and General Insurance Company* [1897] A.C. 68, at p. 72; *Stuart* v. *Moore* (1927), 39 B.C. 237, at p. 240; *Huntting Merritt Lumber Co.* v. *Coyle* (1922), 67 D.L.R. 655, at p. 656. Read as a whole the article is a fair and accurate report of judicial proceedings and therefore within the appropriate privilege. Privilege exists at common law and is further declared by the Libel and Slander Act. The story was verified by the Chamber clerk in the Court House and the privilege extends to proceedings before a judge in Chambers: see *Smith* v. *Scott* (1847), 2 Car. & K. 580; Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 481. The plaintiff has not alleged that the privilege was exceeded by malice in fact. The *onus* of proving malice in fact is on the plaintiff: see *Anderson* v. *Smythe* (1935), 50 B.C. 112.

Shannon, replied. *Cur. adv. vult.*

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SLOAN, J.A.: In my view this is a border-line case and I cannot say that the learned trial judge was wrong in his determination of it. I would therefore dismiss the appeal.

O'HALLORAN, J.A.: I agree in dismissing the appeal.

MCDONALD, J.A.: This is an appeal from a judgment of Chief Justice MORRISON wherein the appellant's action for libel against the respondent newspaper was dismissed. The words complained of are: [already set out in statement.]

The facts were that the committal order in question had in fact been made and the sheriff had been ordered to take the body of the appellant into custody. It turned out, however, that through a mistake which had occurred in the Supreme Court registry the order was made on improper material, and when the mistake came to light on the following day the order was revoked. The appellant's complaint is that the head-line of the article conveys the information that he had in fact been taken bodily to gaol and confined there. Upon consideration I think the article is not defamatory. Inasmuch as the head-line designates no individual it means nothing until read with the article itself, and any reasonable person reading the article would see precisely what had happened. After all, it is the imputation that a man has been found guilty of an offence and sentenced which defames him, and not the statement that the sentence had been executed. For instance, I do not think it would be defamatory to publish of a prisoner sentenced to life imprisonment, that he had been taken to New Westminster to enter upon his sentence, when actually he was not to go to New Westminster until the following day. I do not think that under the circumstances here a reasonable man reading the publication would be likely to understand it in a libellous sense. See *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741. As to the innuendo which is pleaded, I think the learned trial judge was right in holding that no claim had been made out in this regard.

There are two cases which may appear to favour the appellant. In my view both are quite distinguishable. In *Thomson* v. *Herman* (1931), 39 O.W.N. 375, a decision of McEvoy, J. at *nisi*

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prius the jury found "that [the statement was a libel but] the plaintiff had suffered no damage." Judgment was entered for a nominal sum without costs. It must be noted first that the question of a fair and accurate report of judicial proceedings did not arise, the defendant tried to justify and failed; and in the second place the jury found there was a libel. Here the learned Chief Justice, sitting as a jury, found there was no libel.

In *English and Scottish Co-operative Mortgage and Investment Society, Ld.* v. *Odhams Press, Ld.*, [1940] 1 K.B. 440, we have as here a report of judicial proceedings, and a head-line which was mainly the part complained of. The head-line stated that the society was prosecuted for making "false" returns and an innuendo declared that this imputed to the society an attempt to defraud and deceive. The jury found for the plaintiff and awarded one farthing damages. The Court of Appeal ordered a new trial to reassess damages. Admittedly the case is close to what we have here, but I think the clear distinction is this, that in the *Odhams* case the misleading language in the caption completely altered the whole substance of what the public would conclude to be the facts of the case. There was in fact in the judicial proceedings nothing discreditable to the society, whereas the report (as interpreted by the jury) made it appear that the society had been deliberately dishonest. Here there was no substantial difference between what was reported and what was actual truth. The whole sting lay in the truth, *viz.*, that the appellant had had a committal order made against him.

It is important to keep in mind, I think, that we are dealing here, not with a case of "justification," but solely with the question of whether we have a fair and accurate report of a judicial proceeding, there being, of course, no suggestion of malice. Two leading cases may be referred to as indicating how the Courts have looked upon inaccuracies in such reports. In *Hope* v. *Leng* (1907), 23 T.L.R. 243, Collins, M.R. at p. 244, approved of the manner in which Grantham, J. had charged the jury in stating to them that the position of a reporter for a daily newspaper whose function it was to make a fair report of proceedings in a Court of justice, the report coming, not necessarily from the hands of a trained lawyer but from a person whose function it

was to send a report in order that the public might read it on the next day, and said that the matter must be viewed in the light of these considerations and that the jury might so examine the matter when dealing with the question whether a report was fair and accurate. The jury had found for the plaintiff but the Court set aside the verdict, thus holding in effect that the report, though not entirely accurate was sufficiently so to satisfy the rule.

Perhaps a stronger case against the appellant is *Alexander* v. *North-Eastern Railway Co.* (1865), 6 B. & S. 340. The railway company had published a notice stating that the plaintiff had been convicted by justices of an offence against the company's by-laws and fined, with an alternative of three weeks' imprisonment. The alternative in the conviction was in fact fourteen days. It was held that it was a question for the jury whether the statement charged as libellous was or was not substantially true, and that the inaccuracy did not as a matter of law make the statement necessarily libellous, that the conviction was described with substantial accuracy and truth in the statement complained of. Cockburn, C.J. at p. 343 said:

> The case resolves itself into a question of degree of accuracy, which is for the jury.

And Blackburn, J. at p. 344:

> The substance of the libel is true; the question is, whether what is stated inaccurately is of the gist of the libel.

Chief Justice Cockburn's charge to the jury in *Gwynn* v. *South-Eastern Railway Company* (1868), 18 L.T. 738 is to the like effect.

The language used in *Alexander's* case I think exactly fits the present case, and I would hold that the learned Chief Justice sitting as a jury must be presumed to have held that the report was substantially accurate, that what is stated inaccurately is not the gist of the libel and that it did not mislead the public mind.

For these reasons I would dismiss the appeal with costs here and below.

Appeal dismissed.

Solicitors for appellant: *Caple & Shannon.*

Solicitors for respondent: *Lawson, Clark & Lundell.*

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SMITH *ET AL.* v. STUBBERT.

Mechanic's lien—Contract—Construction of apartments—Sub-contracts—Two-thirds of contract completed and paid for—Contract not completed and final payment refused—Owner completes work and pays two material men not paid by contractor—R.S.B.C. 1936, Cap. 170, Sec. 8.

Andresen contracted with Stubbert on the 17th of August, 1940, to construct two four-roomed suites of apartments above the latter's store, and to do certain additional work below. The contract price was $3,000, payable $200 on execution of agreement, $1,000 when ready for roofing, $800 when plastering was done, and $1,000 "when work is completed." Andresen entered into several sub-contracts, one of which was with Gray for the plumbing. Andresen received the first three payments, the third of $800 being made on October 11th, 1940. After this, owing to slow progress by Andresen, Stubbert gave him written notice on November 26th that unless he proceeded with the work and completed it without delay he would employ another contractor. Andresen did his last work on December 28th, when Stubbert took over and completed the work himself on January 23rd, 1941, at an expense to him of $250. Stubbert also paid two material men $772.60 owing them by Andresen. The plaintiff Gray, who had a sub-contract for plumbing, completed his work on December 5th, 1940, but was not paid by Andresen. Both plaintiffs filed liens, and the actions were consolidated. It was held on the trial that Andresen had failed to complete his contract, and on an adjustment of accounts the contractor owed Stubbert $19.54, and Gray's claim was not allowed under section 8 of the Mechanics' Lien Act.

Held, on appeal, affirming the decision of LENNOX, Co. J. (MCDONALD, C.J.B.C. dissenting), that it was so found and there was ample evidence to show that Andresen failed to complete his contract, and his appeal must be denied accordingly. The plaintiff Gray completed his work on the 5th of December, 1940, but neither at that date nor since has there been any money owing or payable by the owner to the contractor Andresen. Gray's lien is therefore defeated by section 8 of the Mechanics' Lien Act.

APPEAL by plaintiffs Gray and Andresen from the order of LENNOX, Co. J. of the 4th of March, 1941, on consolidated actions. In August, 1940, the plaintiff Andresen entered into a contract in writing with the defendant to construct two four-roomed suites above his store on Victoria Drive in Vancouver, for the sum of $3,000, payable as follows: $200 on the execution of the agreement, $1,000 when the structure was ready for roofing, $800 when the plastering was completed, and $1,000 on completion of the contract, and all payments falling due after the

first payment were subject to a discount of 5 per cent. if paid promptly. The plaintiff Smith entered into a contract with the plaintiff Andresen to do the electric wiring for $120.50 on the premises, and the plaintiff Gray entered into a contract with the plaintiff Andresen to supply certain material and instal plumbing in the said building for the sum of $538. The defendant paid the first three payments under his contract with Andresen and obtained the 5 per cent. discount on the second and third payments, but after the third payment was made on the contract the defendant claims that on December 12th, 1940, Andresen abandoned the work under the contract and failed to pay his subcontractors (the plaintiffs Smith and Gray) and materialmen and labourers. The plaintiffs, material men and labourers, filed liens under the Mechanics' Lien Act. After the contract was abandoned by Andresen the defendant completed the work and paid off some of the lien-claimants.

The appeal was argued at Victoria on the 16th of September, 1941, before MACDONALD, C.J.B.C., MCQUARRIE and MCDONALD, JJ.A.

Jeremy, for appellant Andresen: In the contract there was a provision for boilers in the bathrooms, but that had to be changed as the engineer objected to having them in the bathrooms and they had to be in the cellar. The contractor was improperly charged $131 for this and it was allowed by the trial judge, and $22 was taken off the contract price as boilers were not put in bathrooms. We say the 5 per cent. discount was not promised, and even if it was, it is not enforceable. He also deducted $60 for costs that was not chargeable to us.

G. E. Housser, for appellant Gray: He did the plumbing under contract with Andresen, valued at $538. Our lien was filed in time and action was commenced in time. He has priority over the contractor. The lien was discharged under section 8 of the Act. Stubbert paid $799 to two lien-claimants. He had no right to do so. He should have paid the money into Court. He is entitled to charge up the amount paid for completion, and that is all. The Courts have construed the Act so as to give effect to liens.

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Coady, K.C., for defendant: The contract price was paid by instalments and the last $1,000 was not paid as the contractor had abandoned the work before completion and the defendant had to finish the work himself: see *Harris and Co.* v. *Westholme Lumber Co.* (1913), 3 W.W.R. 783; *Sherlock* v. *Powell* (1899), 26 A.R. 407; *Dussault and Pageau* v. *The King* (1917), 58 S.C.R. 1; *Colling* v. *Stimson & Buckley* (1913), 4 W.W.R. 597. Based on the contract and finding of the trial judge there was a failure to complete. When the contract was abandoned there was no money owing and the fact that Stubbert made other payments does not affect the case. He had a right to do so: see *Metals Ltd.* v. *Trusts & Guarantee Co. Ltd.* (1914), 7 W.W.R. 605.

Jeremy, and *Housser*, replied.

Cur. adv. vult.

16th February, 1942.

MCDONALD, C.J.B.C.: By contract undated (Exhibit 4) the appellant Andresen entered into a contract with respondent Stubbert to do certain work in respect to a store building in Vancouver. The contract price was $3,000, payable $200 at the signing of the agreement; $1,000 when ready for roofing; $800 when plastering completed; and $1,000 when work completed. Andresen by sub-contract with appellant Gray arranged for the plumbing work to be done by Gray at a price of $538.

Disputes having arisen, Andresen and Gray filed mechanics' liens. The actions were consolidated with other actions brought by other sub-contractors and "material men" and on the trial before LENNOX, Co. J. the actions were dismissed on the ground that no moneys were due. Andresen and Gray both appealed but on different grounds. Andresen's appeal concerns only three items:

1. The learned trial judge erred in allowing respondent a discount of $90. This allowance is based upon the evidence of Stubbert to the effect that it was verbally agreed at the time of or immediately following the written contract that a discount of 5 per cent. should be allowed for prepayment. This discount was allowed in respect of the two payments of $1,000 and $800. I think this evidence to vary the written contract was inadmissible and that the learned judge was in error in making this deduction.

2. Owing to certain requirements of the city engineer regarding the heating arrangements it became necessary to place a boiler in the basement. It is not seriously contended that it was any part of the plaintiff's contract to instal such boiler. Its cost was $131 and that cost ought not to have been allowed as against Andresen.

3. An amount of $30 was allowed in respect of costs paid by Stubbert to his own solicitor for services rendered in regard to the various lien claims made in respect of the building. It is not indicated which claims were considered in this regard, but in any event I have no doubt that the amount was improperly allowed.

It follows that in respect of these items amounting in all to $251, the judgment below should be varied and the appellant Andresen should have his costs.

As to Gray's claim the judgment below is not understood. The learned judge disallows the claim of lien and yet he does allow Gray his costs of the lien action. This seems inconsistent as Stubbert could not be liable to Gray at all unless Gray had a lien.

A more serious question, however, arises with regard to the claims of McCleery & Weston Ltd. and Eburne Sawmills Limited. On 4th March, 1941, Smith who was a lien-claimant, but it not concerned with the present appeal, applied to have the various lien actions consolidated. Such order was made, and Mr. *A. N. Daykin* acting for Gray, was given conduct of the action. McCleery & Weston Ltd. and Eburne Sawmills Limited had provided materials for the building and filed liens and brought their actions, and a few days after the consolidation order was made Stubbert took it upon himself to pay these claims without regard to the consolidation order and without authority from Mr. *Daykin,* who had conduct of the action.

Having made these payments Stubbert applied for leave to amend his dispute note setting up these payments and claiming to be allowed the amount so paid. In his original dispute note Stubbert stated (alternatively, it is true) that he had in hand $779.78. After paying the two claims above mentioned, amounting in all to $772.65, Stubbert found himself with practically nothing in hand to pay Gray or any other lienholder. I think

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Stubbert was wholly wrong in making these payments when he did. What he ought to have done was to have brought the money into Court pursuant to section 28 of the Mechanics' Lien Act, to abide the order of the Court, and to be distributed in accordance with the terms of section 36. Under the consolidation order and the proceedings to ensue thereon Gray was entitled, if so advised, to dispute the claims of McCleery & Weston Ltd. and Eburne Sawmills Limited. Stubbert by his act defeated the whole scheme of the Act, which is that all matters relating to all liens arising under the consolidation order shall be dealt with by the Court and not by the individuals concerned. I think Stubbert should not now be heard to say that he had made these payments. When he applied for his amendment at the trial setting up these payments counsel for Gray very properly objected, but the amendment was allowed.

Taking this view it is not necessary that I should consider the effect of section 16 of the Act. For the present I should rather doubt that the orders drawn by Andresen on Stubbert in favour of McCleery & Weston Ltd. and Eburne Sawmills Limited, although being equitable assignments, were in fact an infringement of this section. I should prefer to leave that question open for further consideration.

With regard to both appeals counsel for Stubbert argued strenuously that Andresen had abandoned his contract and that the last $1,000 payable on completion never became payable by Stubbert. No one would question the authorities cited in that regard. If money is payable on completion of the contract *prima facie* it is not payable nor is any part of it payable until such completion, either on *quantum meruit* or otherwise. However, the simple answer in this case is that there was no abandonment. Stubbert treated the contract and still treats the contract as continuing to subsist, and in my view this defence completely fails.

Gray's appeal should also be allowed with costs.

SLOAN, J.A.: I would dismiss the appeal, and am in agreement with the reasons of my brother O'HALLORAN.

O'HALLORAN, J.A.: This is an appeal from the dismissal of a consolidated mechanic's lien action. The appellant Andresen

contracted with the respondent Stubbert on 17th August, 1940, to construct two four-roomed suites of apartments above the latter's store and to do additional work downstairs. The contract price was $3,000, payable $200 on execution of the agreement, $1,000 when ready for roofing, $800 when plastering was completed and $1,000 "when work is completed." Andresen entered into several sub-contracts, one of which was with the appellant Gray for plumbing.

Andresen received the first three payments under the contract. The third payment of $800 was made on 11th October, 1940, but the respondent refused to pay the final sum of $1,000 on the ground Andresen had failed to complete his contract. Nothing could be owing Andresen unless and until he finished his contract: *vide* the decision of this Court in *Harris and Co.* v. *Westholme Lumber Co.* (1913), 3 W.W.R. 783 and cases therein cited, and also *Dussault and Pageau* v. *The King* (1917), 58 S.C.R. 1. If there were nothing "actually owing" Andresen he could not have a lien, *vide* section 7 of the Mechanics' Lien Act, Cap. 170, R.S.B.C. 1936.

The conclusion now reached is that Andresen failed to complete the contract, and his appeal must be denied accordingly. The learned trial judge's finding of failure to complete was accepted by Andresen since he did not appeal from it. Moreover it is amply supported by the evidence. The learned trial judge, however, did not appreciate the legal result of his factual finding of failure to complete, and with respect, appears to have thought that the only consequence was the necessity for an adjustment of accounts between the appellant contractor and respondent owner.

This is manifest in his reasons wherein he allowed the following item against Andresen's claim:

> Work paid for by Stubbert on failure of Andresen to complete $188.52.

The learned judge could not have credited Stubbert with that sum, unless it was for work which Andresen should have done and did not do. Nor could the learned judge have allowed that credit unless Andresen's failure to do the work necessitated Stubbert doing it. It is a clear finding, however, that Andresen failed to complete his contract.

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Andresen did not dispute that finding. His counsel before us contented himself with complaining that the learned judge erred in the adjustment of accounts, and during the argument presented the Court with a memorandum of accounts adjusted in the way he submitted to be correct. It contained this item as a credit to Stubbert:

> Money paid by Stubbert direct to workmen finishing contract $188.52.

It is to be observed it is both a repetition and an acceptance of the learned judge's finding to which I have referred.

What has been said should be enough to dispose of Andresen's appeal, but in the special circumstances to which I have alluded, it may be as well perhaps to add that there is ample evidence in the record to show Andresen failed to complete his contract, and in consequence Stubbert had to do the necessary work himself. Andresen received the third payment of $800 on 11th October on completion of plastering. But the slow progress thereafter caused Stubbert to instruct his solicitors to write Andresen on 26th November (Exhibit 23) protesting the delay and adding:

> Unless you proceed with the work immediately and complete the same without further delay, and within a reasonable time, Mr. Stubbert will be obliged to employ another contractor. . . .

It is to be observed that two-thirds of the work was finished in 55 days on 11th October, but the remaining one-third was still delayed on the date of the above letter 46 days later. Andresen did his last work on 28th December according to his own evidence, but it took the respondent until 23rd January to do the work which should have been done. The uncompleted work was of a substantial and essential nature. The hot-water circulation had to be altered. A larger boiler had to be installed also in order to heat the radiators in the suites upstairs; and these radiators were found to be leaking.

Andresen seems to have persistently neglected to complete or remedy these and several other essential matters detailed in the evidence, without which the suites could not be used or lived in. Persons who had paid deposits were waiting to rent the unfinished suites, and Stubbert for his own protection, was forced by Andresen's neglect to intervene and finish them suitably for human habitation.

The appellant sub-contractor Gray is in a different although not in a better position. According to his evidence he completed his plumbing sub-contract on 5th December. But neither on that date nor since has there been, nor is there now, for reasons already stated, any money owing or payable by the respondent owner to the appellant contractor Andresen. Gray's lien is therefore defeated by section 8 of the Mechanics' Lien Act, *supra,* which reads:

> With the exception of liens in favour of labourers for not more than six weeks' wages, no lien shall attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. . . .

And *vide* the decision of this Court in *NePage, McKenny & Co.* v. *Pinner & McLellan* (1915), 21 B.C. 81.

The respondent Stubbert paid material men $772.60 owing them by Andresen, in addition to some $250 the learned judge seems to have calculated he had expended in finishing or doing over work Andresen should have done. In the result therefore to get the work done, he paid out of his own account more than the final payment of $1,000 which he would have had to pay Andresen, if the latter had not failed to complete his contract. Some point was made that Stubbert should not have paid off Andresen's materialmen without including the appellant sub-contractor Gray *pro rata.* But if the materialmen were also barred by section 8, *supra,* then the payment by Stubbert was purely voluntary on his part, and Gray can have no legal ground of complaint.

Hazell v. *Lund* (1915), 22 B.C. 264, dismissed on an equal division of this Court, in so far as it may be said to point to any *ratio decidendi,* is readily distinguishable. The sub-contractors' liens were there recognized, but in the special circumstances mentioned by MACDONALD, C.J.A. at p. 273, that under the agreement between the owner and the contractor, the former became in effect the contractor's agent to complete the contract. That did not occur in the case now under review.

Hodgson Lumber Co. Limited v. *Marshall et al.* (1940), 55 B.C. 467, was referred to. It has no application here. Its decision turned upon the time of expiration of a materialman's

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lien. As that case was presented in this Court section 8, *supra*, was not relied upon or applicable.

The appeal should be dismissed.

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

Solicitor for appellant Gray: *A. N. Daykin.*
Solicitor for appellant Andresen: *J. E. Jeremy.*
Solicitor for respondent: *E. I. Bird.*

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Jan. 22, 23; Feb. 16.

REX v. BYERS.

Criminal law—Evidence—Statement to police by accused—Ruled as not free and voluntary—Accused testifies on his own behalf—Cross-examined on his statement to the police.

On appeal from accused's conviction on a charge of robbery with violence:—*Held*, that the learned magistrate erred in permitting cross-examination of the accused on his alleged statement to the police, which the magistrate had ruled was not free and voluntary, and a new trial was ordered.

APPEAL by accused from his conviction by police magistrate Wood of the city of Vancouver, on a charge of theft with violence. On the 14th of November, 1941, one Talbot came from Nanaimo on the boat. While on the boat he met one Piercy. On arrival at Vancouver the two men stayed together, and shortly after midnight they went into the Good Eats Restaurant on Pender Street. When they left there they met Byers and Oleschuk across the street with two girls. Talbot had a car there, and they all got into the car with a view to going where they could get a bottle of whisky. Talbot drove south and stopped in front of the Dunsmuir Hotel. He got out of the car and walked east on Dunsmuir, followed by Byers and Oleschuk. Piercy remained in the car with the girls until he heard a row going on between the three men. He got out and ran east to the end of the next block, where he found Talbot, who told him he was knocked down and robbed by the two men who had disappeared down one of the streets. The two men were arrested

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on the following day and identified by Talbot and were charged with robbing Talbot of $280 in American currency.

The appeal was argued at Victoria on the 22nd and 23rd of January, 1942, before SLOAN, O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for appellant: Byers was accused of stealing $203 from Talbot. A statement was made by Byers to the police when arrested. The magistrate did not allow it in on the ground that it was not free and voluntary. Subsequently cross-examination of the accused was allowed in on his alleged statement to the police. Evidence of other offences was allowed in on cross-examination: see *Koufis* v. *Regem*, [1941] S.C.R. 481, at p. 487. You cannot introduce evidence of another crime: see *The Queen* v. *Thompson*, [1893] 2 Q.B. 12. There was not a complete trial within a trial as to the admissibility of the alleged statement.

Davey, for the Crown: Even if not voluntary, the accused as a witness can be examined on it: see *Rex* v. *D'Aoust* (1902), 3 O.L.R. 653; *Rex* v. *Mulvihill* (1914), 19 B.C. 197; *Ibrahim* v. *Regem*, [1914] A.C. 599; *Rex* v. *Wilmot* (1940), 74 Can. C.C. 1, at p. 19, and on appeal [1941] 1 D.L.R. 689. The statement was voluntary in any case and the magistrate should have so found: see *Rex* v. *Sidney Miller* (1940), 55 B.C. 204, at p. 206; Taylor on Evidence, 12th Ed., Vol. 1, pp. 554-5, secs. 879 to 881; Russell on Crimes, 8th Ed., Vol. 2, p. 2006; *Rex* v. *James* (1909), 2 Cr. App. R. 319; Phipson on Evidence, 7th Ed., 257; *Rex* v. *Todd* (1901), 13 Man. L.R. 364; *Rex* v. *Rasmussen* (1934), 62 Can. C.C. 217; *Maxwell* v. *The Director of Public Prosecutions*, [1935] A.C. 309; *Koufis* v. *Regem*, [1941] S.C.R. 481, at pp. 486 and 489; *Baldry's Case* (1852), 2 Den. C.C. 430.

McAlpine, in reply: The confession must not be extracted in any way from the accused, if it is it is not admissible: *The Queen* v. *Thompson*, [1893] 2 Q.B. 12 is the leading case on the question. See also *Gilham's Case* (1828), 1 M.C.C. 186.

Cur. adv. vult.

16th February, 1942.

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

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O'HALLORAN, J.A.: The appellant seeks a new trial because the learned magistrate allowed counsel for the prosecution to cross-examine him concerning what he had said in a statement to a police officer, which the magistrate had already excluded as obtained by inducement, when evidence of it was tendered in the case for the prosecution. If that were all there were to this case, I would adopt the view of the majority of the Appellate Division of Alberta in *Rex* v. *Wilmot* (1940), 74 Can. C.C. 1, at p. 19, and direct a new trial on that ground alone.

But in my view it appears on the face of the record before us, that the learned magistrate erred in excluding the statement on the ground of inducement. If that view is correct, then the statement would be admissible and the ground of objection to cross-examination thereon as taken by the appellant must fail. With respect I see no reason to prevent the Crown respondent upholding the conviction in that manner. It is in accord with that principle of reasoning which concedes the futility of debating a proposition founded on a premise known to be false. In its effect that was the forensic position of counsel for the Crown respondent before this Court, when he referred to the latitude a respondent is permitted in upholding a judgment or conviction and *vide Waller* v. *Thomas,* [1921] 1 K.B. 541, Lush, J., at p. 547 and McCardie, J. at p. 552.

Crown counsel's submission resolved itself into this proposition; if the learned magistrate erred as to inducement, then the statement was admissible in evidence, and as such, would be proper subject-matter for cross-examination; it would follow, of course, that the objection as taken by counsel for the appellant could not then arise at all. With deference the preliminary question for this Court to determine therefore is, on the facts disclosed in the present record, was there inducement?

I have come to the conclusion there was not. The only witness examined on the question was the police officer to whom the statement was made. The officer denied positively on cross-examination that the appellant said he would make the statement if no charge was laid against his mistress. It is not disclosed that the statement was elicited by question and answer. There is no

evidence whatever of threat, promise or inducement of any kind. The officer said further:

> He [the appellant] asked us if we would release her. We told him if we were satisfied that this was not the girl in question, there was no evidence against her, she would be released.

That is a fair and frank statement which does not contain even a hint of inducement. In my view it is the kind of a statement which a police officer would reasonably make in the line of duty to anyone. It is quite different, indeed, from what the police officer said in *Rex* v. *Myles*, [1923] 2 D.L.R. 880:

> There would be a lot of fuss in the papers and if he thought anything of the girl and did not want her name mixed up in it, he had better make a clean statement of it.

There the statement was elicited by question and answer following the above inducement. Yet in that case, of the four judges of the Nova Scotia Supreme Court which held it to be an inducement, Russell, J. dissented, p. 883, Chisholm, J. (as he then was) thought it was "close to the line," p. 886, and Rogers, J. held it "with reluctance," p. 895. Perusal of the *Myles* case discloses other circumstances which contributed as well to the result.

It is true that in the course of the cross-examination of the appellant but after the statement had been excluded, this occurred:

> THE COURT: Let us get this as quickly as we can. The reason you told this was because you were trying to protect the girl? That is right.

No doubt the learned magistrate was then prompted by his prior ruling of exclusion, to interject with a question in that form, since the appellant had not said anything previously to justify it. But even at that, the appellant did not then or later, say his statement was induced by any threat, promise, or inducement held out by the police. He did not even say it was obtained by interrogation. It appears his hope in making the statement was purely subjective. He had in his mind the hope the police might release the girl, if he should make a statement. But he does not say the police said or did anything, nor does the record disclose anything, which would lead him to believe that hope would be realized. He nowhere said nor may it be legitimately inferred, that the police said or did anything from which he could reason-

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ably believe, as happened in the *Myles* case, *supra,* that if he made a "clean statement of it" the girl would be protected.

But even if the learned magistrate erred in finding inducement, it does not end the matter. The "statement" is not in evidence. Counsel for the Crown respondent asked us to admit it in evidence in exercise of the Court's wide discretionary powers in the reception of further evidence. But in my view for reasons presently appearing, we should not hear further evidence in a case of this character if a judicial "trial within a trial" has not been held in the Court below. The next question this analysis forces upon us emerges as the underlying and decisive question in this appeal, *viz.,* did a judicial "trial within a trial" take place in the Court below?

It is the duty of the Crown to prove a "statement" affirmatively. All related and surrounding circumstances must be given in evidence affirmatively—*vide Sankey* v. *Regem,* [1927] S.C.R. 436; *Rex* v. *Seabrooke,* [1932] 4 D.L.R. 116, decided by the Court of Appeal for Ontario, and *Thiffault* v. *Regem,* [1933] S.C.R. 509, which approved *Rex* v. *Seabrooke.* But in the present case the learned magistrate took the matter out of the control of the prosecution immediately the police officer testified he had warned the accused. This occurred:

Police officer: He said that . . .

THE COURT: [then interjecting] Is there any objection to this?

Murdock: . . . I am objecting to any statements that Byers made at that time.

THE COURT: All right, you had better cross-examine.

In the result the prosecution proved nothing affirmatively beyond the bald fact that some statement had been made after a warning. That falls far short of the "trial within a trial" which the authorities demand. Essential elements of proof such as for example were described by McKeown, C.J. of the New Brunswick King's Bench in *Rex* v. *Godwin,* [1924] 2 D.L.R. 362, at pp. 372-3 were entirely disregarded. Furthermore, in *Thiffault* v. *Regem, supra,* which seems to weaken if it does not overrule *Rex* v. *Gauthier* (1921), 29 B.C. 401 in the particular aspect I now refer to, such an omission was held at p. 515 to be "not a mere matter of discretion for the trial judge."

I interpret that to mean it is a substantive omission which of itself deprives the accused of a fair trial. As such it becomes an abuse of jurisdiction or a violation of an essential of justice in the sense that term has been used by this Court in such decisions as *In re Low Hong Hing* (1926), 37 B.C. 295, at p. 302, and *Ex parte Yuen Yick Jun. Rex* v. *Yuen Yick Jun* (1938), 54 B.C. 541, at p. 555. Accordingly in my view at least, a substantial miscarriage of justice occurred, and there should be a new trial. The admissibility of the statement or statements may then be properly adjudicated upon.

There is also an additional and related ground of mistrial. The record in its present form leaves doubt as to how many statements were made and which were excluded. In the cross-examination of the police officer this occurred:

> Byers had no statement to make in the first instance? Yes he did; that is what I was going to give now.
>
> That is not what I am arguing about, I am arguing about the statement you say he made when he was charged and warned.

Evidently, therefore, counsel for the defence was informed of two distinct statements of the appellant.

But another one (or perhaps one of the above) appears in the cross-examination of the appellant. Byers was arrested on the morning of 15th November. He was charged in the afternoon of the same day and then made a statement after being warned. Counsel for the prosecution referred him to a conversation he had in the detective office on 16th November, the following day, and appears to direct the cross-examination thereto. The date of this conversation seems to be fixed on the 16th by the appellant as well, when he said the girl was held by the police for two days or one day and one night. For it is in evidence she was arrested on the morning of the 15th and released on the 16th.

It appears reasonable, therefore, to conclude it was the statement on 16th November to which the cross-examination was directed, and that it was confused in some way with the statement on the 15th, concerning which the police officer was beginning to testify when he was diverted from it. If this is so, it was the statement on the 15th which the learned magistrate excluded, and not the statement on the 16th to which the cross-examination was directed. Then again, after the statement on the 16th—the

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interval is not disclosed—the appellant was taken to the scene of the crime, and appears to have made a statement there, particulars whereof in part at least appear in his cross-examination. As to this last statement *vide Markadonis* v. *Regem,* [1935] S.C.R. 657.

The confusion regarding the various "statements" indicated in the record now before this Court, is in itself a powerful ground for a new trial.

I would therefore direct a new trial.

FISHER, J.A.: Upon my view of this matter, as hereinafter indicated, it is sufficient for the disposition of this appeal to deal with only one of the several grounds of appeal, namely, that the learned magistrate erred in permitting cross-examination of the accused on his alleged statement to the police which the magistrate had ruled was not free and voluntary.

Counsel on behalf of the respondent submits certain authorities to establish that this Court can sustain the admission of the evidence objected to on the ground that the statement was a voluntary one, notwithstanding the ruling of the learned magistrate to the contrary, from which no appeal was or can be taken. The authorities are: *Kingston* v. *Salvation Army* (1904), 7 O.L.R. 681; *Waller* v. *Thomas,* [1921] 1 K.B. 541 and *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103, at p. 112.

Having considered the said authorities I have come to the conclusion that they do not support the contention of counsel on behalf of the respondent, which, in effect, is that this Court can now determine the question as to the admissibility of the alleged statement notwithstanding the ruling of the magistrate from which no appeal was or can be taken. On the other hand, *Reg.* v. *Sonyer* (1898), 2 Can. C.C. 501 is direct authority to the contrary. Crankshaw's Criminal Code, 6th Ed., 773 cites such case as authority for the following statement:

> Where an alleged confession is received in evidence, after objection thereto by the accused, and the trial judge, before the conclusion of the trial, reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury empanelled; and, if the trial judge refuses to empanel a new jury in such a case, a new trial will be ordered by the Court of Appeal; and, on

a motion for a new trial, the Court of Appeal in such a case, will not go into the question of the admissibility of the alleged confession; but will take it for granted from the final ruling of the trial judge that it was inadmissible.

From the report of the *Sonyer* case at p. 503 it is quite apparent that counsel for the Crown, opposing the motion for a new trial, asked the Court to hear argument as to whether under the circumstances the alleged confessions were not properly received in the first instance but McColl, C.J., delivering the judgment of the Court, said, in part, as follows:

The conviction must be quashed and a new trial had. This Court cannot now determine the questions as to the admissibility of the alleged confessions.

Following the *Sonyer* case I refuse to go into the question of the admissibility of the alleged statement and must take it for granted from the ruling of the learned magistrate that it was inadmissible. On this basis I hold, with all respect, that the magistrate erred in permitting cross-examination of the accused on his alleged statement to the police, which the magistrate had ruled was not free and voluntary. Fortunately there is direct authority in the decision of the majority of the Appellate Division of Alberta in *Rex* v. *Wilmot* (1940), 74 Can. C.C. 1; affirmed [1941] S.C.R. 53. The head-note in the *Wilmot* case, as reported in 74 Can. C.C. pp. 1 and 2, reads, in part, as follows:

Statements made by an accused person to a person in authority which are inadmissible in evidence-in-chief because of lack of proof of their voluntary character should be regarded as having no probative value of any kind, and hence may not be tendered in evidence by the Crown on cross-examination under s. 11 of the Canada Evidence Act, R.S.C. 1927, c. 59. But even if cross-examination is permissible, s. 11 does not apply to this kind of statement. (Harvey, C.J.A. dissented on the ground that such statements were not protected by any statutory provision).

At p. 19 Ford, J.A. says, in part, as follows:

As to the third ground of appeal, I am of the opinion that the ruling of the learned trial judge was right in refusing to permit the Crown to prove the alleged statements made to the police surgeon, because the accused had, on being cross-examined, not admitted that he made them. It is conceded that the statements, if made at all, were made to a person in authority and that the Crown could not prove their voluntary character so as to make them admissible. This being so, in my opinion not only should the Crown be not permitted to prove them in rebuttal any more than in chief, but that it is improper to permit cross-examination as to them. Indeed they should, in my opinion, be treated for all purposes as non-existent or as having no probative value of any kind, either as going to the credit of the accused as a witness or otherwise.

The language of Armour, C.J.O. and of Osler, J.A. in *R.* v. *D'Aoust*, 5 Can.

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C.C. 407, 3 O.L.R. 653, decided in 1902, in which it was held that an accused person who, on his trial for an indictable offence, is examined as a witness on his own behalf, may be cross-examined as to previous convictions, having put himself forward as a credible person, should not be taken as permitting cross-examination as to statements made while in custody to persons in authority which, because not having been made voluntarily, cannot be treated as admissions or confessions.

But even if cross-examination is permissible, I am of the opinion that they are not the kind of previous statements to which s. 11 is intended to apply.

In the same case McGillivray, J.A. says, in part, as follows:

I have had the benefit of reading the judgments which my Lord the Chief Justice and my brother Ford have written.

I agree with my brother Ford that the Crown cannot succeed upon the second and third grounds of appeal and I accept his reasoning in arriving at that conclusion.

If I may be permitted to say so, I would say that, if there were no direct authority and the matter were now one of first impression, I would hold, with all deference, that the cross-examination in question herein should not have been permitted and that substantial wrong was done to the accused by such cross-examination.

I, therefore, think the appeal should be allowed and a new trial ordered.

Appeal allowed; new trial ordered.

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Jan. 23; *Feb.* 16.

REX v. OLESCHUK.

Criminal law—Evidence—Accused and another jointly charged and tried together — Cross-examination of other on alleged confession ruled improperly permitted — Whether trial of accused was prejudicially affected.

Accused was convicted on a charge of robbery with violence. He and one Byers were jointly charged and tried together. Byers appealed from his conviction and it was held that the magistrate erred in permitting his cross-examination on an alleged statement he made to the police, which the magistrate had ruled was not free and voluntary.

Held, on appeal, that the evidence of Byers having been weakened and his credibility destroyed by his improper cross-examination, the case of the appellant was prejudicially affected by such cross-examination and there should be a new trial.

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APPEAL by accused from his conviction by police magistrate Wood of Vancouver, on the 9th of December, 1941, on a charge of robbery with violence. The facts are set out in *Rex* v. *Byers, ante,* p. 336.

The appeal was argued at Victoria on the 23rd of January, 1942, before SLOAN, O'HALLORAN and FISHER, JJ.A.

McAlpine, K.C., for accused.
H. W. R. Moore, for the Crown.

Cur. adv. vult.

16th February, 1942.

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

O'HALLORAN, J.A.: This appellant was convicted together with one Byers of robbery with violence. Byers's appeal has just now been allowed and a new trial directed. I agree this appeal should also be allowed and a new trial directed.

FISHER, J.A.: In this matter, in order to avoid repetition, I refer to my judgment delivered this day in the *Rex* v. *Byers* case [*ante,* p. 336]. The appellant Oleschuk and the said Byers were jointly charged and tried together in the Court below. Upon my conclusions in the *Byers* case the question arises whether the case of the appellant was prejudicially affected by the improper cross-examination of the accused Byers on his alleged statement to the police, which the magistrate had ruled was not free and voluntary. From the reasons for judgment of the learned magistrate, contained in the transcript of the proceedings at the trial, it is obvious that the result of such cross-examination was that the evidence of Byers was weakened and his credibility destroyed in the judgment of the magistrate. It is also obvious that the magistrate found Oleschuk guilty after weighing the evidence of the witnesses Talbot and Piercy against the evidence of Byers and Oleschuk. In this connection reference might be made to what the magistrate said, in part, as follows:

I have on the one hand the evidence of Talbot and Piercy as against the denials of the two accused, and, to convict, I have to decide between them.

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. . . I accept the evidence of Talbot and Piercy. They are apparently respectable witnesses, and I believe their story as against that of the accused. I find the accused guilty.

Such being the basis of the magistrate's decision and the evidence of Byers having been weakened and his credibility destroyed by his improper cross-examination as aforesaid I am forced to the conclusion that the case of the appellant was prejudicially affected by such cross-examination of Byers. I would, therefore, allow the appeal and order a new trial.

Appeal allowed; new trial ordered.

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Jan. 27; *March* 3.

WAREHOUSE SECURITY FINANCE COMPANY LIMITED v. NIEMI LOGGING COMPANY LIMITED AND OSCAR NIEMI LIMITED.

Woodmen's lien—Default judgment signed under rule 282—Removal of lien logs by defendant—Action for possession and damages—Judgment void—Effect on lien—Amendment of pleadings—Costs—R.S.B.C. 1936, Cap. 310, Secs. 3, 4, 6 and 7—Rule 282.

Certain workmen duly filed statements of woodmen's liens against the logs of the Narrows Arm Logging Company for labour or services performed. On the 3rd of August, 1938, the plaintiff company took an assignment of the liens, and on the 16th of August following duly issued a writ against said company to enforce liens. The Narrows Arm Company did not enter an appearance or file a defence, and on the 19th of October, 1938, the plaintiff signed judgment purporting to act under section 7 (2) of the Woodmen's Lien for Wages Act. The defendant Oscar Niemi Limited having seized and removed the logs in question, the plaintiff brought this action claiming a declaration that it was entitled to possession of the logs, an injunction and damages. In its defence Oscar Niemi Limited raised two points of law, and on its application they were set down for hearing before trial under rule 282, namely, that the district registrar had no power or authority to give the said alleged judgment, and that the statement of claim discloses no cause of action. It was held that the registrar had acted beyond his powers in signing judgment in the woodmen's lien action, that the judgment was a nullity, and that the action be dismissed.

Held, on appeal, reversing the decision of MANSON, J. (MCQUARRIE, J.A. dissenting), that sections 3 to 7 of the Woodmen's Lien for Wages Act make it clear that the lien comes into existence when the work is done. The workmen rendered the services necessary to found a lien and they

took the necessary steps under the statute to preserve their liens, which give an interest in the logs. No sale or transfer of the lien logs could be successfully defended on the sole ground that the judgment in question was not properly signed. Although the statement of claim is deficient there is nothing to show that the defects could not be cured by amendment. The appeal should be allowed from the order dismissing the action, and the action should be remitted for trial with leave to both parties to amend as they may be advised.

The examination for discovery of Oscar Niemi disclosed that the defendant Niemi Logging Company Limited had nothing to do with the removal of the logs, and the order made on the motion for trial by jury recited that counsel for the plaintiff had undertaken to discontinue or apply for dismissal of the action as against the Niemi Logging Company Limited. The next day counsel for the plaintiff wrote the solicitor for said company stating he intended to apply at the trial of the action for dismissal against Niemi Logging Company Limited, but insisted that this should be without costs. Subsequently an order was made by MURPHY, J. that certain points of law raised by Oscar Niemi Limited be set down for hearing before the trial. On the hearing before MANSON, J. counsel for the plaintiff stated he had given notice of abandoning his action against the Niemi Logging Company Limited, and on the trial the question of costs would be spoken to. Counsel for the Niemi Company remained throughout the hearing when the action was dismissed. On this appeal counsel for the Niemi Company filed a factum and appeared throughout the hearing.

Held, that the Niemi Logging Company Limited receive no costs of this appeal, that its costs up to the opening of the hearing before MANSON, J. be taxed as if it had been successful below, and that it recover same together with one-fifth of its costs as taxed on such hearing.

APPEAL by plaintiff from the decision of MANSON, J. of the 28th of April, 1941, in an action for a declaration that the plaintiff is entitled to possession by virtue of a certain lien and judgment of certain logs, for an injunction restraining the defendants from selling the logs, and for damages. In August, 1938, the plaintiff took written assignments from a number of workmen of liens they had previously filed under the Woodmen's Lien for Wages Act against the Narrows Arm Logging Company Limited. The liens were filed within the statutory period, and within 30 days of said filing the plaintiff issued a writ against the Narrows Arm Logging Company Limited. On October 19th, 1938, no appearance having been entered and no defence delivered, the plaintiff signed judgment against said company. Subsequently the defendant Oscar Niemi Limited took the logs upon which the plaintiff had a lien by the judgment

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in the former action, and disposed of them. The present action was then brought. At the trial of the issues of law upon the motion of the plaintiff, the action was dismissed as against the defendant Niemi Logging Company Limited, the only question in regard thereto being the one of costs. Pursuant to an order of MURPHY, J. of 1st April, 1941, the issues of law were tried before the issues of fact, and by the judgment of MANSON, J. of 28th April, 1941, it was held that the default judgment of the 19th of October, 1938, was a nullity, and the action was dismissed on the ground that the district registrar had no power to sign the alleged judgments. The two defendant companies had the same personnel and same activities, and it was only after the examination for discovery of an officer of the defendants that it would be proper to drop the action against the Niemi Logging Company Limited. The said company was then advised that the action would be discontinued as against it except as to costs.

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

Castillou, K.C., for appellant: Under section 7 (2) of the Woodmen's Lien for Wages Act, where no defence or dispute note is filed, judgment may be signed and executed. They surreptitiously took our logs and sold them. They can only attack the judgment in that action and we took that preliminary objection: see *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165, at p. 167. The respondent referred to the case of *Pelly* v. *Ala and Canadian Forest Products Ltd.*, [1940] 1 W.W.R. 528, but that is under the Saskatchewan Act in which there is no provision for signing default judgment at all. It has no application to this case. As to the judgment not declaring in specific words that the same was for wages, the appellant says that the clause "It is further adjudged and declared that the plaintiff is entitled to a lien under the Woodmen's Lien for Wages Act" is a substantial compliance. That it is a proper judgment see *Jones* v. *Macaulay*, [1891] 1 Q.B. 221; *Re Ibex Company* (1903), 9 B.C. 557.

F. R. Anderson, for respondent Oscar Niemi Limited: The alleged judgment is a nullity *"ab initio"* and creates no lien. It

was not obtained or entered in accordance with the Woodmen's Lien for Wages Act. He must proceed under rule 112 or rule 300. The case of *Pelly* v. *Ala and Canadian Forest Products, Ltd.*, [1940] 1 W.W.R. 528, is precisely in point: see also *Webster and Co. Limited* v. *Vincent* (1897), 77 L.T. 167; *Grant* v. *Knaresborough Urban Council,* [1928] Ch. 310, at p. 317. The registrar has no jurisdiction: see *Langford* v. *Langford* (1933), 50 B.C. 303, at p. 304; *Smith and Fisher* v. *Woodward et al.* (1940), 55 B.C. 401, at p. 403. A woodmen's lien gives to the plaintiff no right of property or right of possession to the logs, and he cannot maintain an action in conversion: see *Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472, at pp. 474-5; *King* v. *Alford* (1885), 9 Ont. 643. Without the right of possession and the right of property he cannot sue: see Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 62, par. 98, and p. 68, par. 113; Clerk & Lindsell on Torts, 9th Ed., 344. If the defendant can show that neither the plaintiff nor the person under whom he claims has any property in the subject-matter of the action, he must succeed: see *Gordon* v. *Harper* (1796), 7 Term Rep. 9; *Lord* v. *Price* (1874), L.R. 9 Ex. 54; *Kearry* v. *Pattinson,* [1939] 1 K.B. 471, at p. 480.

Castillou, in reply, referred to *The Odessa. The Woolston,* [1916] 1 A.C. 145, at p. 159; *Richards* v. *Symons* (1845), 15 L.J.Q.B. 35, at p. 36; Halsbury's Laws of England, 2nd Ed., Vol. 20, p. 567, par. 714.

Cur. adv. vult.

3rd March, 1942.

McDONALD, C.J.B.C.: In this case all parties have in my opinion misconceived the legal issues, so that it comes to us in a very unsatisfactory form. It comes to us on appeal from an order of MANSON, J. dismissing the action on proceedings similar to demurrer. The action was brought by the assignee of woodmen's liens on logs, whose statement of claim alleged that it had obtained judgment declaring its lien against Narrows Arm Logging Company Limited but that the main defendant had seized these logs, ignoring its lien, and had taken them away. The plaintiff claimed a declaration that it was entitled to possession of the logs, an injunction and damages.

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The argument before MANSON, J. was directed almost entirely to the questions, whether the judgment declaring a lien was valid and whether in any case it gave the plaintiff a sufficient right to possession to found an action for damages. On both these points he found against the plaintiff and his judgment embodied not only a dismissal of the action but a specific declaration that the plaintiff's judgment, which was signed against Narrows Arm Logging Company Limited, was void.

There can be no doubt that the statement of claim disclosed no cause of action, indeed it was far more objectionable than any one in the Court below perceived. But the real essential objections are as to matters which could probably have been cured by amendment if they had been raised. The legal issues raised by the main defendant below were largely false issues, and in this it was nearly as culpable as the plaintiff. The argument of both parties below on the judgment supporting the lien proceeded on the tacit assumption that it was in the nature of a judgment *in rem*. This, however, seems to me a misapprehension. Section 21 of the Woodmen's Lien for Wages Act does indeed contain a provision for the judge's holding a sort of general hearing which is to be advertised but I do not infer from this that the order which he makes as a result is to bind the world. The object of the section seems to be to bring in all possible lien claimants and I cannot read the section as intending that the order shall bind all who may claim to be owners of the logs, though they were never parties to the proceedings. I think very express language would be necessary to make such an order to bind persons not parties and this is entirely lacking. I think, therefore, that a judgment of lien is to be regarded in the same light as a judgment between A and B as to the ownership of a horse. It is a judgment as to the title of specific property but not a judgment *in rem*. It merely decides who is entitled as between A and B. If A brings an action against C to claim the horse, it is useless for A to plead:

> I obtained a judgment against B declaring my title.

C is entitled to retort:

> That is nothing to me; B never had any interest in the horse and he had no interest in opposing you; your judgment is *res inter alios acta*.

The position is the same whether the dispute is not as to the full ownership, but is as to the existence of a mortgage on the horse.

The same principle applies to this claim of lien on logs. Here we have A suing C and basing his claim on the fact that he obtained judgment for a lien against B. Such a bald claim is, I think, altogether bad in law.

The question how the plaintiff ought to frame its claim raises several considerations. If at the time the basis of the claim of lien came into being, that is, if at the time the woodmen's services were rendered, the defendant was the true owner of the timber converted into logs, then, the plaintiff would presumably have no claim at all. Its claim must be based on the defendant's title, if any, having arisen since the right to a lien arose. This would mean either that the defendant is a trespasser or that it claims title through Narrows Arm Logging Company Limited. In the latter case the defendant would be a privy to the judgment and it would no longer be *res inter alios acta*.

It is obvious that the statement of claim does not contain the first essential of a cause of action. The most essential allegation is that at the time the woodmen's services were rendered the Narrows Arm Logging Company Limited were the owners of the timber or logs worked upon; the next is that the workmen rendered the services necessary to found a lien and that they took the necessary steps under the statute to preserve their liens. I question whether there is any point in alleging the obtaining of a judgment, at any rate before the stage of reply; the essentials are the rendering of services to the owner, the filing of a statement and the commencement of an action. If an action has not yet reached the stage of judgment, that does not mean that the claimant has no right and, even if an invalid judgment has been entered, that does not mean that the claimant is in any worse position than if it had none.

Much of the argument before MANSON, J. arose from the perfectly irrelevant question whether the plaintiff's judgment for a lien against the Narrows Arm Company Limited was valid. The objection raised against this was that the judgment which was signed by default, was not only for the recovery of money but also declared the plaintiff entitled to a lien and that such a declaratory judgment cannot be merely signed in the registrar's office, but can only be obtained on motion. I assume for the

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purposes of this judgment that this objection is sound, though section 7 (2) of the Act is not very clear. It is then said that this rendered the judgment void. Presumably that would be so at common law; but I am far from satisfied that this is now so in view of the provisions of Order LXX., r. 1, which provides:

> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, . . .

This rule does not indeed help default judgments signed for more than the amount claimed or if the time to sign judgment has not arrived; for there the objection is not non-compliance with the rules. Here, however, that is the objection; the plaintiff was entitled to judgment as of course and merely proceeded, as I assume, under the wrong rule. A direction by the Court or judge that a judgment should be treated as void should, I think, be made in the same action not in a collateral proceeding. However, it appears that though the judgment against Narrows Arm Logging Company Limited may, if valid, greatly simplify the plaintiff's case if it appears that the defendant is a privy to the judgment, still the validity of the judgment in no sense goes to the plaintiff's cause of action, the foundation of which is the right of lien, and even if the judgment were held to be void the legal situation would not be greatly changed.

The next question is whether when the plaintiff has made the proper allegations to support a claim of lien as against a third party, it still fails to show any right to damages for interference with its remedy. MANSON, J. has held that no damages can be obtained by a lien claimant or lienholder who had not obtained possession of the logs by attachment. I cannot agree. The argument by the main defendant, which MANSON, J. accepted, was that an action for damages was an action for trespass, trover or conversion, and that possession, or a right of possession and some right of property were essential to any of these forms of action. Then it was argued and held that a lien gives no right of property or interest in the logs. I agree as to the need for possession or a right of possession for actions analogous to those mentioned but the fallacy in the argument is the assumption that this action is necessarily for trespass, trover, or conversion. Even at common law there was a special action on the case for

damage even to a special interest in a chattel that gave the holder no right to possession: see Salmond on Torts, 9th Ed., 356-7; Pollock on Torts, 14th Ed., 285 and *Mears* v. *L. & S.W. Railway Co.* (1862), 11 C.B. (N.S.) 850. A special instance is the action of pound-breach which a landlord can bring even though he had neither possession nor a right of possession nor a right of property: Clerk & Lindsell on Torts, 9th Ed., 395-6. In my view, then, the plaintiff will establish a claim for damages if he can show he has been wrongfully deprived of any special property or interest in these logs, even if he had no right of possession. That requires me to consider whether a woodmen's lien does give any right of property or interest in logs. Defendant's counsel cited much law on the effect of liens which apparently convinced MANSON, J. but which seems to me clearly inapplicable, since it deals with common law possessory liens, which have little resemblance to other types of lien. With regard to such other types, the matter is concluded for us by the decision of this Court in *Chassy* v. *May* (1925), 35 B.C. 113. This case and the authorities cited therein by MARTIN, J.A. held that a lien is equivalent to a charge on property and gives an interest in it. On this point, however, we have been pressed by our judgment in *Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472 which held that a mechanic's lien was not an interest in land within the Mineral Act, Sec. 12, so as to be invalid, unless the claimant held a free miner's licence. I fully adhere to that decision, to which I was a party, since I feel clear that a lien was never contemplated by the framers of the section and that to hold otherwise would produce absurdity. But I think now that perhaps I should have based my concurrence on the principle that when one statute confers a particular new type of lien on the fulfilment of certain named conditions, further conditions are not to be imported from general requirements in another statute. However, our judgment in the *Watt* case stated more or less *obiter* that a mechanic's lien was not an interest in land. On reconsideration I think that went too far; the statement was wider than the decision required and I now prefer to base my concurrence on the narrower ground and to adhere to the general principle stated in *Chassy* v. *May, supra,* that a lien, apart per-

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haps from a possessory lien, creates an interest *in rem*. I find on further examination that our judgment in the *Watt* case was mistaken in stating that the lien in *Chassy* v. *May*, which was held to constitute an interest in land, was a vendor's lien. Actually that lien was a lien allowed to a constructive trustee for money spent by him on the land while he held the legal title: see *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83, at p. 97, *per* MACDONALD, C.J.A. If a lien for money spent can create an interest in land it seems to be very difficult to say that a lien for labour expended on chattels does not create an interest in the chattels.

One argument against this view presented here and below is that a claimant for a woodmen's lien under certain conditions can have the logs seized under an attachment and that this power necessarily implies that without seizure the claimant has no interest in the logs. That reasoning seems to me a *non sequitur*. There is nothing irrational in the Act's giving a right of attachment to a creditor who already possesses a right of property. The right of property may always be a perfect protection where the logs can be found, but the possession of a legal right may be cold comfort when the logs have been spirited away. In my view the right to attachment is merely a practical protection, merely supplementing and not creating the lien claimant's rights. This is confirmed when we note that when a claimant obtains judgment supporting his lien without having previously attached the logs he does not then attach them, but the sheriff sells them under his order for sale: see section 24. That seems to me to destroy the respondent's argument on the necessity for attachment.

In the result, although the statement of claim is deficient, there is nothing in the known facts to show that the defects could not have been cured by amendment. If the matter had been properly presented to the learned judge below he presumably would have allowed an amendment. I think therefore we should allow the appeal from the order dismissing the action and remit the action with leave to both parties to amend as they see fit.

As to costs as between the plaintiff and the defendant Oscar Niemi Limited, I agree with the judgment of my brother FISHER.

There remains to be considered the question of costs in so far

as Niemi Logging Company Limited is concerned. What happened was this: Plaintiff's counsel, being uncertain as to which of the defendant companies had taken the logs in question, took the precaution of suing both. The examination for discovery of Oscar Niemi disclosed that the Niemi Logging Company Limited had nothing to do with the matter. On the motion before MURPHY, J. for an order for a trial by jury on March 10th, 1941, such an order was made, and that order recites that counsel for the plaintiff had undertaken to discontinue or apply for dismissal of the action as against the defendant Niemi Logging Company Limited. The next day the plaintiff's counsel wrote the solicitor for this company stating that he intended to apply at the trial of the action for dismissal against Niemi Logging Company Limited but he insisted, I think without justification, that this should be without costs. *Prima facie* the company would be entitled to its costs up to the date of dismissal. No formal notice of discontinuance was filed or served and no order for dismissal was ever made. On April 1st, 1941, in the presence of counsel for Oscar Niemi Limited (hereinbefore referred to as the main defendant) and the plaintiff, MURPHY, J. made an order that the points of law raised by defendant Oscar Niemi Limited in paragraphs 3 and 4 of its amended defence be set down for hearing before the trial. This hearing came before MANSON, J. in Chambers on April 28th, 1941. On the opening, counsel for plaintiff stated that he had given notice abandoning any claim against Niemi Logging Company Limited and that when the trial came on there would be a question of costs to be spoken to as he supposed. Counsel for Niemi Logging Company Limited appears to have been present in Chambers and to have remained throughout the whole of the hearing. However, neither his presence nor his appearance was announced until after an argument between plaintiff and the main defendant lasting two half days. The learned judge dismissed the action with costs but it was not until the argument on the main issues had been completed that counsel for Niemi Logging Company Limited announced that he was appearing for that company. Some discussion took place regarding costs and the question was left somewhat in the air. Counsel for plaintiff has never formally implemented his undertaking.

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In this appeal the appellant as against Niemi Logging Company Limited sought redress in regard to the taxation of costs, the same having been taxed up to and including the judgment of MANSON, J. at $323.65. This taxation was confirmed by MANSON, J. with a reduction of $15. In this appeal counsel for Niemi Logging Company Limited filed a factum and appeared throughout the hearing and now claims to be entitled to the costs taxed below as well as to the costs of this appeal. In my opinion this is wholly unjustified. It is admitted the Niemi Logging Company Limited, by reason of the plaintiff's failure to implement its counsel's undertaking, was entitled to a fee of $35 for appearing before MANSON, J. to state his position. On the other side it is said that, because no formal notice of discontinuance had been filed and no order for dismissal obtained, the Niemi Logging Company Limited in order to protect its rights, found it necessary to have counsel appear throughout the whole of the hearing before MANSON, J. as well as throughout the hearing before this Court. It is suggested that inasmuch as the name of the company was still on the record no course could have been adopted to protect its interest as to costs, other than that which has been followed. In my opinion this is absurd. After the undertaking given before MURPHY, J. no Court would ever listen to any claim against Niemi Logging Company Limited regarding these transactions, nor would any Court question the right of that company to its costs up to the time of the writing of the letter above mentioned, and the further fee of $35 for appearing before MANSON, J. If counsel for this defendant were in any doubt about the matter he could have had his client dismissed from the action by MANSON, J. as soon as the argument opened. The order would have gone as a matter of course and I think we should not lend our approval to this unnecessary piling up of costs.

I would therefore order that as to Niemi Logging Company Limited there be no costs of the appeal before us, and that that company's costs up to the opening of the hearing before MANSON, J. be taxed as if that company had been successful below, and that it recover same, together with one-fifth of its costs as taxed on such hearing.

McQUARRIE, J.A.: It is contended by the respondents that the district registrar went beyond his jurisdiction in making a declaratory judgment to the effect that the (plaintiff) appellant had a lien on the logs in question herein under the Woodmen's Lien for Wages Act and consequently such a judgment cannot be supported. There is a distinct line of cleavage between the functions of the registrar and the Court, and any attempt on the part of the registrar to usurp the functions of the Court, intentionally or otherwise, is beyond his jurisdiction, and is a nullity. In *Smith and Fisher* v. *Woodward et al.* (1940), 55 B.C. 401, at p. 403 this Court decided that the registrar's function as a taxing officer is confined to taxing the bill of costs and that he has no jurisdiction to pass judicially upon the question of whether or not the estate is liable to pay costs incurred by all or some of the executors. In my opinion the same principle applies here. It is admitted by counsel for the appellant that the registrar's jurisdiction is prescribed by the rules. The registrar's functions are prescribed by the rules and statutes, and clearly if there was no such authority in this case for the registrar to go as far as he did, the judgment will be bad in whole or in part. There are many other cases which may be referred to, *vide* the cases cited by my learned brothers.

Standing trees are real property; when cut down they become chattels and may be dealt with as such unless there is statutory authority to the contrary. A woodman's lien is statutory. Undoubtedly the men who filed the liens which were assigned to the appellant on or about the 3rd of August, 1938, came within the said Act. At that time the logs were allegedly owned by the Narrows Arm Logging Company Limited, who seem to have held leases from the owner of the land. On or about the 16th of August, 1938, being within the statutory period of 30 days from the date of the first liens being filed, the appellant issued a writ of summons against the said Narrows Arm Logging Company Limited to enforce the said liens. On or about the 19th of October, 1938, no appearance having been entered and no defence delivered, the appellant signed judgment in the said action, which judgment was filed as an exhibit in this action. The said judgment was made by the district registrar at Vancouver. It

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is therein adjudged that the appellant (plaintiff) recover against the Narrows Arm Logging Company Limited (defendant) $2,896.42 and $45.70 costs, amounting together to the sum of $2,942.12. And it is further adjudged and declared that the appellant (plaintiff) is entitled to a lien under the Woodmen's Lien for Wages Act, R.S.B.C. 1936, Cap. 310.

It does not appear that the appellant took any proceedings under the said judgment by way of execution or attachment. The present action was commenced on the 5th of October, 1940. During the interval it is alleged the respondent Oscar Niemi Limited caused certain of the said logs to be cold-decked and some of them to be placed in booms and rafts and to be removed from the possession of the appellant, thereby preventing the appellant from exercising its right to enforce its lien. It seems that the said respondent purchased the said logs directly or indirectly from the owner of the land. In paragraph 7 of the statement of claim it is alleged that the appellant has disposed of certain logs therein described, but has not realized enough to satisfy its lien. Under what authority this was done I have been unable to discover. A great deal appears to have been left to the imagination in the factums and arguments before us, but I have been able to find some information from wading through the arguments of counsel on the trial as set out in the appeal book.

So much for the facts. The appellant argues that it signed the default judgment under authority of the Woodmen's Lien for Wages Act and according to the practice of the Court, but the learned trial judge held against it and dismissed the action. I am of opinion that he was right in doing so. The registrar had no jurisdiction to sign the judgment relied on by the appellant and in doing so he usurped the functions of the Court. I think he took the wrong course. The appellant relies on section 7 (2) of the Woodmen's Lien for Wages Act and Supreme Court Rules, 1925, referring to judgments in default of appearance and defence. It may be that it can bring another action to enforce the alleged rights or take some other proceedings, but that is a matter which its counsel must decide. That is no part of our duty. No application was made on the trial to amend and the appellant based its claim on the default judgment.

As I see it that disposes of the present action and the appeal should be dismissed with costs here and below to the respondent Oscar Niemi Limited. As to the costs of the respondent Niemi Logging Company Limited it is to be noted that the letter dated March 11th, 1941, from the solicitor for the appellant to the solicitor for the respondent Niemi Logging Company Limited states that he intends to apply at the trial of this action that it be dismissed as against the Niemi Logging Company Limited without costs unless the solicitor for the Niemi Logging Company Limited would consent to have the same discontinued forthwith without costs, and the reply of the solicitor for the Niemi Logging Company Limited, dated the same day, in which he states that he can see no reason why his client is not entitled to its costs. There was therefore a question to be tried out between them. It was necessary for counsel for the Niemi Logging Company Limited to appear at the trial and remain until that question was disposed of. It is also to be noted that no notice of discontinuance was served on the Niemi Logging Company Limited. The learned trial judge was therefore right in giving the Niemi Logging Company Limited its costs. The notice of appeal in ground (3) also raises a question of these costs which would be again raised on the hearing of the appeal, so that it was necessary for counsel for the said respondent to file a factum and appear on the appeal.

I am of opinion that the learned trial judge was right in allowing the respondent Niemi Logging Company Limited its costs, and that it should have its costs here.

I would, therefore, with due deference to contrary opinion, dismiss the appeal with costs here and below to both respondents.

SLOAN, J.A.: I would allow the appeal and direct the action proceed to trial.

O'HALLORAN, J.A.: This action arose out of the respondents' alleged interference with logs subject to the appellant's lien under the Woodmen's Lien for Wages Act, Cap. 310, R.S.B.C. 1936. It was ordered to be tried by a judge and common jury. But it was dismissed before trial, after decision of a point of law which had been set down for hearing upon the application of

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the respondent (defendant) Oscar Niemi Limited. The appeal lies from that dismissal. The other respondent (defendant) Niemi Logging Company Limited is concerned with a question of costs.

The facts—so far as the Court has them since the action did not go to trial—are as follow: On 3rd August, 1938, the appellant company took an assignment from a number of workmen who had duly filed statements of woodmen's liens against logs or timber of the Narrows Arm Logging Company Limited for labour or services performed in connection therewith. On 16th August, 1938, the appellant duly issued a writ out of the Supreme Court against the said company to enforce its liens (*vide* section 7). Narrows Arm Company Limited did not enter an appearance or file a defence thereto. On the 19th of October, 1938, accordingly the appellant signed judgment purporting to act under section 7 (2).

Then occurred an interval of two years. As the present or second action did not proceed to trial we do not know what happened during that time. We do not know how the respondent companies entered the picture, their relation if any to the Narrows Arm Company Limited, or what happened to the latter company which is not a party to this second action. However, on 5th October, 1940, the appellant issued a writ out of the Supreme Court in this present or second action, claiming, *inter alia,* damages against the two respondent companies for wrongfully dealing with logs it alleged to be subject to its aforesaid lien.

In its statement of defence the respondent Oscar Niemi Limited raised two points of law. On its application, they were set down for hearing pursuant to rule 282, to be disposed of before the trial of the issues of fact in the action. The two points of law were:

1. The alleged judgment [in the woodmen's lien action] is and at all times has been in law a nullity, and of no effect, and creates no lien, in that being an alleged judgment in default of appearance it was not obtained or entered in compliance with the provisions of the Woodmen's Lien for Wages Act, being chapter 310 of the Revised Statutes of British Columbia, 1936, or with the practice of this Court, and in that the district registrar of this Court had no power or authority to give the said alleged judgment.

2. In the alternative, if [it] is not in law a nullity . . . the said alleged judgment and the alleged lien thereunder do not entitle the plaintiff

to the cause of action herein, and that the statement of claim discloses no cause of action.

The two points of law were argued before MANSON, J. on 28th April, 1941. The argument is contained in the record before this Court. The learned judge thought the registrar had acted beyond his powers in signing judgment in the woodmen's lien action and held it to be a nullity. The learned judge said he had not considered the second point of law. He then dismissed the present action. It is at this point, with respect, that a fundamental error occurred. For even if the judgment were a nullity, the appellant's liens remained in existence, and the action should not have been dismissed without consideration of the second point of law, and then only if it were found no claim for damages could lie for interfering with the legal rights the liens conferred.

What has just been said calls for examination of the nature of the lien given by the Woodmen's Lien for Wages Act. The learned judge seems to have been influenced by the submission of counsel for the respondent Oscar Niemi Limited that the liens did not come into existence, or in any event did not become operative against the logs, unless and until judgment were recovered. With respect that view does not bear analysis. Section 3 (1) of the statute creates the lien; it reads in relevant part:

> Any person performing any labour or services in connection with any logs or timber in the Province, or his assignee, shall have a lien thereon for the amount due for the labour or services, and the same shall be deemed a first lien or charge on the logs or timber, . . .

Sections 4 (1) through 6 provide the lien shall not attach "or remain a charge" on the logs or timber unless the statement there mentioned is filed in the proper office within thirty days "after the last day such labour or services were performed." Section 7 (1) provides:

> Any person having a lien upon or against any logs or timber may enforce the same by suit. . . .

within thirty days after the filing of the statement. These sections make it clear beyond doubt that the lien comes into existence when the work is done, and that the filing of the statement and subsequent suit are the means provided to enforce it, *e.g.*, not to create it, but to enforce something already in existence.

A woodmen's lien resembles a mechanic's lien to the extent, at least, that it is a statutory lien which comes into existence

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when the work is done: *vide Hodgson Lumber Co. Limited* v. *Marshall et al.* (1940), 55 B.C. 467, at p. 471. What was said in *Triangle Storage Ltd.* v. *Porter* (1941), 56 B.C. 422, at p. 427 regarding a mechanic's lien may be applied appropriately to a woodmen's lien, *viz.*:

> A mechanic's lien is created by the statute and not by the order of the Court which is designated in the statute to enforce it. The statute creates a right *in rem* and prescribes the method to enforce it.

When a mechanic's lien affidavit is filed in the Land Registry office the land affected may not be dealt with except subject to it. It is true, of course, that filing a woodmen's lien statement in a Court registry cannot record the lien against the logs in quite the same way, since there is no comparable registry where transactions in logs are required to be registered.

But that does not impair the force of the lien itself, although it may make it less easy for the wage-earner to receive the protection the statute gives him. This difficulty, however, is met by section 6 of the statute. The Mechanics' Lien Act does not contain, nor does it need to contain any similar or analogous provision. Section 6 reads in material part:

> . . . no sale or transfer of the logs or timber upon which a lien is claimed under this Act during the time limited for the filing of such statement of claim, and previous to the filing thereof, or after the filing thereof and during the time limited for the enforcement thereof, shall in any wise affect the lien, but the lien shall remain and be in force against the logs or timber in whosesoever possession the same shall be found, except sawn timber sold in the ordinary course of business.

It is a necessary conclusion therefore that no sale or transfer of the lien logs which "affected the lien" within the meaning of section 6, could be successfully defended in the Court below or in this Court, on the sole ground that the judgment in question was not properly signed. This brings us to the second point of law above cited, *viz.*, whether the second action is maintainable. The statement of claim asked for (a) a declaration the appellant was entitled to possession of the logs by virtue of its lien and default judgment, *supra;* (b) an injunction restraining the respondents from selling, parting, disposing or moving the said logs; and (c) damages against the respondent "for the unlawful selling, parting, disposing of and/or moving any or all of the said logs . . . " and (d) such further or other relief as to the Court should seem meet.

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quent decision in *Chassy* v. *May* (1925), 35 B.C. 113 must be read as accepting its resemblance to a vendor's lien; *vide* also the observations of MARTIN, J.A. (as he then was) in *Hazell* v. *Lund* (1915), 22 B.C. 264, at p. 276.

But notwithstanding the foregoing, the third claim for relief in the appellant's statement of claim in my opinion at least, does raise a triable issue and one which in the absence of its own facts cannot be disposed of in a hearing on a point of law prior to trial. Before a Court can determine the principles of law which should be applied it must know the basic facts. That requires a trial when cross-examination may throw quite a different light on the subject-matter. The claim under discussion is for "damages for the unlawful selling, parting, disposing of and/or moving any or all the logs." Section 6 previously cited, expressly provides that no sale or transfer of logs subject to a lien shall affect the lien. If the respondents have in fact dealt with the lien logs so as to "affect the lien" within the meaning of section 6, then undoubtedly an important question arises whether the appellant may or may not recover damages for loss suffered through infringement of the legal rights it has acquired under the statute.

The language and general purview of the statute should be considered in the light of the facts to be elicited and adjudicated upon. This important issue was not really argued in this Court or below. It was approached on several occasions during the argument, but the absence of supporting evidence (no trial having taken place), no doubt prevented adequate submissions being presented. It is not an issue which can be determined without the relevant facts. In my opinion this case should go to trial, and after the evidence has been sifted, the trial Court should then be in a position to apply the applicable principles of law to known facts. On the record before us this Court is not now in that position. The judgment below should be set aside and the action should proceed to trial.

Before parting with this appeal, I should add perhaps that in my opinion the registrar had power to sign judgment as he did in the woodmen's lien action. It is an additional ground for allowing the appeal. I refer to it now because it was the turning point of the decision below and was fully argued in this Court. Section 7 (2) reads in material part:

Although the learned judge expressed no opinion on the second point of law, it was in part, at least, argued before him as well as in this Court. If the logs cannot be found as counsel seemed to intimate (although that is a fact which the trial would settle), then, of course, an injunction could not be granted. Nor am I impressed with the appellant's claim for a declaration it is entitled to possession of the logs by virtue of its lien. Counsel for the respondent submitted the lien gave no right of ownership or interest in the logs upon which a claim for possession could be founded, and cited *Watt v. Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472 in support of the proposition that the right acquired under a woodmen's lien is not a right of ownership, but a right under supervision of the Court, to enforce a claim for payment for work done.

While the *Watt* decision concerned a mechanic's lien, I am satisfied its reasoning is equally in point here, in view of the close resemblance of the two statutes in the particular aspect now discussed. I interject here that in writing the judgment of the Court in the *Watt* case, at p. 475 I described the lien in *Chassy* v. *May* as a vendor's lien. Neither the reasoning nor the conclusion in the *Watt* case is weakened by saying now, that although it resembled a vendor's lien it was not so in literal fact. In *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83, May had refused to transfer to Chassy the latter's half-interest in certain mineral claims, because he was not paid moneys he said he had expended in keeping up the assessments on the claims.

In this Court MACDONALD, C.J.A. (with whom the majority agreed in dismissing the appeal) said at p. 97, May "should have a lien given by the Court below," for such assessment expenditures. But in the Court below the learned trial judge, GREGORY, J., had said as reported at p. 87, that May had no lien that he knew of, and also that the evidence did not disclose the amount May claimed had any connection with the mineral claims. May's lien seems to have been created by the Court itself. It was not a statutory lien such as a mechanic's lien or a woodmen's lien. It was very like that type of vendor's lien which entitles the vendor to withhold delivery of title until he has been paid whatever his agreement calls for. Indeed, it seems to me, this Court's subse-

In case no defence or dispute note is filed, judgment may be signed and execution issued according to the practice of the Court.

Counsel for the respondent contended that does not mean default judgment may be signed by the registrar as happened here, but that it does mean the appellant should have set the action down for trial and moved the Court for judgment..

I think the effective answer is, that if the Legislature had so intended it would have said so in apt language. If that were intended, one would have expected similar language to rule 300 under which motions for foreclosure are made in default of defence, *viz.*:

If the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a judge shall consider the plaintiff to be entitled to.

Of course that is what the appellant would have had to do, if section 7 (2) as cited had not appeared in the statute. It is to be observed no similar provision is contained in the Saskatchewan Woodmen's Lien Act, Cap. 299, R.S.S. 1940. Hence the Court's observations to the same effect as expressed by Gordon, J. in *Pelly* v. *Ala and Canadian Forest Products Ltd.*, [1940] 1 W.W.R. 528, at p. 535, in the Saskatchewan Court of Appeal.

When the Legislature wrote into the statute that where no defence is filed, "judgment may be signed and execution issued" (section 7 (2)) it employed terms possessed of significant and long established legal meaning. There can be little doubt the phraseology was used purposely and with knowledge of its accepted legal meaning. There is nothing in the statute I can find to give it another meaning. That meaning definitely excludes a motion to the Court for judgment. A judge does not sign judgment. That is the special function of the registrar. Where a judge awards A $100 damages against B a formal order for judgment is initialled by the judge, signed by the registrar and entered as an order for judgment. But execution "according to the practice of the Court" (*vide* section 7 (2)) cannot issue thereon. A must do something more. He must produce his formal order for judgment to the registrar who then "signs judgment" for $100 according to the form of judgment set out in the rules. Then and not until then, may execution issue.

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The distinction between "moving for judgment" and "signing judgment" is well known. While authority for that is hardly needed, reference may usefully be made to the Court of Appeal decision in *Jones* v. *Macaulay* (1890), 60 L.J.Q.B. 258, and particularly the latter part of the judgment of Lopes, L.J., following *Higgins* v. *Scott* (1888), 58 L.J.Q.B. 97. Examination of Order XIII. (default of appearance) and Order XXVII. (default of defence) under which the registrar may sign default judgments, indicates that "entering" judgment and "signing" judgment are made interchangeable terms in those rules by their context, in any case where the registrar signs judgment in default of appearance or defence. In fact in r. 6 of Order XIII. "sign" is used instead of "enter."

It was contended the phrase "according to the practice of the Court" at the end of section 7 (2), brought the matter within Order XIII. (default of appearance), and the only rule of that order applicable being rule 112, therefore the appellant could not sign judgment in default without first moving the Court. But section 7 (2) in itself creates a statutory rule of procedure in addition to what is contained in Order XIII. or Order XXVII. If it did not, its provision as to the course of procedure to be adopted in case of default of defence would be meaningless and superfluous. As already pointed out, if it were intended that the registrar should not sign default judgment, but that instead the Court should be moved, that result could have been attained quite simply by leaving out the cited portion of section 7 (2), as was done in the Saskatchewan statute. To my mind it must reasonably be held therefore to mean that judgment may be signed in default of defence without "moving the Court for judgment," and that it may be signed by the registrar in the ordinary way a default judgment is signed before execution may issue.

This view renders it unnecessary to review the finding that the judgment signed in the woodmen's lien action is a nullity. I express no opinion on that subject. The judgment in question is the record of a superior Court—as distinguished from an inferior Court: *vide In re Robert Evan Sproule* (1886), 12 S.C.R. 140, Sir W. J. Ritchie, C.J. at p. 194, and Strong, J. at p. 205. As to inferior Courts see, for example, our recent judgment in *Kennedy* v. *MacKenzie* [(1941), *ante*, p. 94]; [1942] 1 D.L.R. 118.

The judgment appealed from should be set aside and the action proceed to trial. I would allow the appeal accordingly. I concur in the disposition of costs in all respects as stated by my Lord the Chief Justice.

FISHER, J.A.: This is an appeal from the judgment pronounced in this action by MANSON, J. on April 28th, 1941, dismissing the plaintiff's action herein with costs to each of the defendants. The matter came before MANSON, J. pursuant to an order made by MURPHY, J. on the 1st of April, 1941, reading, in part, as follows:

IT IS ORDERED that the points of law raised by the defendant Oscar Niemi Limited in paragraphs 3 and 4 of its amended defence be pursuant to Order XXV., r. 2, set down for hearing and disposed of forthwith, and before the trial of the issues of fact in this action.

Said paragraphs 3 and 4 of the amended defence read as follow: [already set out in the judgment of O'HALLORAN, J.A.].

Said paragraph 4 of the statement of claim reads as follows:

That on the 19th day of October, A.D. 1938, the plaintiff company obtained a judgment for a woodmen's lien against the defendant Narrows Arm Logging Company Limited, in the Supreme Court of British Columbia under No. 1017/38, and that the plaintiff company Warehouse Security Finance Company Limited still holds a lien against 500,000 feet of logs felled and bucked and cold-decked at Sechelt Inlet, in the Province of British Columbia and also holds a lien against 1,000,000 feet of logs felled and bucked at present in the woods at the premises of the Narrows Arm Logging Company Limited at Sechelt Inlet, in the county of Vancouver in the Province of British Columbia.

Although, as I have already intimated, an order was made for the hearing and disposition of the points of law raised by paragraphs 3 and 4 of the amended defence as aforesaid, I would say, with all respect, that the real issue herein was and is whether the plaintiff can maintain an action for damages against the said defendant Oscar Niemi Limited for depriving the plaintiff of the benefit of, or for preventing the plaintiff from enforcing, its alleged lien against the said logs. In this connection reference might be made to what was said in the discussion between the Court and counsel, Mr. *Castillou* being counsel on behalf of the plaintiff and Mr. *Sigler*, counsel on behalf of the said defendant Oscar Niemi Limited:

Castillou: All we are applying for in this action is damages for our right of lien. We say "You have interfered with our right of lien."

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THE COURT: I hold against you on that. I had a reference to me, a specific one. The reference was on clauses 3 and 4 of the amended statement of defence. I have not dealt with 4. I have dealt with 3, and have resolved it in favour of the defendant and found that the judgment relied upon by the plaintiff was a nullity.

Sigler: May I have an order, or part of the order, that this action will be dismissed with costs?

THE COURT: I think that is the logical outcome.

The order or judgment taken out dismissing the action as aforesaid also adjudged and declared that,—

the purported judgment in default of appearance dated the 19th day of October, A.D. 1938, in the Supreme Court of British Columbia, action No. 1017/38 between Warehouse Security Finance Company Limited as plaintiff, and Narrows Arm Logging Company Limited as defendant, purporting to adjudge and declare that the said Warehouse Security Finance Company Limited is entitled to a lien under the Woodmen's Lien for Wages Act is and at all times has been a nullity and of no effect.

I pause here to say that in view of my conclusion on the whole matter, as hereinafter set out, I do not find it necessary to express an opinion as to whether the learned judge was right in his finding that the said judgment relied upon by the plaintiff was a nullity.

The said points of law raised by the defence as aforesaid having been set down for hearing and disposition pursuant to Order XXV., r. 2, it should be noted that r. 3 of said Order XXV. provides that:

If, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, . . . , the Court or judge may thereupon dismiss the action.

It would appear that the learned judge upon deciding said point 3 as aforesaid was of the opinion that the decision on such point substantially disposed of the whole action and accordingly dismissed it. I have to say, with deference, that in my opinion the decision of such point of law does not substantially dispose of the whole action herein although it may be necessary that the statement of claim should be amended so as to disclose the real cause of action which, as suggested by counsel on behalf of the plaintiff in the passage above set out, and also at least suggested by the statement of claim herein, is the alleged damage caused to the plaintiff by the said defendant interfering with its right of lien, or depriving the plaintiff of the benefit of the lien it claims, against the logs referred to in the statement of claim. It is or

may be alleged that permanent damages were sustained by the plaintiff through the wrongful act of the said defendant in interfering with such right of the plaintiff and preventing the plaintiff from enforcing its lien with respect to the said logs arising under said Woodmen's Lien for Wages Act, R.S.B.C. 1936, Cap. 310, especially section 3 (1) thereof. It seems to me that this is the real foundation of the plaintiff's claim and that it does not necessarily disappear in the event of the said judgment signed in the said prior action against the defendant Narrows Arm Logging Company Limited, being held to be a nullity. In my view the real issue as aforesaid has not been tried and the plaintiff (appellant) is entitled to have this action remitted for trial provided that the statement of claim, as it stands, discloses or would disclose, after all proper amendments have been made, a cause of action whether said prior judgment was a nullity or not. I propose therefore to refer to some authorities which seem to me to be of some assistance on the question of whether such a cause of action is disclosed or would be disclosed after proper amendments had been made.

In *Chassy* v. *May* (1925), 35 B.C. 113, at pp. 117-18 MARTIN, J.A. (as he then was) said, in part, as follows:

> The definition of "lien," at law, and in equity, and in admiralty, is well and succinctly set out in Hall on Possessory Liens (1917), Cap. 1, and at p. 16 it is said:
>
> "The word is derived directly from the French *lien*, and further back from the Latin *ligamen*, which signifies 'a tie' or 'something binding.' As will be seen the right in its fullest and widest application means a charge upon property—that is to say, something which is binding upon it."
>
> And at p. 17:
>
> "Perhaps the widest and most satisfactory definition is that adopted by Whitaker in his 'Treatise of the Law of Lien,' published in 1812—namely, 'Any charge of a payment of debt or duty upon either real or personal property.' This is lien in its most extensive sense."
>
> And at p. 18:
>
> "A lien, therefore, is 'any charge of a payment of debt or duty upon either real or personal property,' whilst a possessory lien is 'a right in one man to retain that which is in his possession belonging to another, till certain demands of his, the person in possession, are satisfied.'"
>
> I have found no case wherein special liens created by statute, such as our Mechanics' Lien Act, or declared by the Courts to exist upon special facts upon real property (apart from the ordinary vendor's lien) are considered, but beyond question they create a certain and defined "charge" upon the property and constitute an "interest" in it to the full extent of that of the

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person whose conduct created the lien. In *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, it was said by their Lordships of the Privy Council, at p. 282:

"It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit."

In *Watt* v. *Sheffield Gold & Silver Mines Ltd.* (1940), 55 B.C. 472, O'HALLORAN, J.A. at pp. 474-5, said, in part, as follows:

Watt was declared entitled to a lien for tunnelling and construction work on the mine while employed as a working foreman. It is not disclosed that he had any interest of ownership in the mine. It is asserted however that his right to a mechanic's lien invested him with a "right or interest" in the mining property; and accordingly that his right to a lien under the Mechanics' Lien Act could not arise unless he possessed a free miner's certificate under the Mineral Act.

This contention must be rejected. The purpose of the Mechanics' Lien Act is to ensure payment to persons who do work on various kinds of construction including mines. The Mineral Act sections which relate to free miners' certificates concern the ownership of mineral claims or an interest in the ownership thereof. The right acquired under a mechanic's lien is not a right of ownership but is a right to enforce a claim for payment for work done, by sale of the mine under supervision of the Court.

In *Pelly* v. *Ala and Canadian Forest Products Ltd.*, [1940] 1 W.W.R. 528, apparently relied upon by both counsel, Mackenzie, J.A. at pp. 531-2 says as follows:

In the next place it seems to me in any event that by scattering and using these ties along its right-of-way, the railway company has obliterated their identity to such an extent as to render an effective seizure impossible and has consequently prevented the plaintiffs from enforcing their lien by way of a sale thereof under execution as provided by the Act. This, however, is not to conclude that the defendant company or the railway company may not be liable for damages in conversion for depriving the plaintiffs of the benefit of their lien, as to which of course there is no issue or evidence in this case.

In Pollock on Torts, 14th Ed. 285, the writer says:

But an owner not entitled to immediate possession might have a special action on the case, not being trover, for any permanent injury to his interest, though the wrongful act might also be a trespass, conversion, or breach of contract, as against the immediate possessor (*Mears* v. *L. & S.W. Railway Co.* (1862), 11 C.B. (N.S.) 850, 31 L.J.C.P. 220). As under the Judicature Acts the difference of form between trover and a special action which is not trover does not exist, there seems to be no good reason why the idea and the name of conversion should not be extended to cover these last-mentioned cases.

After a perusal of said authorities I have come to the conclusion that the plaintiff may have, or may have had, a statutory lien or

charge upon the said logs and that the said defendant may be liable to it, whether said prior judgment was a nullity or not, in an action for damages for depriving the plaintiff of the benefit of such lien or preventing it from enforcing or realizing upon it. I do not think it necessary to express an opinion as to whether the statement of claim as it now stands discloses a cause of action as I am of the opinion that, in any event, if it does not now disclose a cause of action, there should be no difficulty in obtaining leave to make the amendments necessary to disclose such. I would, therefore, allow the appeal from the judgment dismissing the action and remit the action for trial with leave to both parties to apply to amend as they may be advised.

As to costs between the appellant and the said respondent, Oscar Niemi Limited, I have to say that it follows that in my view the appellant was right in appealing to set aside the said judgment dismissing the action, as such judgment stood as a barrier in its path to assert a right of action which it has. The appellant should, therefore, have its costs of the appeal in any event and the costs of the hearing before MANSON, J. should abide the result of the trial now ordered.

With respect to the matter of costs as between the appellant and the respondent, Niemi Logging Company Limited, I have to say that I agree with the learned Chief Justice.

Appeal allowed, McQuarrie, J.A. dissenting.

Solicitor for appellant: *H. Castillou.*

Solicitor for respondent Niemi Logging Company Limited: *D. Sigler.*

Solicitor for respondent Oscar Niemi Limited: *F. R. Anderson.*

Tgrd With
Arn Eastham Ltd v
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Jan. 13, 14; *March* 10.

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Limitations, Statute of—Judgment—Death of plaintiff—Order of revivor—Garnishee proceedings 25 years after judgment—Effect of order of revivor on statute—R.S.B.C. 1936, Cap. 159, Secs. 43 and 49—Order XII., r. 17.

Consd
dust. Dev Bank v.
n. Plywood Corp.
2D LR(3d) 592
(BCSC)

In March, 1916, one Ghaniya obtained judgment in the County Court against several East Indians, including the defendant Pram Singh, for $312.95. Ghaniya died in July, 1922, and in the following September letters of administration of his estate were granted to the plaintiff Thakar Singh. In April, 1925, Thakar Singh applied in the action to a judge in Chambers and obtained an order that all proceedings in the action be carried on in his name. In September, 1941, Thakar Singh made application to the registrar and obtained an order attaching sufficient moneys of the defendant Pram Singh in the Canadian Bank of Commerce to pay the debt and interest, and pursuant to the order said bank paid into Court the sum of $626.52. On the application of the defendant an order was made setting aside the garnishee order on the ground that the judgment on which it was based was barred by the Statute of Limitations.

Held, on appeal, affirming the order of WHITESIDE, Co. J., that the appeal be dismissed.

Per McDONALD, C.J.B.C. and SLOAN, J.A.: That the obtaining of an order of revivor is ineffective to stop the Statute of Limitations from running, and the garnishee proceedings were statute-barred.

Per O'HALLORAN, J.A.: That the judgment is not statute-barred because it is not a judgment relating to real property within the meaning of section 43 of the statute, and it is not a specialty within the meaning of section 49, but garnishee proceedings after judgment are a mode of execution within the meaning of Order XII., r. 17. As more than six years had elapsed since the judgment, and also a change in death had occurred, leave to issue garnishee proceedings was required by that rule and order. Such leave was not obtained and the garnishee order was properly set aside.

APPEAL by plaintiff from the order of WHITESIDE, Co. J. of the 4th of November, 1941, setting aside a garnishee order issued herein on the 5th of September, 1941. This action was commenced in the County Court on the 28th of January, 1916, and judgment was entered for the plaintiff on the 23rd of March, 1916, for $312.95. On the 17th of July, 1922, the original plaintiff died and letters of administration of his estate were issued to the present plaintiff Thakar Singh on the 9th of October, 1922. On the 14th of April, 1925, an application was made to HOWAY, Co. J. for leave to carry on further proceedings herein

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in the name of the administrator Thakar Singh, and it was so ordered. On the 5th of September, 1941, the administrator plaintiff made application to the registrar and obtained an order attaching moneys of the defendant Pram Singh in The Canadian Bank of Commerce, and said bank paid into Court the sum of $626.52. On motion for an order directing that said sum be paid out of Court to the defendant Pram Singh, it was held that the judgment and all proceedings taken thereunder after the expiration of 20 years from the date of the judgment are barred by the Statute of Limitations and the attaching order was set aside.

The appeal was argued at Victoria on the 13th and 14th of January, 1942, before McDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

J. A. MacInnes, for appellant: The point in this appeal is a narrow one. The question is whether a revivor order obtained after the death of the plaintiff by the administrator of his estate has the effect of again starting the Statute of Limitations to run from that period. The administrator proceeds under an order of the Court to continue the action. In 1941 the administrator garnisheed the defendant's bank account and the money was paid into Court. It was held the proceedings were barred by the Statute of Limitations. We say we are not barred. There has been confusion for failure to distinguish between Order XII., r. 17 of the County Court Rules, and execution: see *McCullough* v. *Sykes* (1885), 11 Pr. 337, at p. 342; *Allison* v. *Breen* (1900), 19 Pr. 119 and 143; *Stubbs* v. *Allen*, [1934] 2 W.W.R. 459.

Darling, K.C., for respondent: Death itself does not stop the statute running: see *Farran* v. *Beresford* (1843), 10 Cl. & F. 319. He issued the garnishee on the judgment obtained in 1916: see *Ex parte Tynte. In re Tynte* (1880), 15 Ch. D. 125. Entry of a suggestion on the rolls does not start a new period: see *Rhodes* v. *Smethurst* (1838), 4 M. & W. 42, at p. 49; *Perry* v. *Jenkins* (1835), 1 Myl. & Cr. 118, at pp. 121-2; Daniell's Chancery Practice, 7th Ed., Vol. I., p. 251; *Smith* v. *Ontario and Minnesota Power Co. Ltd.* (1919), 16 O.W.N. 187. Add-

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ing a new plaintiff is all that was done. It is not a new judgment: see *Stubbs* v. *Allen,* [1934] 2 W.W.R. 459; Halsbury's Laws of England, 2nd Ed., Vol. 24, p. 663, par. 829; *Evans* v. *O'Donnell* (1885), 16 L.R. Ir. 445; *Thompson* v. *Donlands Properties Ltd. et al.,* [1934] O.R. 541. Here we are guided by the English cases: see *McCullough* v. *Sykes* (1885), 11 Pr. 337; 23 C.J. 367. He should first have applied for leave to issue execution, but did not do so: see *Caspar* v. *Keachie et al.* (1877), 41 U.C.Q.B. 599.

MacInnes, replied.

Cur. adv. vult.

10th March, 1942.

MCDONALD, C.J.B.C.: This case raises an important point of law, *viz.,* the effect on the running of the Statute of Limitations, of an order obtained by a judgment creditor's administrator substituting himself as plaintiff, which order, it is contended, has the effect of an order of revivor.

The exact point that arises in this case seems never to have arisen before, but there is no dearth of cases upon closely related points. Our decision requires consideration of the older law to an extent that the outward aspect of the case would not suggest.

The material facts can be shortly stated: One Ghaniya (whose administrator the appellant is) obtained a judgment in the county court in 1916 against the respondent and others with whom we are not concerned. Ghaniya died in 1922; in 1925 the appellant obtained an order from the county court judge giving leave that "all proceedings herein be carried on in the name of Thakar Singh, administrator of the estate of Ghaniya, deceased." It is obvious from the form of this order that it was obtained *ex parte* and that the only evidence produced was the letters of administration. In 1941, that is sixteen years after the order of revivor, and 25 years after the original judgment, the appellant garnished the respondent's bank account. By the order appealed from, WHITESIDE, Co. J. set aside the garnishing order on the ground that the judgment on which it was based was statute-barred. We have to decide whether he was right.

The governing statute law is section 43 of the Statute of Limitations, R.S.B.C. 1936, Cap. 159. By section 43:

No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued. . . .

Notwithstanding this peculiar wording, the decisions make clear that the section applies to all judgments, and not merely to the charge they create: see the decisions in *Watson* v. *Birch* (1847), 15 Sim. 523; *Jay* v. *Johnstone,* [1893] 1 Q.B. 25, and *Stubbs* v. *Allen,* [1934] 2 W.W.R. 459. It should also be noted that the section applies not only to action on the judgment, but to all "proceedings," which would include executions.

The appellant, however, contends that the order which he obtained in 1925 had the effect of giving a new starting point for the statute, so that the judgment was in effect renewed for 20 years from that date. He argues that since revivor orders have been substituted for *sci. fa.* proceedings, which were the only appropriate machinery up to 1852, and for the proceedings by writ of revivor or by suggestion on the judgment roll, which were also sanctioned methods from 1852 to 1883, and since these older methods gave a new starting point for the statute, the modern order of revivor must have the same effect. The appellant is apparently quite right as to the effect of the older proceedings; the neat point we have to decide is whether the modern type of order is really analogous, and operates in the same way. Consideration of this point makes it necessary to examine the scope and significance of the older remedies.

There was no statutory limit affecting judgments until 1833, when the English Act was passed from which our own section 43 is taken. But from the earliest times the common law imposed effective limitations of its own through restricting execution. By the time of Edw. I., a rule was established that a personal judgment was so conclusively presumed to be satisfied after a year and a day that no execution could issue; the judgment creditor's only remedy was to bring action on the judgment and obtain a new one, on which he issued execution. The obscure and vague provisions of the Statute of Westminster II. (1285) 13 Edw. I., Stat. 1, c. 45, were held to obviate the need for this, and to provide the alternative remedy of *sci. fa.* proceedings on

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the judgment after the year and a day. For some time, apparently, these *sci. fa.* proceedings could be brought without any limit in time, but eventually they were effectually limited, without statutory provision, by the fiction of law that after 20 years the judgment must be presumed to be satisfied.

It is necessary to consider just what *sci. fa.* proceedings were. They were initiated by a writ, calling on the defendant to show cause why he who sued out the writ should not be judicially declared entitled to certain rights which *prima facie* he possessed under some matter of record. Obviously the proceedings were applicable to a large variety of matters. A judgment creditor, who had allowed a year and a day to go by without executing, could call on the judgment debtor to show cause why he should not have execution. If the judgment creditor died and his executor wished to execute, then, even though the year and a day had not expired, since he was not a party to the record, the executor had to issue a *sci. fa.* to the judgment debtor, so as to enable the latter to dispute his representative capacity. Similarly, if the judgment debtor died, a *sci. fa.* against his executor was necessary before execution. The point to be observed is, that *sci. fa.* proceedings were equivalent to an action, there were pleadings, and there might be a trial, and a judgment was pronounced. Where the *sci. fa.* was issued for the purpose of obtaining execution, the judgment declared that the judgment creditor should have execution of his judgment: see Tidd's Forms (1828), p. 455 *et seq.*, and p. 489 *et seq.*

Scire-facias proceedings were regarded as a summary way of suing on the judgment; but as pointed out in Day's Common Law Procedure Acts, 4th Ed., 18, they were themselves dilatory and cumbersome. The Common Law Procedure Act, 1852, added two further alternative remedies. By section 129 where a judgment creditor had allowed a year and a day to expire without executing, or either he or the execution debtor had died, the party claiming the right to have execution could apply to the Court for leave to enter on the judgment roll a suggestion that it had been proved that he was entitled to execution. Notice was to be served on the judgment debtor, who could show cause against leave being given. There was also under sections 129 and 130,

an alternative procedure by writ of revivor (a term apparently borrowed from Chancery procedure); and it seems that the procedure by suggestion was appropriate where there was no serious dispute, or only a dispute on legal points, but that where a triable issue of fact was raised the procedure by writ of revivor must be resorted to. Under this writ there were pleadings, and a judgment was pronounced, like a judgment in *sci. fa.* Indeed, the remedies by writ of revivor and writ of *sci. fa.* seem to have been identical, except that the former were slightly simplified to prevent delay.

But, whichever alternative was followed under the Common Law Procedure Act, the type of judgment entered (by suggestion on the roll) seems to have been the same. And on the effect of this, Sir W. Page Wood, L.J. said in *Haly* v. *Barry* (1868), 3 Chy. App. 452, at p. 456:

> . . . it is beyond dispute that if the suggestion is entered on the record its effect is the same as that of a judgment on *scire facias*. . . .

This and the similar rulings in *McCullough* v. *Sykes* (1885), 11 Pr. 337, and *Allison* v. *Breen* (1900), 19 Pr. 119 and 143, far outweigh the contrary *dictum* of Bacon, C.J. in *Ex parte Tynte. In re Tynte* (1880), 15 Ch. D. 125, which does not seem to have been much considered, the case having been decided on many other grounds.

The appellant has based his case on *McCullough* v. *Sykes, supra,* and *Allison* v. *Breen, supra,* which decide that after a judgment has been revived by a judgment creditor under the Common Law Procedure Act of Ontario (similar to the English Act), by entry of a suggestion on the judgment roll, the judgment creditor is entitled to execution, and the limitation period is 20 years after such entry. The decisions are based on the decision of the House of Lords in *Farrell* v. *Gleeson* (1844), 11 Cl. & F. 702, which held that *sci. fa.* proceedings on a judgment gave a new date for computation of the statutory period, and that thereafter the judgment creditor was not barred in 20 years from the original judgment. These Ontario cases thus put the revivor proceedings under the Common Law Procedure Act on the same basis as *sci. fa.* proceedings. I see no reason to question these cases; the only question is, do they help the appellant?

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The Common Law Procedure Act was at one time in force in the superior Courts of this Province "so far as the adoption of the same is practicable" (see the Civil Procedure Ordinance, 1869), but it never had any application to inferior Courts either here or in England. In England the provisions considered above were replaced by the Supreme Court Rules, 1883, which are copied by our own Supreme Court Rules and our County Court Rules, 1914, Order II., r. 44, and Order XII., r. 17.

In all three of the above cases the judgment creditor had obtained a judicial declaration that he was entitled to execution against the judgment debtor. Here the appellant never obtained anything of the sort; and that distinction alone makes those cases entirely inapplicable here. The appellant's argument comes to this: he says that because what this order effected, a change of parties, could have been effected by *sci. fa.*, and because by *sci. fa.* the new party could have been declared entitled to execution, therefore an order merely changing parties must have all the effect a *sci. fa.* might have had. That seems to me clearly wrong, the more so because the appellant could, and perhaps should, even for the sake of regularity, have obtained a further order giving him the essential right to issue execution, but failed to do so. There may well be a question whether the garnishing order issued should not have been set aside on the mere ground that it was issued without leave more than six years after judgment. However, in view of the rather unsatisfactory judgment in *Fellows* v. *Thornton* (1884), 14 Q.B.D. 335, distinguishing between garnishment and other execution, I will assume that there was no irregularity in that respect. Yet, quite apart from regularity, the order for leave to issue execution was essential to bring the appellant within the principle of the cases he relies on, which turned on the fact that the judgment creditor had obtained a judicial declaration of his right to execution against the defendant, which declaration was held to create a new right. There is not a particle of authority, old or recent, for saying that mere substitution of an executor has any effect on the Statute of Limitations, and the reasoning in *Stubbs* v. *Allen, supra,* is against any such view.

However, even if appellant had obtained his leave to issue

execution, I think he still would have failed, because of the essential difference between the old and new proceedings for revivor. Both *sci. fa.* proceedings and proceedings under the Common Law Procedure Act were made on notice to the judgment debtor. Ordinarily, proceedings under the modern rules, either to substitute an executor or to get leave to execute, are made *ex parte,* and Order II., r. 44, of the County Court Rules expressly authorizes this. This indicates a fundamental difference in the purposes of the old and new procedure. Under the old, the judgment debtor was required to raise all objections before any leave was given, and the matter was then concluded. But the fact that *ex parte* proceedings are contemplated by the modern rules shows that it is intended that leave shall merely remove any objection to regularity, leaving the judgment debtor to contest the right to the order, by application to rescind. In other words, the *ex parte* order is not supposed to decide anything at all. It merely goes to regularity.

I do not overlook that Order XII., r. 17, like Supreme Court Rules, Order XLII., r. 23, provides that the Court may, if it sees fit, direct an issue between the judgment creditor and debtor. This indicates that if, on *ex parte* proceedings, it appears that, even on the judgment creditor's own story, there is doubt about his right to obtain leave, the Court may notify the judgment debtor, so that he can contest it then and there. If this procedure were followed in any particular case, it may be that an order made in favour of the judgment creditor would be within the principle of *Farrell* v. *Gleeson, supra,* though all modern *dicta* in point would seem to make no exception. However, the point does not arise here, since the order made was *ex parte,* and no evidence has been given to show, nor is it suggested, that it was ever served on the judgment debtor, or that he ever heard of it.

It is true that in *Allison* v. *Breen, supra,* the revivor proceedings, which were held to have given a new starting point for the statute, were actually taken *ex parte.* That procedure, however, was followed in breach of the statute, and the provisions of the statute show that the suggestion entered thereunder was intended to settle rights, and not merely to regularize procedure. Mere failure to observe the statute could not change the nature of what

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it authorized, if it applied at all. An irregular judgment is none the less a judgment; but the order here was not a judgment at all.

On principle, then, I think the modern orders giving leave to execute are not ordinarily equivalent to revivor by *sci. fa.* or under the Common Law Procedure Act. Turning to the authorities, I find that they take the same view. In *Evans* v. *O'Donnell* (1885), 16 L.R. Ir. 445, at p. 452, there is a *dictum* by O'Brien, J. to this effect. In *Stewart* v. *Rhodes,* [1900] 1 Ch. 386, there are several pointed statements as to the nature of modern orders. There the situation was the converse of this; the judgment debtor had died, and the judgment creditors had obtained an order giving them leave to issue execution against the deceased's executor. The question arose whether this made the executor a "judgment debtor" within a certain statute. On this Lindley, M.R., said (p. 402):

> . . . But it is said that the plaintiffs have done that which by the modern practice is equivalent to a judgment. Is it so? Let us look a little further. The order relied on by the appellants as providing a procedure equivalent to obtaining judgment is Order XLII., r 23. I agree that for most purposes if you have a judgment against a deceased man you need not bring an action on that judgment and recover another judgment against his executor; you can under that rule obtain leave to issue execution against the executor. There are two possible views of that rule. The one is that which has been urged by the appellants, that an order giving leave to issue execution is equivalent to a judgment. The other view is that an order giving leave to issue execution dispenses with the necessity of a judgment. In my opinion, the latter is the true view. . . .

Similarly, at p. 404 Vaughan Williams, L.J., said:

> . . . I cannot agree that that is equivalent to a judgment against the executor. . . .

And a pp. 399, 400, he distinguished between a revivor order and a suggestion under the Common Law Procedure Act.

By parallel reasoning, it follows, that when an executor of a deceased judgment creditor gets an order allowing him to issue execution, he does not get what is equivalent to a judgment, *a fortiori* he does not when he merely gets an order substituting him as a party. If there could be any doubt on that point, it is, I think, entirely dispelled by the carefully-reasoned decision of the Saskatchewan Court of Appeal in *Stubbs* v. *Allen, supra.* There, it is true, the judgment creditor, apparently with the sole object of avoiding the Statute of Limitations, had applied for

and obtained an order which neither substituted any new party nor gave leave to execute, merely declaring that "the judgment be and is hereby revived for a period of twelve years." An order of this type seems to be something quite novel, having no precedent either in the old practice or the new, and the Court of Appeal held it to be ineffective to stop the Statute of Limitations' running. Here, it is true, the appellant was obtaining an order of a type presumably sanctioned by the rules. But that does not appear to be a material difference, and the whole of the reasoning in *Stubbs* v. *Allen, supra,* is applicable to this case. There appears to be no distinction between the rules of court applicable there and here. That decision in itself therefore seems to be an insuperable obstacle to the appellant, though even without it, I should have reached the same conclusion.

It follows that in my opinion the order appealed from is right and that the appeal should be dismissed.

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

O'HALLORAN, J.A.: In March, 1916, one Ghaniya obtained a default judgment in an action for debt against several other East Indians including the respondent Pram Singh. Ghaniya died in July, 1922, and in September of that year letters of administration to his estate were granted to the appellant Thakar Singh. In April, 1925, the administrator applied *ex parte* in the style of cause of the action to a judge in Chambers and obtained an order that

> all proceedings herein be carried on in the name of Thakar Singh, administrator of the estate of Ghaniya, deceased, and leave is hereby granted accordingly.

In September, 1941, the appellant administrator garnisheed two bank accounts of the respondent in New Westminster and then attached sufficient moneys to pay the judgment debt and interest. WHITESIDE, Co. J. set aside the garnishee order on the ground the judgment of March, 1916, and all proceedings taken thereunder 20 years after its date, were barred by the Statute of Limitations. In the view I have reached the decision of the appeal involves two questions, *viz.*: (1) Whether the judgment is subject to statutory limitation as found below, and (2) whether

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garnishee proceedings after judgment comes within "execution," for the issuance of which leave is required under Order XII., r. 17 of the County Court Rules.

In 1833 two separate limitation statutes were passed in England. One concerned actions relating to real property while the other concerned actions relating to recovery of specialty debts. They are respectively chapters 27 and 42 of 3 & 4 Will. 4. The former specifically included "judgment" but the latter did not. These two statutes were included in material part in our Statute of Limitations being Cap. 159, R.S.B.C. 1936. Part II. thereof (sections 15 through 48) covers the relevant subject-matter of Cap. 27 of 1833, while Part III. thereof (sections 49 through 54) covers the relevant subject-matter of Cap. 42 of 1833.

In my view "judgment" in section 43 of our statute is necessarily confined to judgments relating to real property, and does not include and never was intended to include a judgment for debt such as we have here. The history of the two statutes and their respective language point conclusively to that view. It is supported as well by reasoned decisions in Ontario. The question was fully considered in *Boice* v. *O'Loane* (1878), 3 A.R. 167. Moss, C.J.A. in giving the judgment of the Ontario Court of Appeal at p. 174 considered the opinion of Shadwell, V.C., in *Watson* v. *Birch* (1847), 15 Sim. 523; 60 E.R. 721, which had been cited to support another view.

Boice v. *O'Loane, supra,* was applied by Rose, J. in *McCullough* v. *Sykes* (1885), 11 Pr. 337 and followed in *Mason* v. *Johnston* (1893), 20 A.R. 412. In *Allison* v. *Breen* (1900), 19 Pr. 143 Meredith, C.J. in giving the judgment of a Divisional Court, said at p. 144 that *Boice* v. *O'Loane* had been uniformly followed and recognized by the Court of Appeal in Ontario as correctly deciding the point notwithstanding the decision of certain English cases to which counsel had referred. *Jay* v. *Johnstone* (1892), 62 L.J.Q.B. 128 is founded largely on *Watson* v. *Birch, supra,* which Moss, C.J.A. considered and distinguished in *Boice* v. *O'Loane, supra.*

The judgment in *Jay* v. *Johnstone* was obtained in an action on a personal covenant in a mortgage. As such it came plainly within section 40 of Cap. 27 of 1833 (replaced by section 8 of the

Real Property Limitation Act, 1874, being Cap. 57 of that year, reducing the period of limitation from 20 to twelve years) reproduced in our section 43 as follows: [already set out in the judgment of McDonald, C.J.B.C.]

That is what was decided by the Court of Appeal in *Sutton* v. *Sutton* (1882), 22 Ch. D. 511—Sir George Jessel, M.R. at p. 516. On their own facts *Sutton* v. *Sutton* and *Jay* v. *Johnstone* concerned judgments plainly within the purview of section 43. As such they cannot be authorities to support a contention that "judgment" in section 43 includes judgments upon causes of action which do not relate to real property. Any observations therein which might seem to say so were unnecessary to their decision, and obviously *obiter dicta.*

But we have still to consider Cap. 47 of 1833 and that portion of it carried into section 49 of our statute. It provides that "all actions of covenant or debt upon any bond or other specialty," shall be commenced "within twenty years after the cause of such actions or suits but not after." It is observed that the term "judgment" has not been employed as it was in section 43 which relates to real property. Section 49 could not apply here in any circumstances unless the garnishee proceedings were an "action of debt." The phraseology in section 49 is not "action, suit or other proceeding," as it is in section 43.

Garnishee proceedings after judgment are not "an action" as that term is employed in the Statute of Limitations or in our Supreme or County Court Rules—*vide* rules 1, 2 and 3, and Order I., r. 1 of the County Court Rules, and section 77 of the County Courts Act, Cap. 58, R.S.B.C. 1936. It is true that in *Re M'Cabe* v. *Middleton* (1896), 27 Ont. 170, a garnishee summons before judgment was held to be "an action" within the meaning of the rules there considered but Boyd, C. pointed out at p. 174 that was because the plaintiff was proceeding against both the debtor and the garnishee as parties defendant by one summons, and the garnishee proceedings were then combined with the ordinary claim for a debt against a party defendant. But that decision was given under different rules and in a compound proceeding before judgment.

While the foregoing should be sufficient in itself to deny the

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applicability of section 49, it is interesting to note that the reasoning in *Jay* v. *Johnstone, supra,* seems to exclude that section as well. In that case the mortgagee sued on the personal covenant because prior mortgagees had realized the security leaving no surplus. Judgment was obtained in August, 1878. The judgment creditor having died, his will was proved by his executors in 1886. In 1890 the judgment debtor was bequeathed a substantial legacy under a will. He died in January, 1891, and his will was proved by his executors.

Subsequently the executors of the judgment creditor applied under Order XVII., r. 4 that the proceedings upon the judgment should be carried on as between them and the executors of the judgment creditor. The application was dismissed by the Master and upon appeal as well by Bruce, J. on the ground that 12 years had elapsed since the judgment and it was therefore barred by the Real Property Limitation Act, 1874 (our section 43, *supra*). An appeal to a Divisional Court was dismissed as was also an appeal to the Court of Appeal. The appellants did not argue that the judgment in question was a "specialty" and therefore not barred until the lapse of 20 years.

The substantial point was that although the judgment in question related to the subject-matter of our section 43, nevertheless the section was not applicable to the particular case under appeal, because by the Judgments Act, 1864, judgments were no longer a charge on land until delivered in execution. If that were given effect to, then judgments in an action to recover money secured on land would not be subject to any limitation at all, while judgments in personal actions (assuming for the moment, as was there assumed by counsel for the appellant, that they were "specialties" within section 49) would be barred in 20 years.

That appears to have been the narrow point upon which *Jay* v. *Johnstone* turned and which in the Court of Appeal particularly, directed the minds of the judges to its consequences. In the Divisional Court, at p. 131, Wills, J. expresses the opinion that "specialty" in section 49 does not include a judgment. It is true his conclusion seems to have been prompted largely by the view that judgment in section 43 applied to all judgments, however arising. But it is difficult to escape the conviction that the

latter view was prompted in its turn by the fact that prior to the Judgments Act, 1864, all judgments were charged on land, and therefore automatically within section 43.

This view gathers force when it is considered it would have been a convincing answer to the appellants in *Jay* v. *Johnstone* that the judgment arose in an action to recover a sum of money secured by a mortgage and was therefore plainly within the twelve-year period as previously decided in *Sutton* v. *Sutton, supra.* A debt does not change its nature upon judgment being obtained, *vide In re Wethered* (1925), 95 L.J. Ch. 127, Lawrence, J. at pp. 130-1. A judgment neither creates, adds to, nor detracts from a debt on which it is based. Its only office is to declare the existence of the debt, fix the amount and secure the creditor the means of enforcing its payment. It does not create a new debt, *vide International Harvester Co.* v. *Hogan,* [1917] 1 W.W.R. 857 in the Alberta Appellate Division.

If it is correct to conclude that the *obiter dicta* observations in *Jay* v. *Johnstone* pointed to "specialty" in section 49 excluding judgments because they were already included in section 43, it is interesting to note that in *Thompson* v. *Donlands Properties Ltd. et al.,* [1934] O.R. 541, the Ontario Court of Appeal held "specialty" in the Ontario counterpart of section 49 (*viz.,* section 48 (1) (*b*), Cap. 106, R.S.O. 1927) did not include judgment at a time when "judgment" had been deleted from the Ontario counterpart of our section 43 (*viz.,* section 23, Cap. 106, R.S.O. 1927). This is made clear in the judgment of Davis, J.A. (as he then was) at p. 552. His dissent did not rest upon this point.

In my view section 49 is confined to debt or covenant which is itself a specialty before judgment is obtained therefor. The object of the 20-year limitation is to fix the time within which judgment may be obtained in an action of covenant or debt. Judgment once obtained secures to the creditor the means of enforcing that debt or covenant, *viz.,* the right to execution or putting the sentence of the law in force. The limitations upon this execution of the judgment are contained in Order XII., rr. 16 and 17 of the County Court Rules.

The foregoing reasons lead to the conclusion that the judgment

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in this case is not statute-barred because (1) it is not a judgment relating to real property, within the meaning of section 43 and (2) it is not a specialty within the meaning of section 49.

This brings us to the second pivotal point for consideration. For if garnishee proceedings after judgment are a mode of execution within the meaning of Order XII., r. 17 of the County Court Rules (*cf.* Supreme Court Rules 600 and 601), then the garnishee order must be set aside, because leave of a judge was not obtained for its issuance as is required by r. 17 when, as here, six years have elapsed since the judgment and also a change has taken place by death in the party entitled to execution. The answer to that question depends on the County Court Rules, *supra,* read in the light of what is necessarily included when we use the terms judgment, execution and garnishee proceedings.

As pointed out previously, the judgment declares the existence of the debt judicially and finally; it fixes the amount and entitles the creditor to enforce it, *vide International Harvester Co.* v. *Hogan, supra.* Execution is the enforcement of a judgment. In 1 Co. Litt., 17th Ed., p. 154. a., it is said:

> "Execution," . . . signifieth in law the obtaining of actuall possession of anything acquired by judgement of law, or by a fine executory levied, whether it be by the sherife or by the entry of the party.

In Blackstone's Commentaries, Lewis's Ed., Book 3, Cap. 26, pp. 412-3, it is said:

> If the regular judgment of the Court, after the decision of the suit, be not suspended, superseded, or reversed . . . , the next and last step is the execution of that judgment; or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

Execution is aptly described as "putting the sentence of the law into force." The means of putting the sentence in force must necessarily vary with the nature of the subject-matter. This is recognized in Order XII., r. 8 of the County Court Rules (*cf.* Supreme Court Rule 586) by differentiating between "warrant of execution" there described in particular, and "issuing execution" there described in general. The routine method of execution by "warrant of execution," *supra,* is quite unable to reach money due the judgment debtor which is in the hands of a third person.

Garnishee proceedings are the appropriate method of enforcing a judgment by seizing moneys of the judgment debtor in the

hands of a third person. It is if anything a speedier, more effective, less cumbersome, and certainly a less expensive mode of "putting the sentence of the judgment" into effect than a "warrant of execution" against his lands or chattels. In substance and effect it is quite obviously an execution of the judgment. No refinements of language may be read into procedural rules to alter the essential nature of the thing itself. In *Richter* v. *Laxton* (1878), 48 L.J.Q.B. 184 Lush, J. described it as a "process of execution." In *Robson* v. *Smith, Son and Downes* (1895), 64 L.J. Ch. 457 Romer, J. at pp. 460-1 described it as a "form of execution."

But it seems to be argued that because the procedure for execution in Order XII. does not refer to the Attachment of Debts Act, *post,* in express terms we are somehow prevented from regarding garnishee proceedings after judgment in their true legal effect. This is a resort to a strictly literal method of interpretation, depending not upon what execution is in substance, but rather on the form of the phraseology in which the Rules of Court may be imperfectly couched. In *Caledonian Railway Co. v. North British Railway Co.* (1881), 6 App. Cas. 114, Lord Selborne, L.C. observed at p. 122:

> The more literal construction ought not to prevail, if . . . it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

It is quite apparent that the intention of the Legislature in the Attachment of Debts Act, Cap. 17, R.S.B.C. 1936, in the case of garnishee proceedings after judgment, was to enforce and execute that judgment in Blackstone's words, "to put the sentence of the law into force." This is also illustrated by the provisions of section 31 of the Creditors' Relief Act, Cap. 64, R.S.B.C. 1936. As already mentioned Order XII., r. 8 of the County Court Rules distinguishes "warrant of execution" and "issuing execution." The former is restricted to warrants there described, and does not expressly include garnishee proceedings. The latter, however, is thus described:

> And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

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Looking back at the preceding rules of Order XII., we find r. 3 reads:

> A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money might have been enforced at the time of the passing of the Act.

Rules 2 and 17 of County Court Order XII. are reproductions of Supreme Court Rules 581 and 586 which are in turn reproductions of rules 581 and 586 as they appeared in the English Rules of the Supreme Court, 1883, authorized by the Supreme Court of Judicature Act, 1875 (s. 17, c. 77, 38 & 39 Vict.) and amendments thereto—*vide* Wilson's Practice of the Supreme Court of Judicature, 7th Ed., 128. In a note to rule 581 in Wilson's Practice, *supra*, at p. 339 is given a "summary of various modes of enforcing judgments" at the time of the passing of the Judicature Act. Attachment of debts is there specifically mentioned. The conclusions necessarily follow (1) that garnishee proceedings after judgment is one of the "modes" by which a judgment may be enforced within the meaning of County Court Order XII., r. 3 and (2) it comes accordingly within the description "issuing execution" in r. 8 of the same Order.

We were referred to *Fellows* v. *Thornton* (1884), 14 Q.B.D. 335. In October, 1884, the registrar issued a garnishee order in respect to a judgment obtained in 1876. In November, 1884, after hearing the parties, the registrar ordered the garnishee to pay the sum to the judgment creditor forthwith. Pollock, B. set aside this order at Chambers. A Divisional Court (Lord Coleridge, C.J. and Stephen, J.) upheld the registrar, but for different reasons. Lord Coleridge, C.J. held garnishee proceedings were not execution while Stephen, J. held they were, and that leave had in effect been obtained. Of the three judges who considered the question (two in Divisional Court and Pollock, B. in Chambers) each seems to have held a different view. I am unable to find it discussed in any subsequent reported decision.

The difference of opinion in the Divisional Court centred on the meaning of "attachment." Lord Coleridge, C.J. confined it to attachment of person while Stephen, J. extended it to attachment of debts. Neither judge seems to have considered the force of Supreme Court Rule 581 (*cf.* County Court Order XII., r. 3) already referred to, and which in my view at least determines the

question. *Fellows* v. *Thornton* cannot therefore be regarded as very helpful in the decision of the point raised before us. I must refer to it further, however, on the point of leave to issue execution required by Order XII., r. 17. Stephen, J. seems to have thought that leave was given within the meaning of that rule, when the registrar made the garnishee order absolute. There are no facts in this case to permit that interpretation. The garnishee order was made *ex parte* on 5th September, 1941.

No leave to issue execution was obtained, and it was not contended in this Court that there was. In fact, before this Court counsel for the appellant took the bold position no leave was required because garnishee proceedings were not execution. On the 9th of September, 1941, the respondent entered an appearance and four days later served notice of application to set aside the garnishee order. No order absolute was made after a hearing such as in *Fellows* v. *Thornton* which could in any wise justify a conclusion that leave was in effect given at any time. The very terms of Order XII., r. 17, make it implicit that notice of application for leave as such shall be given. It was not given or alleged in this case.

On this second branch of the case therefore I must conclude (1) Garnishee proceedings after judgment are a mode of execution within the meaning of Order XII., r. 17. (2) As more than six years had elapsed since the judgment and also a change in death had occurred, leave to issue garnishee proceedings were required by that rule and Order. (3) Such leave was not obtained. Having reached the conclusion that the judgment was not barred by our Statute of Limitations, and also that leave was not obtained for its execution by the garnishee proceedings, I must hold the garnishee order was properly set aside in the Court below.

I would dismiss the appeal accordingly.

Appeal dismissed.

Solicitor for appellant: *J. A. W. O'Neill.*
Solicitor for respondent: *Clarence Darling.*

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Jan. 19, 20;
March 3.

MAINWARING v. MAINWARING. (No. 2).

Alimony—Action for — Husband leaves wife—Wife's cruelty—Persistent groundless accusations of husband's infidelity — Husband's health impaired—Order LXXA, r. 1 (a).

In an action by a wife who sets up desertion and sues for alimony under Order LXXA, r. 1 (*a*) of the Supreme Court Rules, 1925, it was held that the plaintiff was entitled to alimony without the necessity of proving a sincere desire to renew cohabitation.

Held, on appeal, reversing the decision of FISHER, J., that where the defence set up is one of cruelty consisting of persistent nagging, quarrelling and false charges of infidelity carried to the husband's friends and employers, which reached such a pitch that it endangered the husband's health, and that the evidence justifies such a finding, this is a good defence and the action should be dismissed.

APPEAL by defendant from the decision of FISHER, J. of the 29th of July, 1941 (reported, 56 B.C. p. 448), in an action for alimony, declaring that the plaintiff is entitled to alimony so long as she shall live separate from her husband, and that the husband do pay the plaintiff $60 per month during the lifetime of the parties or until the Court shall otherwise order. The plaintiff and defendant were married at Calgary, Alberta, in September, 1929, where the defendant was employed as a printer on a daily paper. In October, 1930, they moved to Vancouver where they lived together until March, 1934, when the husband left his wife. The husband claimed that while residing with his wife she was guilty of constantly nagging and quarrelling with him and continuously making false charges of unfaithfulness on his part, and carrying such charges to his friends and employers, that it affected his health and in consequence he was forced to give up his position in Calgary and move to Vancouver in the hope that a change of environment would improve her. The quarrelling continued in Vancouver, and for the sake of preserving his health he gave up his position and left her in November, 1933, and sought seclusion for the purpose of restoring his health and peace of mind. From 1935 until the commencement of this action he paid her monthly sums varying from $15 to $60. At the time of the marriage the plaintiff had a son five years old who was adopted by the defendant. After the separation the son continued to live with his mother.

The appeal was argued at Victoria on the 19th and 20th of January, 1942, before McDonald, C.J.B.C., Sloan and O'Halloran, JJ.A.

Cunliffe, for appellant: It was held that the plaintiff is entitled to alimony under Order LXXa, r. 1 (*a*). We say there was no desertion without cause. The separation was for good and sufficient cause. The wife had a child by another man, five years old at the time of her marriage. She had been a waitress and worked since she was seven years old. She continually nagged him and accused him of being unfaithful with another woman. He gave up his job in Calgary as a printer and went with his wife to Vancouver, but the quarrelling continued. Her conduct amounted to legal cruelty. When he left her he was on the verge of a nervous breakdown. After the separation she earned as high as $7 per day. He was in danger as to his health and was suffering at the time of separation. Her conduct was the cause of it, and there was no justification for her conduct: see Latey on Divorce, 12th Ed., 77; *Nelligan v. Nelligan* (1894), 26 Ont. 8; *Newton* v. *Newton,* [1924] 2 W.W.R. 840; *Russell* v. *Russell* (1897), 66 L.J. P. 122; *Davis* v. *Davis* (1929), 73 Sol. Jo. 767. As to what is "good cause" see *Yeatman* v. *Yeatman* (1868), 37 L.J. P. 37. A woman who could not get judicial separation cannot get alimony: see *Lovell* v. *Lovell* (1906), 11 O.L.R. 547; *Oldroyd* v. *Oldroyd* (1896), 65 L.J. P. 113, at p. 114; *Haswell* v. *Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; *Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384; *Paitson* v. *Rowan,* [1919] 3 W.W.R. 516, at p. 518; *Mellor* v. *Mellor* (1905), 11 B.C. 327; *George* v. *George* (1867), L.R. 1 P. & D. 554; *French* v. *French,* [1939] 2 W.W.R. 435; *Quinn* v. *Quinn* (1908), 12 O.W.R. 203; *Ney* v. *Ney* (1913), 11 D.L.R. 100, at p. 103. She must satisfy the Court that she has a desire for restitution: see *Harnett* v. *Harnett,* [1924] P. 126. But there is evidence that she will not go back.

A. M. Whiteside, K.C., for respondent: The learned trial judge has found on the facts and there is evidence to justify his findings: see *McCoy* v. *Trethewey* (1929), 41 B.C. 295; *Macdonald* v. *Pacific Great Eastern* (1922), 68 D.L.R. 124. He found the plaintiff was telling the truth and there is ample ground

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for finding that the husband left his wife without cause. He abused his wife and was the cause of her having a miscarriage. This is not contradicted. There is an obligation on him to provide for her maintenance. He recognized he had to pay for her support and paid her an average of $40 per month. The order that he pay $60 per month is a reasonable one: see Latey on Divorce, 12th Ed., 99. Her acts do not justify a finding of legal cruelty: see *Horton* v. *Horton* (1940), 109 L.J. P. 108, at p. 111; *Heyes* v. *Heyes* (1887), 13 P.D. 11; *Goodden* v. *Goodden,* [1891] P. 395; *Prichard* v. *Prichard* (1864), 3 Sw. & Tr. 523; *Forth* v. *Forth* (1867), 36 L.J. P. 122, at p. 123; *Soules* v. *Soules* (1851), 2 Gr. 299; *Rousseau* v. *Rousseau,* [1920] 3 W.W.R. 384; *Jackson* v. *Jackson* (1860), 8 Gr. 499; *Aldrich* v. *Aldrich* (1891), 21 Ont. 447; *Lee* v. *Lee* (1920), 54 D.L.R. 608; *Torsell* v. *Torsell,* [1921] 1 W.W.R. 905.

Cunliffe, in reply, referred to *Leib* v. *Leib* (1908), 7 W.L.R. 824.

Cur. adv. vult.

3rd March, 1942.

MCDONALD, C.J.B.C.: This is an action by a wife who sets up desertion, and sues for alimony under Order LXXA, r. 1 of the Supreme Court Rules. This rule reads as follows:

1. Alimony may be recovered in an action brought and prosecuted in the ordinary manner:—

(*a.*) By any wife who would be entitled to alimony by the law of England or of this Province; or

(*b.*) By any wife who would be entitled by the law of England or of this Province to a divorce, and to alimony as incident thereto; or

(*c.*) By any wife whose husband lives separate from her without any sufficient cause, and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony, when decreed or adjudged, shall continue until the further order of the Court.

The provisions of this rule are copied from an Ontario statute, except that the opening words of the statute were:

The High Court shall have jurisdiction to grant alimony to any wife. . .

and the statute makes no reference to the law "of this Province," but only to the law of England. This statute was passed when Ontario had neither divorce laws nor Divorce Courts. Why it was thought desirable to reproduce it in this Province, where the English Matrimonial Causes Act of 1857 has been in force since

1858, is not easy to see. The order first appears in the Rules of 1890, and I feel no doubt that originally it was *ultra vires,* as an attempt to legislate by order in council on substantive rights under the guise of regulating procedure. However, I shall assume (without deciding) that the order is now law, being either validated by statute that confirmed the Supreme Court Rules of 1890, or at any rate, put beyond our power to question by this Court's decision in *Rousseau* v. *Rousseau* (1920), 3 W.W.R. 384. However, assuming Order LXXA, r. 1 to be valid, I find it no small task to discover its meaning. Though it has been copied by several Provincial Legislatures, it would be hard to find a more embarrassing piece of legislation. It strikingly demonstrates how unwise it is to copy what another Province has evolved, without enquiring into the reasons for it. Actually, however, though the language in all the legislation is nearly the same, our Province has gone farther than the others in an important respect that I shall examine later.

I first point out some of the anomalies which that rule 1 creates. The intention obviously is that a wife shall issue a writ and obtain alimony by invoking the common-law jurisdiction instead of the matrimonial jurisdiction of the Supreme Court. How this is to be worked consistently with principle, is hard to see. Alimony cannot well be awarded in lump sums; it calls for periodic payments. But judgments for payment *in futuro* are unknown to common-law jurisdiction; and if a judgment is once given for specified sums, how is a common-law Court to vary it when the husband's means change? Somewhat similar difficulty was felt in *Dorey* v. *Dorey* (1912), 46 N.S.R. 469, under the same legislation in Nova Scotia, and in *Severn* v. *Severn* (1852), 3 Gr. 431, in Ontario.

In Ontario, however, the anomalies were never as serious. There from the creation of the Court of Chancery in 1837, statute (7 Wm. 4, c. 2, s. 3) gave it all alimony jurisdiction "possessed by any Ecclesiastical or other Court in England." The Ecclesiastical Courts did not decree alimony for desertion, but enforced restitution of conjugal rights in other ways. The English Matrimonial Causes Act of 1857 for the first time enabled an English Court to award alimony for desertion. Presumably as a result,

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the Legislature of Upper Canada in the same year enacted that the Chancery might give alimony in those cases now included in our r. 1 (*c*). The Consolidated Statutes of Upper Canada, 1859, c. 12, s. 29 "An Act Respecting the Court of Chancery," expanded the previous sections so that they read the same as our r. 1, with the variations already noted. These provisions were carried on in the various revisions down to recent times.

The obvious difference, however, between the Ontario legislation and our own Order LXXA, r. 1 is that the former gave the power to award alimony with all the powers of the Ecclesiastical Courts, so that it could readily assimilate its machinery to that in matrimonial causes without incongruity. In our own Province, the inference from the passing of Order LXXA at all is that the Court is to proceed apart from its divorce and matrimonial jurisdiction, but at the same time is given no apt machinery for the purpose. In the North-West Territories the same difficulty was felt, as shown in *Harris* v. *Harris* (1896), 3 Terr. L.R. 416, and *Holmes* v. *Holmes,* [1923] 1 W.W.R. 86. There, however, the anomaly was less, because the Court did not also have a divorce jurisdiction existing side by side with this new alimony jurisdiction. As it was, the Courts hacked their way through the difficulties rather than solved them.

I assume therefore that we must likewise manufacture machinery to make Order LXXA workable, though it is not only embarrassing and anomalous, but entirely unnecessary in this Province, even if the Deserted Wives' Maintenance Act did not offer a third alternative remedy.

The ineptitude of Order LXXA, r. 1 becomes the more obvious when we pass from making it workable to finding what field it covers. In all the Provinces where statutes similar to r. 1 (*a*) are in force, their meaning has caused difficulty. A common-law action for alimony is unknown in England, and it can only be obtained by petition in a matrimonial cause, a deserted wife's remedy at common law being to pledge her husband's credit as agent of necessity. But in order to give sub-clause (*a*) some effect the Courts have decided that it applies where the wife has grounds upon which in England she could file a petition and obtain alimony.

One obvious objection to this construction is that it renders sub-clauses (*b*) and (*c*) meaningless and superfluous, and there is really no getting over the objection; it simply has to be ignored. In Ontario, indeed, where sub-clause (*c*) came from, there was some sort of reason for it, since it was first inserted in 1857, as seen above, to include a remedy newly created in England that year, and hence not included in a previous general reference to English jurisdiction. But that reason is entirely lacking in this Province, where apparently sub-clause (*c*) is meaningless tautology, adding nothing to sub-clause (*a*).

That, however, is not all. Our Legislature, as, I think, unfortunately, has added to the difficulties, which the Courts of other Provinces found formidable enough, by adding an alternative in sub-clause (*a*) not found in other legislation. Thus, here, any wife is to be able to sue "who would be entitled to alimony by the law of England or of this Province." The reference to the law of this Province must be to the Matrimonial Causes Act, 1857, which is copied into our own statutes. I do not see what other meaning can be assigned to the words. Other Provinces which passed similar legislation had no Provincial divorce law to refer to, and had perforce to go to the law of England. Without observing this radical difference, we copied the other Provinces. But what is the result? Where other Provinces have something like certainty, we have an alternative, and the most startling consequences are inherent in that alternative. Before examining them, I must touch on an ancillary point. There has been some argument as to whether "the law of England" means that law as at the date when Order LXXA became effective, or whatever may be the law of England from time to time. Diverse opinions on this point were expressed in *O'Leary* v. *O'Leary*, [1923] 1 W.W.R. 501; but I cannot feel that there is real doubt. Legislation by reference in this same way has often been the subject of decision, and it has been consistently construed not to be ambulatory in its effect, but to incorporate the extrinsic law as at the date of the Act that is being construed, and to be unaffected by subsequent change of the law incorporated: see *e.g.*, *Reg.* v. *Inhabitants of Merionethshire* (1844), 6 Q.B. 343; *The Queen* v. *Smith* (1873), L.R. 8 Q.B. 146; *Clarke* v. *Brad-*

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laugh (1881), 8 Q.B.D. 63, at p. 69; *Kilgour* v. *London Street R.W. Co.* (1914), 30 O.L.R. 603, at p. 606. The effect of such legislation is as though the extrinsic law referred to was written right into the Act: *In re Wood's Estate* (1886), 31 Ch. D. 607, at p. 615. Order LXXA thus refers to the law of England as at the date when Order LXXA became law. Here I may refer to *Cumpson* v. *Cumpson* (1934), O.R. 60, *per* Riddell, J.A. For our purposes, though the exact date does not seem to be material, I think this should be taken as 1893, the date as of which the Rules of 1890 were confirmed by the Supreme Court Amendment Act, 1896, Cap. 14, Sec. 21.

Order LXXA, r. 1 therefore allows a wife to sue for alimony who could petition for it either in England or in this Province, according to the law of 1893. Since the law here is that of the Act of 1857, but that law was considerably changed in England by the Imperial Act of 1884 and rules passed thereunder, some very anomalous situations could obviously arise. A wife whom we would refuse alimony under our divorce jurisdiction, could ignore our divorce law and claim under English law, and presumably she could do this even after her petition had been dismissed. On the other hand, if she had been deserted less than two years, so that an action must be based on her right to restitution of conjugal rights, then, according to sub-clause (*c*) of this rule of ours, she could only invoke the law of England, and a more favourable law prevailing under our divorce jurisdiction would avail her nothing.

It was argued for the appellant that the wife could only succeed by showing her right to restitution of conjugal rights. If that were so, there would be little difficulty in this case. Under the English Act of 1884 and rules passed thereunder, a formal request for resumption of co-habitation was made a condition precedent to claiming restitution. No such request was made here. Moreover, it is a further condition of granting restitution, certainly under the English law of 1893, and I think even under the Act of 1857, that the petitioner must satisfy the Court of her sincere desire to resume co-habitation. It would be grotesque to suggest that the evidence here showed any such desire; the respondent's letters state emphatically, again and again, that she

does not want to live with her husband, and also express violent hatred for him.

If, then, her claim for alimony was based on her right to restitution of conjugal rights, it would be easily met. However, the decisions indicate that she need not base her claim so; the desertion has lasted more than two years, and if it was without cause she would be entitled to a judicial separation with alimony, which would be sufficient to bring her under r. 1 (*a*), without any need to invoke (*c*).

This brings before us squarely the question whether the evidence shows the husband's desertion to have been without cause. I have read the evidence through carefully more than once, and each perusal has satisfied me that he had ample cause for leaving the respondent. Throughout, her evidence strikes me as that of an untrustworthy witness, evasive and prevaricating. The husband's evidence seems to me infinitely more truthful; moreover, any corroboration that is to be found is in his favour.

Descending to particulars, I refer to the wife's evidence stating that her husband had kicked her in the stomach while she was pregnant, probably causing her later miscarriage. The statement that she did not know whether he did it accidentally or not, the fact that this alleged assault was never made the basis for a charge of cruelty, but simply dragged in casually, make the evidence incredible to me: I think it must be looked on as "propaganda" evidence. However, its only bearing is on her credibility. Considerably more importance attaches to her evidence on her husband's relations with other women, as I think it clear that this touches the main source of the matrimonial troubles. Even taking the wife's evidence alone, I would find it quite unconvincing. According to her, the husband for years was consistently running around with other women, or another woman; he had brought a woman up from Vancouver to Calgary to play about with, a suggestion that I think is not meant to stop short of a charge of adultery. All this is supposed to have gone on, while, by her own evidence, her husband was in poor health, and most of the time on relief. There is not the slightest attempt to identify any woman, in spite of the fact that the wife all the time was

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watching and following the husband; and the only evidence that is even reasonably concrete is that she saw the woman twice at a distance of about half a block. Against all this we have not only the husband's complete denials; we have the significant and uncontradicted evidence of his brother that the wife eventually admitted to him that her ideas of other women were "most likely hallucinations." I think that very well describes them.

The defence set up is one of cruelty, consisting of persistent nagging, quarrelling and false charges of infidelity carried to the husband's friends and employers, which reached such a pitch that it endangered the husband's health. I think this defence was substantially made out.

According to the husband's uncontradicted evidence the wife made an accusation to his employer in Calgary that the husband was running around with the telephone operator at the office. The employer investigated and satisfied himself the charge was baseless, later intervening to convince the wife. According to the appellant, when he left Calgary for Vancouver it was because she had made his life unbearable in Calgary. Almost as soon as they reached Vancouver she accused him of having brought his "lady friend" to the Coast, her basis being "the expression on his face."

She later went to his employers in Vancouver and made enquiries as to whether he was meeting another woman at the plant. She insisted on escorting him to and from work for the purpose of preventing meetings with his supposed paramours. Her jealousy of him seems to have become such an obsession that his fidelity, or want of same, became the continual topic, "all day and every day."

None of this evidence of what the husband was subjected to is contradicted; the wife's attitude seems to be simply that her jealousy was justified. This is made clear by her counsel's line of cross-examination when the husband was on the witness stand. Strong efforts were made to make him admit that he had got some girl into trouble in Vancouver and brought her to Calgary. So that there can be no doubt that her accusations against her husband were not mere accusations of philandering, but of adultery. Judging by the line her counsel takes, after eight years

of separation, and from the coarse, indecent and violent vituperation contained in her letters, the types of accusation and abuse that the husband must have had to endure are not hard to imagine. Not many men could have stood it, and I have not the least difficulty in believing that it could break down the appellant's health.

The agreement (Exhibit 3) by which the husband agreed without consideration, to turn over to his wife all his wages for the next twelve years, seems to me rather significant. I cannot imagine any man signing such an agreement except under strong pressure as indeed both parties agree that he was; and it furnishes strong evidence of who was the dominant personality. The husband's evidence that his health was broken by his wife's persecution does not rest on his own evidence; it is corroborated, at least as to the result, by his brother, and even by the wife herself. She gave her account of her husband's disappearance. She was asked about his physical condition at the time and said:

He was very jittery. He looked to me as though he was pretty ill. Sometimes I was scared he would have a nervous breakdown.

The questions leading up to that answer carried the implication that the husband's condition was due to the constant quarrelling, and there was nothing said by her to rebut the implication. I infer that the wife herself would have admitted that, but said he brought the quarrels on himself by his conduct. I do not think that he did.

The learned trial judge seems to have disregarded the evidence on the husband's health because it was not given by a doctor. With respect, I do not think that was a good reason. Nothing, unfortunately, is commoner than for people to be seriously ill and to die without medical attention, and I think it would be impossible to hold that lay evidence on such matters would not be admissible. If the husband had been shown to have had a doctor whom he failed to call as a witness, it would have been a matter for comment, though there I think adverse comment would have been completely met by the wife's own evidence. Here it is not shown that he ever had a doctor, but that does not say that he was not seriously ill; I think the evidence establishes that he was, and sufficiently establishes that it was due to persistent persecu-

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tion from his wife. I think things reached the stage where it was impossible for him to live with her.

There is some authority for saying that a spouse may resist a legal separation on grounds that would not enable him to obtain one himself. This apparent anomaly is explained by Lord Herschell in *Mackenzie* v. *Mackenzie,* [1895] A.C. 384, at pp. 389 and 390, though he is there referring to restitution of conjugal rights and not to judicial separation.

Here, however, the question does not really arise, because I think the husband has shown legal cruelty by the wife, within the definition of *Russell* v. *Russell,* [1897] A.C. 395, misconduct sufficient to endanger his health.

It is unusual for us to reverse a trial judge's findings in a case of this kind; but I think we must do so here. It follows that I would allow the appeal and reverse the judgment entered below.

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

O'HALLORAN, J.A.: The amendment of the Court Rules of Practice Act at the last session of the Provincial Legislature has supplied the statutory authority to support Order LXXA and has made it retroactive as well.

With due respect to the learned judge who made the order now complained of, I take the same view of the evidence as my Lord the Chief Justice. The respondent's behaviour to her husband was so persistently and intentionally unreasonable that his health was undermined, he lost one good position after another, and it became impossible for him to live with her any longer.

I agree in allowing the appeal.

Appeal allowed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *A. M. Whiteside.*

KEYSTONE SHINGLES AND LUMBER LIMITED v. MOODY SHINGLES LIMITED.

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Jan. 21, 22; *March* 3.

Company—Director—Ostensible authority—Contract—Change of control of defendant's mill—Business carried on in defendant's name—Purchase of shingles—Of benefit to defendant—Ratification.

On the 11h of May, 1934, the defendant company entered into a written agreement with one Thomson, a creditor of the company, whereby Thomson was to have the use of its shingle mill and its employees for the purpose of turning a boom of logs owned by Thomson into shingles. Upon the completion of the boom the agreement terminated. Thomson was to pay the employees while the boom was being cut, and the mill was to be under the supervision and management of one Langs. Thomson was also to pay arrears of wages to the workmen up to a certain sum and was entitled to retain all moneys realized from the sale of the shingles cut from his boom. The bank account of the company as at that time operated at a branch of the Bank of Montreal was to continue as previously under Thomson's operations for the purpose of paying the workmen and operating expenses. Performance of the agreement by the defendant was to be accepted by Thomson as satisfaction of the debt due him by the defendant. During Thomson's control the shingles in question in this action were ordered from the plaintiff by Langs to enable him to complete an order received from a Seattle firm in the defendant's name, there being insufficient shingles on hand at the mill just then to fill the order. The plaintiff delivered the shingles on the defendant's premises and they were shipped with other shingles by Langs in the defendant's name to the Seattle firm and the defendant received credit for them in its running account with the Seattle firm. The plaintiff drew on the defendant for the price of the shingles and Langs as "director" accepted the draft. The plaintiff recovered judgment for the price of the shingles.

Held, on appeal, affirming the decision of SIDNEY SMITH, J., that Langs was *de facto* manager, his act was proper and necessary in the defendant's interest. He was carrying on in the defendant's name with the entire approval of its executive, and for the defendant's own benefit as well as Thomson's. He used the shingles to fill an order received in the defendant's name and the proceeds actually went to its credit. Even if all that went before was unauthorized, the defendant, by taking advantage of the transaction, ratified it.

APPEAL by defendant from the decision of SIDNEY SMITH, J. of the 18th of June, 1941, in an action for the price of a quantity of cedar shingles sold and delivered to the defendant. On May 11th, 1934, the defendant company entered into a written agreement with one Thomson who had been financing the company

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and to whom the company was indebted, whereby Thomson was to have the use of its shingle mill and its employees for the purpose of turning a boom of logs owned by Thomson into shingles. Upon completion of the boom the agreement terminated. Thomson was to pay the employees while the boom was being cut, and during that time the mill was to be under the supervision and mill management of one Langs. Thomson was also to pay all arrears of wages to the workmen not exceeding a certain sum, and he was entitled to retain all moneys realized from the sale of said shingles. It was further agreed that the bank account of the company as at the time operated at the Bank of Montreal, Hastings and Homer Streets branch in Vancouver, be operated as heretofore during the continuance of this contract for the purpose of paying the company's workmen and operating expenses. Performance of the agreement by the defendant was to be accepted by Thomson as satisfaction of the debt due him by the defendant. Langs had previously been managing director of the defendant company but was dismissed by resolution of the directors on May 8th, 1934. During Thomson's control the shingles in question in this action were ordered from the plaintiff by Langs to enable him to complete an order received in the defendant's name from a Seattle firm, there being insufficient shingles on hand at the mill just then to fill the order. The plaintiff delivered them on the defendant's premises and they were shipped with other shingles by Langs in the defendant's name to Seattle and the defendant received credit for them in its running account with the Seattle firm. The plaintiff drew on the defendant for the price of the shingles delivered and Langs as "director" accepted the draft in the defendant's name, but it was never paid.

The appeal was argued at Victoria on the 21st and 22nd of January, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Edith L. Paterson, for appellant: One Langs had been managing director of the defendant, but prior to the defendant's agreement with Thomson, Langs was dismissed from office at a meeting of the directors. The shingles were ordered by Langs when Thomson was in possession of the mill and Langs was in

charge as managing director for Thomson. Keystone had no dealings with the Moody Company. All the other directors knew nothing of this transaction. Langs had no authority to purchase shingles for the Moody Company. He signed as "director" and in fact he was not managing director for the Moody Company when the shingles were ordered: see Lindley on Companies, 6th Ed., 205; *Thomas Logan Limited* v. *Davis* (1911), 104 L.T. 914. Langs had no authority as a "director" to bind the company: see *In re Cunningham & Co., Limited* (1887), 36 Ch. D. 530, at p. 536; *Totterdell* v. *Fareham Brick Co.* (1866), L.R. 1 C.P. 674, at pp. 676-7; *Houghton & Co.* v. *Northard, Lowe and Wills,* [1927] 1 K.B. 246. When he signed as a director only the plaintiff was put on inquiry as to his authority: see *O'Brien* v. *Credit Valley R.W. Co.* (1875), 25 U.C.C.P. 275; *Fred T. Brooks Ltd.* v. *Claude Neon General Advertising Ltd.,* [1931] O.R. 92, at p. 107; *Albert Cheese Co.* v. *Leeming et al.* (1880), 31 U.C.C.P. 272; *Myers* v. *Union Natural Gas Co.* (1922), 53 O.L.R. 88, at p. 92; *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *Hedican* v. *Crow's Nest Pass Lumber Co.* (1914), 19 B.C. 416, at p. 422.

Sullivan, K.C., for respondent: The facts are all important in this case. The cases referred to are with relation to putting the seller on inquiry. That Langs had authority to buy see *British Thomson-Houston Co.* v. *Federated European Bank Ld.,* [1932] 2 K.B. 176, at p. 183; *Kreditbank Cassel G.M.B.H.* v. *Schenkers,* [1927] 1 K.B. 826. They say they leased the premises to Thomson. In fact Thomson was a book-keeper in the defendant's employ. In the circumstances it makes no difference whether Langs had authority to purchase or not: see *Smith* v. *Hull Glass Co.* (1849), 8 C.B. 668. This is an ordinary business transaction where the goods were delivered and accepted: see *Biggerstaff* v. *Rowatt's Wharf* (1896), 65 L.J. Ch. 536, at p. 541; *Ticonderoga Pulp & Paper Co.* v. *Cowans,* [1925] 4 D.L.R. 1. They received the shingles and we were not paid for them: see *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; Palmer's Company Law, 16th Ed., 36.

Paterson, replied.

Cur. adv. vult.

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3rd March, 1942.

McDONALD, C.J.B.C.: This appeal is from a judgment awarding the plaintiff $416.25 as the price of shingles sold and delivered to the defendant. The defence set up is that the shingles were ordered by one Langs, who was merely one of several directors, and who, it is said, had no actual or ostensible authority to order them.

A number of legal points have been raised by the appellant; but the main difficulty is to arrive at the facts, and then, I think, legal difficulties largely disappear.

Langs, who had been for some time managing director of the appellant company, was ousted from that position by resolution of directors dated 8th May, 1934, but this ouster, if it took place in fact at all, which is probably not material, did not last for more than six days; for on the 11th of May, 1934, a written agreement was made between the appellant and one Thomson, who had been financing the appellant and was a creditor; and this agreement provided that Langs was to superintend and manage the mill, apparently from the 14th of May, 1934. Though he did this, much of the rest of the agreement was never carried out according to its tenor, and it seems advisable to note its terms as against the course actually taken under it.

The written agreement in effect gave Thomson the use of the appellant's shingle mill and employees for the purpose of turning a boom of logs owned by Thomson into shingles, after which the *status quo* would be restored. He was to pay the appellant's employees while his boom was being cut, and during that time the mill was to be "under the supervision and mill management" of Langs. Performance of the agreement by the appellant was to be accepted by Thomson as satisfaction of his debt. There are indications in the agreement that the changes in the appellant's operations were not to be disclosed to the public; for example, though Thomson was to pay the arrears of wages due to appellant's workmen, and to pay current wages and part of the operating expenses during the operation of the agreement, this was to be done through the appellant's bank account. Actually the parties' course of conduct in carrying out the arrangement went much farther than the agreement contemplated. Under its terms

Thomson was simply to provide current expenses and to receive payment in shingles. In reality this plan was radically altered; instead of the shingles being delivered to Thomson, the shingles were sold by Langs in the appellant's name, the invoices were assigned to Thomson, and he collected the sale price. The original arrangement was that when Thomson's logs had been made into shingles and the shingles delivered to him, the appellant was to be discharged; but under the altered arrangement apparently the appellant was merely credited with the proceeds of the shingles sold for Thomson, and when they were gone, the appellant was still in his debt.

The reason for all these changes is not made clear; but the appellant called Thomson as its witness, and both he and Langs (on discovery) testified that the changes as to the appellant's making sales in its own name were designed to preserve the appellant's credit with the public, so that it could resume business when Thomson's logs were cut, without the public's suspecting that it had temporarily suspended normal business.

This explanation seems entirely reasonable and credible; and no doubt the variation by which the appellant merely got credit for the proceeds of Thomson's shingles instead of a complete discharge, was a concession in return for the privilege of keeping up appearances.

Thomson's control of the mill came to an end about the 20th of June, 1934, and the shingles supplied by the respondent were delivered on the order of Langs in the appellant's name, on 30th May, that is, during Thomson's control. These shingles were ordered to enable Langs to complete an order received in appellant's name from a Seattle firm, there being insufficient shingles on hand at the mill just then. The respondent delivered them on the appellant's premises, they were shipped with other shingles by Langs in the appellant's name to Seattle, and the appellant received credit for them in its running account with the Seattle firm. The exact details of this seem immaterial; it is clear that the appellant received value from the buyer, whether ultimately the proceeds went to reduce Thomson's claim or not.

The respondent drew on the appellant for the price of the shingles, and Langs as "director" accepted the draft in the

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appellant's name, but it was never paid, and the appellant later repudiated the whole transaction, contending that Langs's only position in their executive was that of an ordinary director, without actual or ostensible authority to pledge their credit.

A number of cases have been cited; but I do not think the authorities present much difficulty. A single director as director has no ostensible powers, such as a managing director has. But any director, or even an agent, not on the board, may be allowed by the company to wield *de facto* powers, without any formal investment; and then the company cannot deny his possession of them: *Biggerstaff* v. *Rowatt's Wharf, Limited,* [1896] 2 Ch. 93. Shareholders cannot with impunity allow usurpation of management, thus allowing deception of the public. In the present case, however, there is no question of usurpation. Though the appellant had on 8th May ousted Langs from management and reduced him to an ordinary director; still by the agreement of three days later Thomson reimposed him on the appellant as supervisor and mill manager, and both Thomson's and Langs's undisputed evidence shows that while Thomson controlled the mill and did so at the time the cause of action arose, Langs was completely in charge of the whole of the appellant's operations, with the knowledge and entire approbation of the appellant's board of directors.

It has indeed been brought out that prior to 30th May respondent had never sold anything to appellant and so could not have relied on the ostensible continuation of Langs's previous role of managing director. Also, the appellant makes much of the fact that the requisition slip for the respondent's shingles, though in the appellant's name, was signed by Langs merely as "director," that he signed the receipt in his own name, and that he accepted the draft as "director." None of these facts seems to me of weight; continuity of managership was unnecessary: the respondent, when it got the order, saw Langs in the saddle, a *de facto* manager, and that was enough. The fact that he signed documents merely as "director" means little; when doing so he was signing for the appellant, and the only question is whether he had power *de facto* or *de jure* to sign the appellant's name, which he undoubtedly did. Mere misdescription of his position

would not matter, and actually there was nothing inconsistent in his being director and manager. Nothing can be made of the argument that the use of the word "director" should have warned the respondent of Langs's limited authority; for, if the respondent had made enquiry, it would simply have learned that Langs had in fact the position of manager, and hence presumptively the powers he was exercising.

Not only was Langs *de facto* manager, but it cannot even be suggested that his ordering of the shingles was an improper act; so that we have not to decide which of two innocent parties must suffer for the wrongful act of a third. His act was entirely proper and apparently necessary, in the appellant's own interest.

Against this it is said that Langs was manager, but for Thomson, not for the appellant; and that the appellant was really temporarily out of business. This, however, is a distortion of the facts; Langs was carrying on in the appellant's name, with the entire approval of its executive and moreover for the appellant's own benefit as well as Thomson's.

Even if this were not so, and even if Langs had not been *de facto* manager, I still think the appellant would fail. The appellant has argued entirely as though the respondent must establish a binding contract; but I think this is wrong in view of the fact that the appellant has had the respondent's goods and received the proceeds thereof. That being so, I think it is immaterial who ordered the shingles, or whether they were ordered at all. If my grocer by mistake delivers at my door groceries that I have never ordered, and I then use them, I must pay for them; the question whether I ordered them becomes irrelevant. The situation here is analogous. If Langs had lacked all authority and had used the goods for his own advantage there might be something to argue about. Here, however, he used the shingles to fill an order received in the appellant's name, and to fill it for the appellant's benefit, and the proceeds actually went to its credit.

It does not lie in the appellant's mouth to say that this was really a tortious conversion of the respondent's goods in which the appellant had no colour of title. Even if all that went before was unauthorized, the appellant by taking advantage of the transac-

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tion, ratified it; and there can be no doubt that it did take this advantage. I refer to the decision in *Lawford* v. *Billericay Rural Council*, [1903] 1 K.B. 772, which held that a corporation, after taking the benefit of work done or goods supplied under a contract that should have been under seal but was not, must pay for what it has received, and cannot set up the want of a seal. The reasoning in that case applies here.

In my opinion the appeal should be dismissed.

MCQUARRIE, J.A.: I would dismiss the appeal for the reasons stated by the learned trial judge.

SLOAN, J.A.: In my view the learned trial judge reached the right conclusion and I would dismiss the appeal.

O'HALLORAN, J.A.: The appellant company authorized two of its officials to operate its shingle mill temporarily under the cloak of its name. During that interval a quantity of shingles was purchased from the respondent company in order to complete a shipment in the name of the appellant to one of its Seattle customers.

As I read the evidence, the course of conduct of the appellant during that interval constituted a holding out to the public that it was then operating its shingle mill as usual. It should therefore be held liable to the respondent which supplied the shingles in its ordinary course of business and without knowledge of the business device to which the appellant had resorted.

I would dismiss the appeal.

FISHER, J.A.: I would dismiss the appeal for the reasons given by the Chief Justice.

Appeal dismissed.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitors for respondent: *Sullivan & McQuarrie.*

BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JR.

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April 16.

Costs—Petition to cancel share certificate and rectify register—Granted—New trial ordered on appeal—Petition dismissed on rehearing at instance of petitioner with right to commence new action—Costs of first hearing to abide result of new action—Appeal—Costs to follow event—R.S.B.C. 1936, Cap. 42, Sec. 78.

On the application of the petitioner it was ordered by MORRISON, C.J.S.C. on the 21st of May, 1941, that the issue of 753 shares of the capital stock of the petitioner in the name of Ray W. Jones, Sr. as represented by share certificate No. 75, be cancelled and that the share register of the petitioner herein be rectified accordingly. On appeal, a majority of the Court held that there should be a new trial and that the costs of the hearing appealed from abide the result of the hearing to be had pursuant to this judgment. On the rehearing, counsel for the petitioner applied to have the petition dismissed with leave to institute new proceedings against the heirs of Ray W. Jones, deceased. An order was made granting the petitioner's application and ordering that in the event of the petitioner commencing new proceedings within thirty days, then the costs of the hearing of the said petition in the first instance in the Court below shall abide the result of the hearing of such proceedings that will be commenced as aforesaid.

Held, on appeal, reversing the decision of MANSON, J., that when the petitioner requested the learned judge below to dismiss his petition after the hearing in this Court, the respondent then was entitled *ex debito* to his costs up to the motion for dismissal, since costs would follow the event unless for good reason otherwise ordered. This right to costs is according to the judgment of this Court on the former hearing, when it was ordered that the costs of the original hearing before MORRISON, C.J.S.C. abide the result of the new hearing.

APPEAL by defendant from the decision of MANSON, J. of the 27th of November, 1941, whereby the petition of British American Timber Company Limited was dismissed with liberty to [said company] to institute new proceedings against the said Ray W. Jones, Jr. for himself and the heirs . . . of the late Ray W. Jones, deceased, and . . . in the event of the [said company] not commencing new proceedings [against said parties] within a period of 30 days from date of entry of this judgment, . . . the costs of the hearing of the said petition in the first instance in the Court below shall abide the result of the hearing of such proceedings that will be commenced as aforesaid within the period of 30 days from the date of entry of this judgment.

On the hearing of the petition in the first instance it was ordered by MORRISON, C.J.S.C. on the 21st of May, 1941, that the peti-

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tioner's prayer be granted, and that the issue of 753 shares of the capital stock of the British American Timber Company Limited in the name of the late Ray W. Jones, as represented by share certificate No. 75, be cancelled and that the share register of said company be rectified accordingly. On appeal it was ordered by the Court of Appeal

that a new trial be held for the rehearing of the petition, and that the costs of the hearing now appealed from abide the result of the hearing to be had pursuant to this judgment.

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

Carmichael, for appellant: The appellant had to set the case down for rehearing and on the hearing the petitioner, of its own motion, refused to proceed and applied to have the petition dismissed and for leave to institute new substantive proceedings. This was granted with the costs of the former proceedings to abide by the result of an entirely new action. There was a grave injustice in depriving us of the costs of the former proceedings and contrary to the judgment of the Court of Appeal whereby the costs of the first hearing was to abide the result of the new trial, contrary to the Rules of Court and established practice. It is putting on the appellant the expense of abortive litigation commenced, prosecuted and abandoned by the respondent on its own motion. I am entitled to all the costs up to the time of his application to start a new trial.

Campbell, K.C., for respondent: Under section 16 of the Court of Appeal Act there is no appeal on a question of costs. The petition was brought under section 78 of the Companies Act. On the question of rectifying the register see *In re National and Provincial Marine Insurance Co. Ex parte Parker* (1867), 2 Chy. App. 685, at pp. 690-1; Palmer's Company Law, 16th Ed., 111; *Askew's Case* (1874), 9 Chy. App. 664. As to the first petition, it was a necessary preliminary step that had to be taken for which costs may properly be granted: see *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 273, and on appeal (1910), 15 B.C. 305, at p. 308; *Re Smart* (1888), 12 Pr. 635. The learned judge exercised his discretion. On the question of

a new trial see *McSweeny et al.* v. *The Windsor Gas Co. Ltd.*, [1940] O.W.N. 561; *Hunter* v. *Boyd* (1903), 6 O.L.R. 639; *Canadian Pacific Ry. Co.* v. *Blain* (1905), 36 S.C.R. 159. The appellant acquiesced in the new action and waived a right to object to the order as to costs. He accepted the order and cannot now raise this point: see *Coughlan & Son Ltd.* v. *The King*, [1937] Ex. C.R. 29; *Centre Star* v. *Rossland Miners Union* (1902), 9 B.C. 325; *Cotton* v. *Rodgers* (1878), 7 Pr. 423; *Goddard* v. *Bainbridge Lumber Co.* (1933), 47 B.C. 390, at p. 397.

Carmichael, was not called on in reply.

McDONALD, C.J.B.C.: I am of opinion that when the petitioner requested the learned judge below to dismiss his petition after the hearing in this Court, the respondent then was entitled *ex debito* to his costs up to the motion for dismissal, since costs would follow the event unless for good reason otherwise ordered. This right to costs is according to the judgment of this Court on the former hearing; the order of this Court was that a new trial be held for the rehearing of the petition herein, not, be it observed, the hearing of some other petition or action, but this petition. This Court further ordered that the costs of the original hearing before MORRISON, C.J.S.C. abide the result of the new hearing. They abide the result of the judgment of this Court. When the petitioner chose to have his petition dismissed, then no matter what his future intentions were, or action may be, he should be liable for all the costs that had been incurred up to that time. I think section 16 of the Court of Appeal Act does not apply here.

I would allow the appeal. So far as the costs are concerned the appellant to have the costs of this appeal, less the costs of the motion regarding the factum, because we decided that in Mr. *Campbell's* favour.

Carmichael: Due to the unfortunate death of the late Chief Justice, when I made my application before, we had considered only the question of the costs of this action when I applied to set this case down for hearing in Vancouver.

McDONALD, C.J.B.C.: Those costs were given against you. The next day when Mr. *Campbell* had to apply for adjournment those costs were given against him.

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Carmichael: What I am asking the Court to decide is that by reason of the argument coming up before lunch and the Court rising to attend the funeral of the late Chief Justice, the case ran into two days; and I am asking now that the one motion offset the other. I do not think we should be penalized for two days' costs.

MCDONALD, C.J.B.C.: I think we better leave it to see what happens.

Carmichael: Very well, my Lord.

MCQUARRIE, J.A.: The costs here and below.

MCDONALD, C.J.B.C.: The costs of this appeal, and other costs incurred.

Campbell: This judgment does not affect the new action in any way.

MCDONALD, C.J.B.C.: No. That is why I put in those words. In so far as costs are concerned the new action proceeds.

Appeal allowed.

Solicitor for appellant: *J. F. Downs.*
Solicitor for respondent: *J. A. Campbell.*

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March 13, 16, 17; *April* 14.

THE KING *EX REL.* LEE v. WORKMEN'S COMPENSATION BOARD.

Mandamus—Workmen's Compensation Board — Old-age pension — Discontinuance of payment by Board—Application by pensioner for mandamus to compel payment—Whether Board a special or general agent of Crown R.S.C. 1927, Cap. 156, Sec. 9, Subsec. 3—R.S.B.C. 1936, Cap. 208.

The applicant Lee was paid an old-age pension by the Workmen's Compensation Board for six years prior to the 1st of September, 1941. His pension was discontinued on the ground that he had divested himself of an equity in a certain property in Nanoose District, British Columbia. He seeks *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension from September 1st, 1941, as required by the Old Age Pensions Act (Dominion) and the Old-age Pension Act (Provincial) and the regulations thereunder. It was held that there is nothing in either Act or the regulations to support the action taken by

Re Usaki
24 D.L.R. (2d) 761
Rammell v. ...
28 D.L.R. (2d) 138

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the Board, and *mandamus* lies to compel it to make payments to persons entitled to pensions.

Held, on appeal, affirming the decision of MANSON, J. (MCDONALD, C.J.B.C. dissenting), that there was a statutory obligation or duty on the part of the Board to pay the respondent the pension and to continue such monthly payments as may be required pursuant to the provisions of the Old Age Pensions Acts and regulations. The Court below was right in directing a *mandamus* as asked to compel the Board to do the very thing authorized by the Legislature and for which the Legislature specifically provided the money.

Distd
Re Central Can. Potash Co & Min. of Mineral Resources
32 D.L.R. (3d) 107
(Sask. C.A.)

APPEAL by defendant from the decision of MANSON, J. of the 23rd of January, 1942 (reported, *ante*, p. 298) on an application by Henry Richard Lee for a *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension from the 1st of September, 1941, under the Old Age Pensions Act (Dominion) and regulations made thereunder, and the Old-age Pension Act (Provincial) and regulations made thereunder. Lee was paid an old-age pension by the Board for six or seven years prior to the 1st of September, 1941. His pension was discontinued on the ground that he had divested himself of his equity in lot 3 of lot 29, Nanoose District. Prior to 14th July, 1941, Lee and his brother, a pensioner, were the registered owners of lots 4 and 5 and part of lot 3 of said lot 29. The brothers were indebted to Mr. and Mrs. Matterson in a sum in excess of $2,500, which money had been loaned to them from time to time and had been used in part for the payment and discharge of a mortgage upon the aforementioned land for the payment of taxes against the said lots, for the payment of hospital bills and other miscellaneous purposes. On the 14th of July, 1941, the Mattersons were pressing for repayment, and had engaged a solicitor for the purpose of taking proceedings to recover from Lee and his brother. The parties then agreed that the Lees would transfer to the Mattersons as joint tenants the portion of lot 3 which they owned, reserving to themselves, or survivor, a life interest. The transfer was made, and in consideration thereof the Lees were given a release and discharge by the Mattersons. The transfer was not a voluntary transfer. The parcel of land transferred appears not to have had a value in excess of $2,000. Lots 4 and 5 were not affected by the trans-

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fer to the Mattersons and are still registered in the names of Lee and his brother. The brother died on the 22nd of August, 1941. It does not appear whether the brothers were joint tenants or tenants in common. The sole ground for discontinuing Lee's pension was the above referred to transfer. On the 13th of November, 1941, the pensioner was advised by the Board by letter of the cancellation of his pension. The application was granted.

The appeal was argued at Vancouver on the 13th, 16th and 17th of March, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

J. A. MacInnes, for appellant: Public funds cannot be reached by *mandamus.* The proper remedy is by petition of right. We rely on the judgment of MURPHY, J. in *Gartley* v. *Workmen's Compensation Board* (1932-33), 57 B.C. 217; Short & Mellor's Crown Office Practice, 2nd Ed., pp. 198 and 212; *Yorke* v. *The King,* [1915] 1 K.B. 852; *Fletcher* v. *Wade* (1919), 26 B.C. 477; *The King* v. *Junior Judge of the County Court of Nanaimo and McLean* (1941), 57 B.C. 52. A pensioner has not got an enforceable claim. What he receives is a gift from the Crown: see Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 692; *Balderson* v. *The Queen* (1898), 28 S.C.R. 261; *Thomas* v. *The King,* [1928] Ex. C.R. 26. *Certiorari* cases have no application to *mandamus*: see *The Queen* v. *Secretary of State for War,* [1891] 2 Q.B. 326, at p. 334. They cannot be *mandamused* unless they are personally liable: see Halsbury's Laws of England, 2nd Ed., Vol. 6, p. 488, par. 602. The case of *The King* v. *The Lords Commissioners of the Treasury* (1835), 4 A. & E. 286 would be against us but it was overruled: *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; *The Queen* v. *Commissioners of Inland Revenue* (1884), 53 L.J.Q.B. 229, at p. 234; *Leen* v. *President of the Executive Council and Others,* [1928] I.R. 408; *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313; *Rex* v. *Commissioners for Special Purposes of Income Tax,* [1920] 1 K.B. 26; *The Minister of Finance* v. *The King, at the Prosecution of Andler et al.,* [1935] S.C.R. 278.

It was not recognized below that the moneys are Crown funds and beyond control of Court: see *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*, [1931] A.C. 662. *Habeas corpus* is totally different from *mandamus*. Prohibition is preventing Courts going beyond their jurisdiction: see *In re Chinese Immigration Act and Chin Sack* (1931), 45 B.C. 3. When the moneys are appropriated for a special purpose and pass to the authorities specified, *mandamus* will not lie: see *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; Clement's Canadian Constitution, 3rd Ed., p. 101; *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284; *Dixon* v. *Workmen's Compensation Board* (1935), 49 B.C. 407.

Cunliffe, for the Crown: Old-age pensions are different in Canada from others. There are the Dominion and Provincial Acts and they act together in providing funds. The Board proceeds under both Acts. The Board can decrease the amount of a man's pension according to his assets, but they cannot exclude it altogether. In cancelling the pension they had no authority whatever. They made no enquiry at all and cancelled his pension. This was an administrative act and the Board is subject to *mandamus*: see *The King* v. *The Lords Commissioners of the Treasury* (1835), 4 A. & E. 286; *In re Baron de Bode* (1838), 6 D.P.C. 776, at p. 792; *The Queen* v. *The Lords of the Treasury* (1851), 20 L.J.Q.B. 305, at p. 310; *The Queen* v. *The Lords Commissioners of the Treasury* (1872), 41 L.J.Q.B. 178, at p. 179. The case of *Literary Recreations Ltd.* v. *Sauve* (1932), 46 B.C. 116, does not deal with anything in issue here. They are not acting as servants of the Crown: see *Fox* v. *Newfoundland Government* (1898), 67 L.J.P.C. 77. The Board is an administrative body: see *Graham & Sons* v. *Works and Public Buildings Commissioners* (1901), 70 L.J.K.B. 860; *The King* v. *Minister of Finance* (1934), 49 B.C. 223, at p. 242; [1935] S.C.R. 278. When the money gets into the hands of the Board they are charged with the payments of pensions, and it being a statutory duty to pay they should do so. It is a ministerial Act: see *Dumont* v. *Commissioner of Provincial Police* (1940), 55 B.C. 298; [1941] S.C.R. 317, at p. 320; *In re Homfray and*

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Building Inspector of the City of Kamloops (1933), 46 B.C. 475, at p. 479; *Rex* v. *Commissioners for Special Purposes of Income Tax*, [1920] 1 K.B. 26; *Rex* v. *Board of Education* (1910), 79 L.J.K.B. 595; *Board of Education* v. *Rice* (1911), 80 L.J.K.B. 796. On the question of acting judicially see *The Security Export Co.* v. *Hetherington*, [1923] S.C.R. 539, at p. 557; [1924] A.C. 988; *Rex* v. *Electricity Commissioners* (1923), 93 L.J.K.B. 390, at p. 399; *The King* v. *Minister of Finance* (1934), 48 B.C. 412, at p. 425. *Mandamus* and *certiorari* are governed on the same principle: see *Re Kendrick and Milk Control Board of Ontario* (1935), 63 Can. C.C. 385; Halsbury's Laws of England, 2nd Ed., Vol. 9, p. 744, par. 1269; *Rex* v. *London County Council* (1931), 100 L.J.K.B. 760. He says that *mandamus* will not lie to affect Crown funds. The Board is not a servant of the Crown and not employed or paid by the Crown. Assessments are made on industries of the Province: see *Scott* v. *Governors of University of Toronto* (1913), 4 O.W.N. 994. The Board is not performing Crown duties, not answerable to the Crown and not dischargeable by the Crown: see *Dixon* v. *London Small Arms Company* (1876), 1 App. Cas. 632. In the *Gartley* case MURPHY, J. followed *The Queen* v. *Commissioners of Inland Revenue* (1884), 53 L.J.Q.B. 229, but in that case they are servants of the Crown and the funds are Crown funds: see also *The Mayor and Assessors of Rochester, in re The Parish of St. Nicholas* v. *The Queen* (1858), 27 L.J.Q.B. 434.

MacInnes, in reply: The leading case on the subject is *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387, at p. 394. The money is voted by Parliament. *Board of Education* v. *Rice*, [1911] A.C. 179, is his best case.

Cur. adv. vult.

14th April, 1942.

MCDONALD, C.J.B.C.: We have to decide whether *mandamus* is a remedy by which a pensioner may enforce payment of an old-age pension. The Court below has so held.

The respondent pensioner qualified as to age, nationality, etc., for the pension, and received it for a time; but recently the

Workmen's Compensation Board, which acts as the Pension Board in this Province, stopped his pension on the ground that he had disposed of property in contravention of the conditions on which they pay pensions. The property disposed of was a half interest in a lot, which the pensioner conveyed to a creditor, getting in return a release of liability. This was apparently done under pressure from the creditor, but was also done without the knowledge or consent of the Board. The Board, in stopping the pension as a result, stated in a letter that it relied on a statutory section which admittedly is inapplicable. Its real justification was regulation 23 (*b*), made under the Dominion Old Age Pensions Act, which regulation authorizes the suspension of a pension if

> a pensioner makes any voluntary assignment or transfer of real or personal property without the approval of the pension authority. . . .

Was the transfer within this regulation? The learned judge below, assuming that the word "voluntary" means "without consideration," has held that the transfer was not one of those struck at. I am not at present prepared to accept that view. "Voluntary" is an ambiguous term, and I have a strong impression that here it is used in the sense of "without compulsion." Section 9, subsection 3 of the Dominion Old Age Pensions Act makes the Board a creditor for amounts paid to a pensioner, and since all pensioners may be considered in the position of insolvents, it seems to me quite a reasonable construction that forbids pensioners to transfer any property without the Board's consent, unless they do so involuntarily, *e.g.*, when compelled by an order of Court.

I am far from satisfied that the transfer made here was the unobjectionable act that the judge below saw. At best, it was a preferring of one creditor to another, *viz.*, the Board. Apart from the Fraudulent Preferences Act, it was an act that the Board could reasonably object to, and I am inclined to think it was a transaction struck at by regulation 23 (*b*). However, the view I take on other points makes it unnecessary to reach a final conclusion on the effect of the regulation.

I shall assume that the Board misinterpreted the regulation. The question remains whether the respondent rightly resorted to *mandamus*.

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In order to make this remedy appropriate, he had to show: (a) a legal right to a pension; (b) the Board's ability to pay it, that is, its legal control of funds available for the purpose; (c) want of any other remedy, since *mandamus* only lies where other remedies fail.

I therefore consider, first, whether an old-age pension is ever claimable as of right. The judge below has quoted statutory provisions that he construes to give a legal right to qualified persons; but these seem to me equivocal, and I find it necessary to consider the general scheme of the statute law applicable. This brings in both Dominion and Provincial legislation, and it is quite obvious from the tenor of this that the Federal and Provincial Legislatures have been collaborating in pursuance of negotiations between the Dominion and the Provinces.

The main statute is the Old Age Pensions Act, R.S.C. 1927, Cap. 156. Section 3 thereof enables the Governor in Council to make an agreement with the Lieutenant-Governor in Council of any Province to pay such Province one-half (increased in 1931 to three-quarters) of what it may pay out under a Provincial statute for old-age pensions under conditions specified in the Dominion Act and regulations made thereunder. Section 4 states that any agreement between the Dominion and Provincial authorities shall endure so long as the Provincial statute is in force, unless the Dominion ends the agreement on ten years' notice. By section 5 of the said Cap. 156 any Province must obtain the Dominion's approval of any proposed scheme of administering pensions and cannot change its scheme without the Dominion's consent. Section 8 of Cap. 156 provides:

> 8. Provision shall be made for the payment of a pension to every person who, at the date of the proposed commencement of the pension. . . .

Then follow seven qualifications to be fulfilled by a pensioner, who must be a British subject, 70 years old, a resident of Canada for 20 years, a resident of the Province for 5 years, not an Indian. His income must be less than $365 a year, and he must not have voluntarily transferred property in order to qualify for a pension. Section 8 (*a*) makes special provision for the blind. By section 9:

> The maximum pension payable shall be two hundred and forty dollars

yearly, which shall be subject to reduction by the amount of the income of the pensioner in excess of one hundred and twenty-five dollars a year.

Section 10 provides for apportionment of the cost of pensions between the authorities of two or more Provinces between which the pensioner's residence has been divided, and section 11 reduces the pension where part of the residence has been in a Province where no pensions are payable. Sections 11 to 15 deal with the effects of changes of residence.

By section 19 the Governor in Council may, on the recommendation of the Minister of Labour, and with the approval of the Treasury Board, make regulations as to pensions generally, and no regulation made before an agreement with a Province shall be altered without the consent of that Province, or under a power of alteration reserved in the regulations. By section 20 all regulations, from the date of publication in the Gazette, shall have the force of statute. They must be presented forthwith to Parliament, if then sitting, if not, then within fifteen days after the beginning of the next Session.

I turn now to the Old-age Pension Act, R.S.B.C. 1936, Cap. 208, which was originally passed 24 days before the Dominion Act. The Provincial Act is much shorter, but it uses similar language. By section 2:

The Lieutenant-Governor in Council may enter into an agreement with the Governor-General in Council as to a general scheme of old-age pensions in the Province pursuant to any Act of the Dominion heretofore or hereafter passed. . . .

By section 3:

The Lieutenant-Governor in Council may by Order authorize and provide for the payment of old-age pensions to the persons and under the conditions specified in any Act of the Dominion heretofore or hereafter passed relating to old-age pensions, and the regulations made thereunder.

By section 4 (1):

Notwithstanding the provisions of the "Workmen's Compensation Act," the Workmen's Compensation Board shall, in addition to the duties assigned to it under that Act, be charged with the administration of this Act, including the consideration of applications for old-age pensions and the payment of old-age pensions.

By section 5:

In the absence of any special appropriation of the Legislature available for the purposes of this Act, all moneys necessary to meet the old-age pensions payable under this Act and the salaries and expenses necessarily incurred in the administration of this Act shall be paid out of the Consolidated Revenue Fund.

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By section 6, the Board shall make up accounts and balance-sheets quarterly and submit them to the Comptroller-General for certification, and these must be laid forthwith before the Provincial Legislature, if sitting, if not, then within fifteen days after the opening of the next Session.

Section 7 allows the Lieutenant-Governor in Council to make regulations

> with regard to the scheme of old-age pensions . . . for the proper administration of this Act, and for regulating expenditures to be made thereunder.

From the restricted wording of this section as compared with the parallel Dominion section, I infer that regulations as to details and circumstances affecting payment to pensioners in particular cases are meant to come from the Dominion, and only general ways-and-means regulations from the Province.

Pension Acts fall generally into two classes. Some authorize the Crown to make payments to qualified persons by way of grace and bounty (see *Nixon* v. *Attorney-General,* [1931] A.C. 184). Others, however, if their language is sufficiently explicit, give a pensioner a legal right to payment of an ascertained or ascertainable sum, and these enable him to enforce his right by action or petition of right: *Wigg* v. *Attorney-General for the Irish Free State,* [1927] A.C. 674. The question is, into which category our Old-age Pension Acts fall.

It has been laid down as a general principle for construing pension Acts that unless the intention to give a legal right to a pensioner is shown "beyond all manner of doubt," they are to be construed as leaving pensions in the bounty of the Crown: *Kidd* v. *The King,* [1924] Ex. C.R. 29, at p. 31. Even language stating that pensioners "shall be entitled" to pensions has been held not to create any legal right, but merely to justify Crown officials as against the Crown in paying the pensions: *Kidd* v. *The King, supra; Thomas* v. *The King,* [1928] Ex. C.R. 26.

We have a strong decision on the construction of pension legislation in the unreported judgment of this Court in *Rex (Wardman)* v. *Manson and Howe* (1933), transcripts of which we have obtained from the Court stenographer. In that case the relator had been in receipt of a mother's pension; this had been stopped by the superintendent, who administered the pension scheme,

wrongfully, as the relator claimed. She obtained a *mandamus* from MORRISON, C.J.S.C. to compel continuance of the pension, but this Court set aside the writ, holding that it did not lie. MACDONALD, C.J.B.C., who gave the principal majority judgment, stated emphatically that the pension lay in the gift of the Government, and was not claimable as of right, that the superintendent was the Crown's agent, and even if he was not doing his duty, the pensioner had no legal remedy. The statute there being construed, *viz.*, the Mothers' Pensions Act, B.C. Stats. 1931, Cap. 42, was in many respects worded more strongly in the pensioner's favour than the Old-age Pension Acts.

Both these statutes, to my mind, show no other purpose than to carry out a bargain between the Dominion and its Provinces for sharing the burden of maintaining the aged poor. All obligations created seem clearly to be obligations between the Dominion and the Province, and between the Province and its servants. I see nothing in either of these Acts to create liability by anyone to the aged poor, and of course there was none at common law.

MANSON, J. has selected section 8 of the Dominion Act as the provision that gives the Board a duty to pensioners. This reads:

> Provision shall be made for the payment of a pension to every person who, ...

(quoted fully above).

But all that this means is that before the Dominion will repay its proportion of the Province's outlay for pensions, they must be pensions paid in accordance with that section. The Dominion or its officers pay no pensions direct, and obviously the Dominion cannot create a Provincial duty towards a pensioner. The Dominion Act throughout is an enabling Act.

A pensioner claiming against the Board must claim some specific amount, but the only figures that appear in either of the statutes are those in section 9 of the Dominion Act. Obviously this section merely defines the Dominion's maximum obligation to the Province. The whole Dominion Act indeed simply validates an agreement by which the Dominion said to the Province: "If you will pay certain pensions, we will share your expense." How that can confer any rights on pensioners I fail to see.

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The Provincial Act is merely the complement of the Dominion Act, and its sole purpose is obviously to carry out the Province's bargain with the Dominion.

Section 4 (1) of the Provincial Act "charges" the Board with duties, but duties toward the Crown; it charges them with payment of pensions, but for carrying out the Province's arrangement with the Dominion. This section is perfectly consistent with the pension's being a pure bounty, payable so long as the Crown wishes it paid, and not a day longer. When the Act is looked at as a whole, it is clearly an enabling Act.

If I am wrong, and the respondent has a legal right to a pension, the question remains whether he has sought his proper remedy in *mandamus* against the Board. If the Board in dealing with pensions, acts as an agent of the Crown, then *mandamus* does not lie, because this would be indirectly to command the Crown as principal. This was hardly disputed, and the judge below did not question the principle. The respondent, however, contends, as he contended successfully below, that the principle does not apply, because the Board was not an agent of the Crown, but of the Legislature. I do not like this phrase, though it has been used judicially; what it conveys is that though the Board is a Crown agent for some purposes, the Legislature has given it statutory powers *ad hoc* which it can and ought to exercise free from intervention by the Crown. That is, it does not derive its authority from the Crown, and owes the duty to perform its functions, not to the Crown, but to those given a statutory right to have them performed.

The Legislature's intentions often have to be inferred from statutes whose objects are none too clear. Where a Board, which is already a Crown servant for other purposes, is given new statutory powers, it may not be easy to say whether it is to exercise them in its own right, independently, or whether it is to exercise them still as the Crown's agent, the statute merely removing doubt as to the propriety of its exercising these new powers, so as to facilitate the obtaining of Crown funds and to satisfy the Crown's auditors. Evidence of the Legislature's intentions may take many forms, but it seems to me elementary that in order to justify any inference that a statute gives a Board

independent statutory powers that enable it to act *proprio vigore,* it must be given means to enable it so to act; and if, on the other hand, the statute gives the Board authority which it can only carry out with the help of the Crown, its servants and resources, then the presumption is clear that the Board is simply to act on behalf of the Crown, as its agent.

Obviously, the first requisite of a pensions board, if it is to be independent of the Crown, is that it must have money to pay pensions. The Act gives the Workmen's Compensation Board, acting as a pensions board, no fund to distribute and no means of raising a fund to be held by it. Instead the Act shows that pensions shall be paid out of yearly appropriations in the Supply Act, if available, otherwise out of consolidated revenue, in other words, out of the Crown's official purse.

MANSON, J. saw no obstacle in the Board's possessing no funds of its own, and having to resort to consolidated revenue for yearly appropriations. But the very case on which he relied as holding that an official with statutory powers was amenable to *mandamus, viz., The Minister of Finance* v. *The King, at the Prosecution of Andler et al.,* [1935] S.C.R. 278, is directly against this view. Davis, J., who gave the judgment of the Court, said at p. 286:

> We are of opinion that in a proper case a *mandamus* lies against the Minister to compel payment out of the fund when as here there is no suggestion that the fund itself is not sufficient to meet the claim without resort to any moneys of the Consolidated Revenue Fund.

By "the fund" Davis, J. referred to the Assurance Fund, built up out of fees collected in Land Registry offices, of which he said, on the same page: "The fund is not public money of the Crown . . . ." I think it is impossible to say the same of yearly appropriations in the Supply Act for the Department of Labour.

The judgment appealed from treats the appropriation made for 1941 as a specific appropriation for pension purposes. Actually, the Supply Act lumps all appropriations for the Department of Labour together, and there is no attempt to segregate them. It is true that the estimates are also in evidence, showing how the appropriation for the Department of Labour is made up, and the figures for the year ending March, 1942, contain an item

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of $762,758.41 for "Old-age Pension Act," made up of "Net cost of pensions" $710,888.41 and "Salaries and expenses" $51,870. I still see nothing specific, and for the respondent to urge that this appropriates a specific amount for his pension seems hopeless. It seems to me that an employee of the Board could as reasonably claim a *mandamus* for payment of his salary, because the estimates contain a figure referable to salaries. Actually, when the estimates were passed the Legislature knew nothing of the respondent, and could not know whether he would be entitled to a pension during 1941-42. However, I do not think these details are really material; the point of substance is that the Legislature voted supplies to His Majesty; they were not voted to the Board, and it was the Crown's responsibility whether these were ever put at the Board's disposal.

The *mandamus* in this case orders the Board to pay the respondent, that is, to do what it has no legal means of doing. The Board may issue a cheque or warrant on the treasury; but neither it nor this Court can compel the treasury to pay.

MANSON, J.'s view that a specific appropriation in the yearly Supply Act for paying the respondent's pension would have given him a legal claim to it seems to me clearly contrary to authority, as well as principle. It is a reversion to the view taken in the case of *The King* v. *The Lords Commissioners of the Treasury* (1835), 4 A. & E. 286, a view which was disapproved in *The Queen* v. *Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387, at p. 395, and definitely overruled in *In re Nathan* (1884), 12 Q.B.D. 461. I think the correctness of his view is also negatived by the reasoning in *Leen* v. *President of the Executive Council and Others,* [1928] I.R. 408, and *Lords Commissioners of the Treasury, ex parte Walmsley* (1861), 1 B. & S. 81.

In *Gartley* v. *Workmen's Compensation Board* (1932), an unreported* case, which seems to have been on all fours with this, MURPHY, J. refused a *mandamus* to a pensioner, following *Nathan's* case, *supra,* and this Court affirmed him on the facts, without deciding whether *mandamus* was appropriate. MANSON, J. referred to this case, but refused to follow MURPHY, J. I

* Since reported, *ante,* p. 217.

think MURPHY, J. was right, and in general approve his reasons, which have been furnished to us.

The other unreported case that I have mentioned, *Rex (Wardman)* v. *Manson and Howe,* is also a direct authority on this point. For the Mothers' Pensions Act, B.C. Stats. 1931, Cap. 42, there construed, had the same provisions as the Provincial Old-age Pension Act for annually laying accounts before the Legislature so as to get yearly appropriations for pensions (section 12) and for payment of pensions out of consolidated revenue, when yearly appropriations failed (section 11); yet this was held not to strengthen the pensioner's position nor to make *mandamus* appropriate. MARTIN, J.A. actually pointed to section 11 of the Mothers' Pensions Act as an indication that the pensioner had no legal right. I think therefore that the judgment appealed from is in conflict with the decision in the *Wardman* case.

I see still another objection to the judgment below. It is a settled rule that a *mandamus* is not obtainable where any other remedy is available. If the grounds on which MANSON, J. granted a *mandamus* were sound, *viz.,* that the respondent had a legal right to a pension and that the Board owed him a duty to pay it, then I can see no reason why the respondent should not have had his remedy by action against the Board: see *Nathan's* case (1884), 12 Q.B.D. 461, at p. 471. If he could sue, then he had no right to ask for a *mandamus*: *ibid.*

I do not think he could sue, for reasons I have given; but those reasons equally show that he had no rights that could form a basis for *mandamus,* even apart from duplication of remedies.

On the argument both parties took the position that the Board acted judicially. Upon consideration, I am of opinion that this is not so. I do not think, upon a careful study of the statutes in question, that the Board has judicial functions, or that it is a tribunal at all, in the true sense. Appellant's counsel argued, in fact, that the Board was a judicial tribunal and at the same time a mere servant of the Crown. Those two views were in my judgment clearly incompatible. Persons exercising judicial functions did act as agents for the Crown in the days of the Stuart Kings, but we have come a long journey since those unhappy days. However, I base my decision on the grounds already stated,

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and for the purposes of this judgment this question thus loses importance.

I would allow the appeal.

MCQUARRIE, J.A.: I agree that the appeal should be dismissed.

SLOAN, J.A.: The principles and tests which a Court ought to apply in determining whether in any particular case *mandamus* will lie are well known and have often been canvassed. The problems arise in the application of those familiar tenets to the circumstances of the special case. The questions at that point fall more in the realm of fact than of law.

Upon consideration of the special facts of this case I have reached the conclusion that, on the authorities, *mandamus* will lie.

I would, therefore, dismiss the appeal.

O'HALLORAN, J.A.: Lee had been receiving the old-age pension for some six years when the appellant Board stopped payment on the stated ground there was no authority to continue it because he had made a transfer of property. In my view the Board acted without jurisdiction, and the Court below was right in granting the *mandamus*. Lee and his brother owed $2,500 to a *bona-fide* creditor who was pressing them for payment and threatening legal action. They jointly owned a parcel of land worth $2,000 which the creditor agreed to accept in full settlement reserving the Lees a life interest in the land. That transfer led the Board to stop Lee's pension.

The only kind of a transfer contemplated in the statute or regulations is a "voluntary transfer." Under regulation 23 (*b*), if a pensioner makes "any voluntary assignment or transfer" without the approval of the Board, the payment of his pension "may be suspended" until the aggregate amount of the suspended payments shall equal the value of the property transferred. But the record before the Court below and before this Court discloses no evidence whatever which points to a "voluntary transfer" or from which it could be legitimately inferred. On the contrary, the unchallenged evidence is, the transfer was made in good faith for valuable consideration, in payment of a *bona-fide* debt, the payment whereof had been legally demanded by a pressing creditor.

A "voluntary transfer" imports lack or inadequacy of consideration. When used in the Old Age Pensions Act and regulations, it carries with it as well a plain meaning of giving away or disposing of property for the purpose of deceitfully qualifying for a pension or deceitfully retaining it (*vide* section 8 (*g*)). No such element has been shown to exist here, or has it been suggested as capable of legitimate inference. There is nothing in the statute which prevents a pensioner making a *bona-fide* transfer for consideration. Nor do the old-age pension payments constitute a charge on the pensioner's property.

There is nothing in the statute which requires a pensioner to retain or preserve his property in the form it was when he was granted the pension. It is true that by section 9, subsection 3 the pension authority may recover pension payments "out of the estate" of the deceased pensioner as a "debt due." But that clearly implies the freedom of the pensioner in his lifetime to sell and resell his property without interference by the Board. For that claim is not against any specific property, and does not arise until after his death, and then only "as a debt due out of the estate." When the appellant Board cited section 9, subsection 3 in its letter to Lee as the governing ground for its decision that the statute does not allow the transfer of property, it clearly gave an interpretation to the statute which Parliament neither expressed nor intended.

In this case Lee was receiving the maximum pension of $20 per month. His interest in the property could not decrease his pension. His pension was the maximum, just the same as if he did not have an interest in the property. Obviously the property could not affect his qualification for a pension, even if he gave it away by a "voluntary" transfer. Lee swears and the Board does not deny that the property transferred did not have a value of more than $2,000. His interest therein was $1,000, his brother owning the other half. Adopting the method of calculation in the second sub-paragraph of regulation 17 (*a*), 5 per cent. thereof is $50 per year, or $75 per year less than the deductible income allowed by section 9, subsection 1. Even if the property were worth two and a half times what Lee testified, its calculated income value would still entitle him to the maximum pension.

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The meaning of "voluntary transfer" in regulation 23 (*b*) stems from section 8 (*g*), and therefore to apply at all (which it cannot in any event as there is no evidence whatever that the transfer was "voluntary"), it must relate to a disposition of property whose calculated income value under regulation 17 (*a*), *supra,* does actually affect the retention of the pension. If that is correct, then the power in regulation 23 (*b*) to suspend a pension if a "voluntary transfer" is made without the Board's approval, should be held to arise only when the *quantum* of the pension is affected thereby. If the maximum pension is being paid, then a "voluntary transfer" does not affect the *quantum,* unless at the time of transfer its calculated income value exceeds the $125 allowed income, and thereby would reduce the maximum pension paid, by the amount of such excess. But that does not arise here.

To interpret regulation 23 (*b*) in any other way would be to read it as if it were in itself an enactment of substantive law, instead of a procedural regulation limited in its regulatory ambit by the powers given in the statute. It is true that by section 20 of the statute, the regulations when published in the Canada Gazette, "shall have the same force and effect as if they had been included herein." But that extends to their probative force and binding effect. It does not make them anything more than they are, *viz.,* procedural regulations limited to the power the statute has already given. This is also made clear by section 19 of the statute which enables the Governor in Council to "make regulations, not inconsistent with the provisions of this Act." That power does not confer jurisdiction upon the Governor in Council to enact substantive law. It gives power to make rules for carrying out the powers the statute has previously conferred.

Considering that Lee is a man of 76 years of age and wholly dependent on the old-age pension, one would have thought that if the Board had really regarded the transfer as "voluntary," it would not have stopped his pension entirely, but would have continued it while deducting from it the amount of the calculated income value of the property transferred, which might be in excess of the permitted income of $125 per year. Its failure to adopt this humane procedure in the administration of humani-

tarian legislation, is in itself rather convincing that the Board acted wholly on the assumption (borne out by its letter to Lee), that the statute prohibited Lee as a pensioner from making any transfer whatever of his property. The Board stopped the pension not because it thought the transfer was "voluntary," but because it considered Lee had no right to make any transfer at all.

The appellant Board by section 4 (1) of Cap. 208, R.S.B.C. 1936, is charged with the administration of the Old-age Pension Act "including the consideration of applications for old-age pensions and the payment of old-age pensions." As the Board has clearly acted without jurisdiction, it has rendered itself subject to correction by *mandamus*. For it has refused or eluded the performance of an express duty, and the Court will interfere by *mandamus* to compel it to do what appertains to its duty: *vide* Lord Ellenborough, C.J. in *The King* v. *The Archbishop of Canterbury* (1812), 15 East 117; 104 E.R. 789, at p. 799, applied by this Court in *Rex* v. *Lennox* (1940), 55 B.C. 491, at p. 494. I might add here that even if the Board had stopped the pension because it regarded the transfer as "voluntary," *mandamus* would still lie, but for reasons it is now not necessary to consider, since that was not the ground upon which the Board acted.

In *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371, the vestry had declined to grant a superannuation allowance to a retiring officer because it was influenced by the idea it had no jurisdiction at all as to the amount. *Mandamus* was granted, and Lord Esher, M.R. said at pp. 375-6:

> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

And again at p. 377:

> . . . the vestry did not bring their minds to the question which they had to decide, and took into account circumstances which they ought not to have taken into account, and so did not properly exercise their discretion.

The above was applied as a general principle in *Sadler* v. *Sheffield Corporation* (1924), 93 L.J. Ch. 209, at p. 224. *Vide* also *The Queen* v. *Bishop of London* (1889), 24 Q.B.D. 213, Lord Esher, M.R. at p. 227, Lindley, L.J. p. 240, Lopes, L.J.

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p. 243; *Rex* v. *Board of Education* (1910), 79 L.J.K.B. 595, Farwell, L.J. at pp. 603-4, the decision being affirmed in the House of Lords, [1911] A.C. 179. *Rex* v. *Brighton Corporation* (1916), 85 L.J.K.B. 1552, Lord Reading, C.J. at pp. 1554-5.

Nor need we be concerned whether what the Board has done may be described as a "ministerial" or a "judicial" act. As Lord Parmoor said in *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72, at p. 87, in respect to *mandamus* directed to an administrative board:

> Whether the order of the Local Government Board is to be regarded as of an administrative or of a *quasi*-judicial character, appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.

The King v. *The Bishop of Sarum* (1916), 85 L.J.K.B. 544, at pp. 548-9, and *In re Chinese Immigration Act and Chin Sack* (1931), 45 B.C. 3, at pp. 5-7 are examples of the grant of *mandamus* to order the doing of what was there described as a "ministerial" act. *Vide* also *Dumont* v. *Commissioner of Provincial Police* (1940), 55 B.C. 298, affirmed generally [1941] S.C.R. 317.

Once it appears a public body has neglected or refused to perform a statutory duty to a person entitled to call for its exercise, then *mandamus* issues *ex debito justitiæ*, if there is no other convenient remedy, *vide The King* v. *Bank of England* (1780), 2 Dougl. 524; 99 E.R. 334, *per* Lord Mansfield, and *The Queen* v. *The Justices of Surrey* (1870), 39 L.J.M.C. 145, a *certiorari* case which was approved by Lord Blackburn in *Julius* v. *The Bishop of Oxford, infra,* at p. 591, as applicable to *mandamus* and prohibition; and also *The King* v. *The Bishop of Sarum, supra,* and a prohibition case *Farquharson* v. *Morgan* (1894), 63 L.J.Q.B. 474, at pp. 476, 477, and 479, and also *In re Chinese Immigration Act and Chin Sack, supra.* If, however, there is a convenient alternative remedy, the granting of *mandamus* is discretionary, but to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice, and *vide Dumont* v. *Commissioner of Provincial Police, supra,* at p. 303 in this Court.

The high prerogative writ of *mandamus* was brought into being to supply defects in administering justice. It is not to be regarded as some secondary or unusual remedy which the Courts should avoid granting if they can avoid it, but as a speedy, inexpensive and efficacious remedy wherever by any reasonable construction it may be made applicable. As was said in the Court of Exchequer Chamber in *The Mayor of Rochester* v. *The Queen* (1858), El. Bl. & El. 1024; 120 E.R. 791, at p. 794, *per* Pollock, C.B. and Martin, B.:

> Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.

The modern tendency is to enlarge the scope of *mandamus,* as Duff, J. (as he then was) said of *certiorari* in *The Security Export Co.* v. *Hetherington,* [1923] S.C.R. 539, at p. 555.

Notwithstanding the foregoing, counsel for the appellant contended *mandamus* does not lie to the Board. His supporting argument resolved itself into two main grounds (1) Public funds or Crown funds cannot be reached by *mandamus,* and (2) the Board is an officer or servant of the Crown. These two grounds are closely allied, and upon examination it will be found the first merges into the second, which may thus be regarded as the substantive objection.

The objection as advanced, implies that the *mandamus* orders the Board to expend moneys which the Board has not in its control for the purpose the *mandamus* was granted. It implies that the Dominion Parliament and the Provincial Legislature have not authorized and provided the Board with the money for the performance of the specific statutory duty, which the Board has neglected and the *mandamus* now compels it to perform. But that is not the case. The Parliament of Canada and the Provincial Legislature synchronized and co-ordinated their respective powers to pass legislation making obligatory the payment of old-age pensions. Section 8 of the Dominion Act, Cap. 156, R.S.C. 1927, peremptorily provided "Provision shall be made for the payment of a pension to every person who" possesses certain qualifications there specified. Section 4 of the Provincial Act, Cap. 208, R.S.B.C. 1936, charged the appellant Board with the

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administration of old-age pensions including "the payment of old-age pensions."

The statute not only confers the faculty or power, but makes imperative the performance of that power. It is not of an enabling or permissive character such as "it shall be lawful" in *Julius* v. *The Bishop of Oxford* (1880), 49 L.J.Q.B. 577 (also a *mandamus* case but refused on other grounds). Yet in that case Earl Cairns, L.C. at p. 580 summarized the law thus:

> Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

That is the case here. In section 8, *supra,* the persons are "pointed out" of whom Lee is one, with regard to whom Parliament has "supplied a definition of the conditions" upon which they shall be paid a pension. In the assessment appeal of *Shannon* v. *Corporation of Point Grey* (1921), 30 B.C. 136, affirmed (1922), 63 S.C.R. 557, the exercise of the power by the Court of Revision there considered was by no means of the mandatory and imperative character we find in section 8. But yet Lord Chancellor Cairns's statement of the law as applied by the judge of first instance was upheld in this Court and the Supreme Court of Canada, although with some division of opinion in view of the less imperative language in which the power was couched.

In *Cameron et ux.* v. *Wait* (1878), 3 A.R. 175, at p. 193, Harrison, C.J.O. said when a statute confers authority to do an act whether judicial or ministerial, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. In such a case he continued, although the words may only be used as conferring the power, the exercise of the power depends not on the discretion of the person authorized, but upon proof of the particular case out of which the power arises, following *Macdougall* v. *Paterson* (1851), 11 C.B. 755; 138 E.R. 672, approved in *Julius* v. *Bishop of Oxford, supra.* Also his further observation at p. 194, applies with equal force to the case now before us:

> In giving one person the authority to do the act, the statute impliedly gives to the others the right of requiring that the act shall be done, the power

being for the benefit not of him who is invested with it, but of those for whom it is to be exercised.

The power and the mandatory direction in section 8 has been vested in the appellant Board. It is so vested for the benefit of those for whom it is to be exercised, of whom Lee is one, *viz.*, the aged people who fulfil the requirements Parliament has prescribed in section 8, *supra*. They are entitled to call for its exercise and the Court will require its exercise, *vide Julius* v. *Bishop of Oxford,* and *Cameron et ux.* v. *Wait, supra*. Lee was paid the pension for six years. If the Board had not illegally stopped payment he would still be receiving it. Payment of the money was not stopped because the Board has not the money or has no authority to pay it. The money is available but the Board refuses to apply it as the statute requires. This is not a case where the act ordered to be done involves the expenditure of money which the appellant Board has not in its control, or which the Dominion or the Province has not already authorized and provided for.

All Lee asks for, is that the Court order the Board to continue allocating and transferring to him the amount the Parliament of Canada and the Legislature of the Province have ordered the Board to pay him out of moneys already provided for that purpose. That money, if it is not already in the hands of the Board, is nevertheless always available to it and under its control for that purpose, without any further authority or action of Parliament or the Provincial Legislature. Where as here the performance of the statutory duty involves the expenditure in a designated manner, of public funds which the Legislature has entrusted to the public body with an imperative command to it to expend them in that designated manner, the question of "reaching public funds" by *mandamus* cannot properly arise at all. The funds are available to be expended in the manner Parliament has ordered.

All the Court is doing by *mandamus* here is to order the Board to do what Parliament and the Legislature have already commanded it to do. In its letter to Lee stopping his pension the Board indicated his pension payments would be resumed if he should obtain a retransfer of the property. That is clear intimation the money is available. If the money were not available

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to it or under its control, one would have expected the Board to have put that in evidence in the Court below. The Board did not do so. It seems quite clear the Board could not do so in view of the statutory provisions and its own letter to Lee. The Board has the money available but refuses to pay it to Lee, because it has attached conditions to its payment which Lee rightfully contends it has no authority to impose. Once these essential facts appear, it is seen that no issue in regard to public moneys can properly arise here at all.

A great deal of discussion took place as to whether the money was actually appropriated by the Legislature. I am satisfied it was. But we need not in this case be concerned with the procedural steps involved in the appropriation of money by the Legislature. What we are concerned with is that Parliament and the Provincial Legislature have not only authorized the expenditure of old-age pension money by enacted statutes, but have ordered that money to be spent in the manner specified in the statutes. Once that appears as it does here, we are not concerned with the mechanics of appropriation. Nor does it seem, is want of funds (which does not arise here either) a legal excuse for non-payment, *vide The Queen* v. *The Eastern Counties Railway Company* (1839), 10 A. & E. 531; 113 E.R. 201, and *Reg.* v. *Trustees Luton Roads* (1841), 1 Q.B. 860; 113 E.R. 1361.

Counsel for the appellant Board relied strongly on *The Queen* v. *Lords Commissioners of the Treasury* (1872), 41 L.J.Q.B. 178, and *The Queen* v. *Commissioners of Inland Revenue* (1884), 53 L.J.Q.B. 229, referred to as the *Nathan* case. In the former case, the Court discharged the rule for *mandamus* directing the Lords Commissioners of the Treasury to show cause why they should not pay in full certain taxed costs for prosecutions at Assizes and Quarter Sessions, which they considered were taxed too high. In the *Nathan* case the Commissioners of Inland Revenue declined to repay excess probate duty, on the ground they were not satisfied of the lawfulness of the claim. It was not denied in either decision as I read them that a *mandamus* lies to compel performance of a statutory duty, but it was held that the money being in the hands of servants of the Crown, they

could not be *mandamused* as such, any more than the Crown itself could be *mandamused.*

That is to say, it was not held that *mandamus* did not lie because public money was affected, but because a servant of the Crown could not be *mandamused* under any circumstances. That being so, the first objection of counsel for the appellant disappears and merges entirely into his second objection, which those two decisions would seem to uphold, if their reasoning in that respect had been sustained in subsequent decisions. A short answer to the *ratio decidendi* in these two decisions is found in *The Minister of Finance* v. *The King, at the Prosecution of Andler et al.,* [1935] S.C.R. 278, at p. 285, where in delivering the judgment of the Court Davis, J. pointed to the distinction between a Minister of the Crown acting as a servant of the Crown, and "acting as a mere agent of the Legislature to do a particular act." It would follow that any agent of the Legislature ordered by the Legislature to act in a particular manner must also be subject to *mandamus.*

That distinction was followed and applied by this Court in *Dumont* v. *Commissioner of Provincial Police* (1940), 55 B.C. 298, affirmed generally, [1941] S.C.R. 317. To the objection that *mandamus* did not lie against the Commissioner of Police as a servant of the Crown, my brother SLOAN (with whom MACDONALD, C.J.B.C. agreed) said at p. 302:

> The commissioner does not act pursuant to the authority conferred under said section 84 *qua* servant of the Crown but "merely as an agent of the Legislature to do a particular Act" and in such capacity the writ will lie against him.

The appellant Board is essentially an agent of the Legislature in that respect. It is the administrative agency set up by statute to administer old-age pensions. As such it is independent of any Minister of the Crown. It is responsible to the Legislature.

It may be said, of course, every agent of the Legislature is also a servant of the Crown. But a contention that *mandamus* does not lie against a servant of the Crown simply because the Courts cannot command the Crown, overlooks entirely what is really being done by the Court. It is not attempting to command a servant of the Crown as against the Crown. Quite the contrary. It is acting under the Crown, to compel respect to the Crown by

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ordering that the Crown's commands be obeyed by the Crown's servants. The Crown has deposited in the Courts its faculties in that respect. If a Crown servant refuses or neglects to obey the Crown, it is the function of the Courts to compel his obedience. It is the function of the Courts to interpret the laws and enforce them. It is in point to observe that the *mandamus* proceedings are brought in the name of the Crown *ex relatione,* to compel the administrative agency to perform its statutory duty.

The Crown has intervened to assist its subject who has been deprived of his statutory right by the illegal action of the administrative agency in refusing or neglecting to perform the duties which the Crown and Parliament have commanded it to perform. That view is epitomized by the Court of Appeal in *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313. The facts somewhat resemble those in the *Nathan* case, which it did not follow. The applicant had overpaid his income tax and obtained a certificate from the Commissioners for General Purposes entitling him to repayment. When the certificate was presented to the Commissioners for Special Purposes they declined to order payment on the ground the Commissioners for General Purposes had no jurisdiction to issue the certificate.

The argument on behalf of the Commissioners for Special Purposes was, *vide* p. 316, that *mandamus* did not lie, because the application was substantially for the payment of money and not to compel the performance of a statutory duty, as the statute itself created no duty between the applicant and the Commissioners for Special Purposes. It was also argued that the Crown could not direct *mandamus* to itself or its servants acting merely as such and reliance was placed on *In re Nathan* and *The Queen* v. *Lords Commissioners of the Treasury, supra.* The arguments were rejected and *mandamus* upheld. Lord Esher, M.R. said at p. 317:

> The case falls within the class of cases, where officials having a public duty to perform, and having refused to perform it, *mandamus* will lie on application of a person interested to compel them to do so.

That is what the House of Lords said in effect in *Julius* v. *The Bishop of Oxford, supra.* But the Commissioners for Special Purposes were undeniably "servants of the Crown." But that fact alone did not exempt them from *mandamus.* This is made

more clear in the judgment of Lindley, L.J. when he said at p. 322:

> The application is not to enforce payment of money by the Crown, but to enforce the making of an order [my note—for payment] by the Commissioners which it is the duty of the Commissioners to make, and without which the repayment cannot be obtained. I think the case comes within the principle of the cases of *Reg.* v. *Lords of the Treasury*, [(1851)] 16 Q.B. 357 and *Reg.* v. *Commissioners of Woods and Forests*, [(1850)] 15 Q.B. 767, and not within the cases cited for the Crown.

That is a strong case. Its strength is better appreciated when it is noted that the cases cited by the Crown, which Lindley, L.J. did not follow, were *In re Nathan* and *The Queen* v. *Lords Commissioners of the Treasury, supra.* The latter decision is not to be confused with *Reg.* v. *Lords of the Treasury* (1851), 16 Q.B. 357 (The Queen's annuity case) which was followed. In the other decision followed by Lindley, L.J. *viz., Reg.* v. *Commissioners of Woods and Forests* (1850), 15 Q.B. 761, it is significant that at p. 772 Lord Denman, C.J. affirmed the view of the Court given fifteen years before in *The King* v. *The Lords Commissioners of the Treasury* (1835), 4 A. & E. 286, and said "it had never been called in question." This is stated because in both *The Queen* v. *Lords Commissioners of the Treasury* and *In re Nathan* it has been referred to as of doubtful authority. Lord Lindley's judgment as cited was applied in *Rex* v. *Income Tax Commissioners* (1919), 89 L.J.K.B. 194 (Barnardo's Homes case). Bray, J. said at p. 203:

> The *mandamus*, therefore, is to compel the Commissioners to make the order referred to. In making the order are they the servants or representatives of the Crown, or are they persons interposed between the subject and the Crown?

Bray, J. held that *The Queen* v. *The Commissioners for Special Purposes of the Income Tax* and particularly Lord Lindley's judgment therein "practically decided" that question.

After referring to Lord Esher's distinctive statement in *The Queen* v. *Secretary of State for War* (1891), 60 L.J.Q.B. 457, at p. 463, that the Crown cannot be *mandamused,* he proceeded at p. 204:

> In the present case, it seems to me clear that these Special Commissioners are not acting merely as servants of the Crown. They are answerable, it may be, to the Crown, but they are answerable to the subject who is entitled to exemption. They are directed to make an order without which the repay-

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ment cannot be obtained. That being so, it appears quite clear that the common law rule does not prevail, because, in fact, the order is not against the Crown but against the Special Commissioners . . . , who have an independent position, and are answerable to the subject if they have refused to make an order which they ought to have made.

In the same case, the Earl of Reading, C.J. and Darling, J. both referred to the observation of Cockburn, C.J. in *The Queen* v. *Lords Commissioners of the Treasury, supra,* that *mandamus* does not lie against a servant of the Crown, because the Court cannot command the Crown.

It was held that principle was not applicable. The essential difference as the Earl of Reading pointed out at p. 201, is that the officer "is charged with a statutory duty by the express provision of the statute." That is the case here. While the appellant Board is a "servant of the Crown" in the broad sense, yet it is charged with a statutory duty by the express provisions of the statute. If it fails in that duty, it is answerable to the subject who is entitled to its performance, and an order then made is not made against the Crown. *The Queen* v. *The Commissioners for Special Purposes of the Income Tax* and *Rex* v. *Income Tax Commissioners* make it clear that the principle cited in *Julius* v. *The Bishop of Oxford* and *Cameron et ux.* v. *Wait* applies as well to a "servant of the Crown." In *Rex* v. *Income Tax Commissioners,* the Earl of Reading, C.J. observed "The Crown represents the public."

In *Rex ex rel. McKay* v. *Baker,* [1923] 1 W.W.R. 1430, the Minister of Education in Alberta was ordered by *mandamus* to make due provision for the settlement and adjustment of assets and liabilities of a school district. Stuart, J.A. (with whom Hyndman, J.A. agreed), pointed out at p. 1432 that the Minister had misconceived the true construction and purpose of the statute and did not exercise the real jurisdiction given to him. In *Commissioner for Local Government Lands* v. *Abdulhusein Kaderbhai* (1931), 100 L.J.P.C. 124, it was not suggested that the Commissioner for Local Government Lands and Settlement in Kenya was not subject to *mandamus* because he was a "servant of the Crown," and there so described by Lord Atkin at p. 127. The case turned upon whether he was acting within his statutory power, although it was intimated as well at p. 127 that the

ordinance there did not as the statute does here, confer a right upon the complainant to have the power exercised in his favour.

In *Local Government Board* v. *Arlidge* (1914), 84 L.J.K.B. 72 appeals from the local housing authority which formerly lay to the quarter sessions, had been transferred to the Local Government Board (at the head of which was a Minister of the Crown) resembling other great Departments of State (pp. 78-9). The only authority which could review what it did in the course of its duty was Parliament to which the Minister in charge was responsible (p. 80). Nevertheless, it was held by the House of Lords that if it failed to act "judicially" it was subject to *certiorari*. That the same principle was there considered applicable to *mandamus* may be seen from the reference to *Board of Education* v. *Rice* (1911), 80 L.J.K.B. 796, then followed.

Since writing the foregoing I have found the House of Lords' decision of *Commissioners for Special Purposes of Income Tax* v. *Pemsel,* [1891] A.C. 531. For the appellant Commissioners it was argued at p. 536 that being Crown servants no *mandamus* should issue; that the proper remedy was by petition of right praying that the moneys in the hands of the Crown might be repaid. Reliance was placed on *In re Nathan, supra,* and it was submitted the case came within that decision and not within *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888), 21 Q.B.D. 313, but the House informed counsel for the respondent they need not argue that question.

Lord Halsbury, L.C. said at p. 539:

> The statute under which the Commissioners are acting is peremptory in its terms to the Commissioners to make the allowance, and to give the certificates in cases where they are commanded to be given. If, therefore, the case is made out that the facts show a case where the allowance ought to be made, and the certificate, which is merely consequential, should be given, there is a plain duty imposed by the statute on these executive officers, the neglect of which is properly enforceable by *mandamus.*

That is the case here. The statute is peremptory to the Board to pay the pension, according to the conditions the statute has specified. Lee qualified therefor and his pension was stopped illegally. *Mandamus* lies accordingly to the Board.

Counsel for the appellant Board referred us to decisions in respect to civil service pensions and military pay. But whether

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a servant of the Crown may be *mandamused* depends upon whether in the statute in the particular case he is charged with a statutory duty by the express provisions of the statute within the meaning of *Julius* v. *The Bishop of Oxford, Cameron et ux.* v. *Wait, The Queen* v. *The Commissioners for Special Purposes of the Income Tax,* and the *Pemsel* case, *supra.* For example, in one of the cases cited, *Balderson* v. *The Queen* (1898), 28 S.C.R. 261, it appears at p. 267 that the statute expressly provided it did not

> confer "any absolute right to superannuation allowance, or impose any statutory obligation on the Crown to grant it."

That is not the case here.

We reach the last point, the form of the *mandamus* order. It directs payment of the twenty dollar monthly old-age pension from 1st September, 1941, and the continuance of "such monthly pension payment as may be required pursuant to the provisions of the statute and rules." The objection is, the order should not direct the Board to act in a particular way, but should send the matter back to the Board and direct it to do its duty according to law. It is based on the proposition generally stated that it is quite unusual to direct a judicial tribunal to act in a particular way, unless it is quite plain that what is to be done is purely ministerial and not judicial, *per* Lord Alverstone, C.J. in *Rex* v. *Justices of Kingston; ex parte Davey* (1902), 86 L.T. 589, at p. 590.

That was said of judicial tribunals. But the appellant Board is not a judicial tribunal. It is an administrative agency. Its job is to administer the Old-age Pension Act. No doubt, in the course of doing so it reaches decisions which may involve interpretation of the common or statute law, which affect personal rights and property. But that does not make it a judicial tribunal any more than it makes the manager of a large business a judge. The duty cast upon it of reaching its decisions "judicially" does not make it a judicial tribunal, *vide St. John* v. *Fraser,* [1935] S.C.R. 441, Davis, J. at pp. 452-3. In the case of the constituted Courts, no doubt some kind of a workable distinction has grown up between "ministerial" and "judicial" acts. But it seems with respect that an attempt to apply that same

distinction to administrative bodies leads easily to over-simplification.

In my view at least, the form of the *mandamus* order does not depend upon a distinction between "ministerial" and "judicial" acts, but rather on the circumstances found in the particular case. For example (1) if Lee had been applying for a pension in the first instance, and the Board had then refused to receive and entertain his application, the form of a *mandamus* would not be to pay him so much per month, for that would be usurping the Board's jurisdiction, but the order to the Board would then be to hear and determine his application according to law. But (2) if as here, Lee having been in receipt of a pension for some years, and it is stopped by the Board without jurisdiction, the order could not be to hear and determine, for the Board having stopped the pension without jurisdiction it is *coram non judice* in that respect and there is nothing to hear and determine, and the payment of the pension should be resumed as if it had not been illegally interrupted.

Therefore, the only appropriate order is to direct continuance of the pension. If, as could have been done, the Board's refusal to continue the pension had been quashed on *certiorari* in aid of the *mandamus,* it would then be quite clear that the only proper order is the one which was made. We could, of course, as Stuart, J.A. said in *Rex ex rel. McKay* v. *Baker, supra,* at p. 1433 direct the order below to be amended by inserting a direction to quash what the Board did. I would do so if any confusion should arise without it, although I do not regard it as necessary. *Certiorari* in aid sometimes accompanies *habeas corpus* where a sufficient statement of what is complained of cannot be obtained without it. But if it can be, the authority for holding the applicant may be quashed without it on *habeas corpus.* As the Board acted without jurisdiction, I find the present order to be in proper form in the circumstances concerned.

Mandamus orders to act in a particular way were made in *The King* v. *The Bishop of Sarum, In re Chinese Immigration Act and Chin Sack* and *Dumont* v. *Commissioner of Provincial Police, supra.* In *The Bishop of Sarum* case the complainant was elected as churchwarden by the Parish. The Bishop refused

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to admit him to make the prescribed declaration as churchwarden alleging he was not a fit person. The Court held that as it was for the Parish to elect and not for the Bishop to control, he acted without jurisdiction, and ordered him to admit the complainant to make the declaration. That is analogous to the present case, since the Board terminated Lee's pension without jurisdiction. The natural order is to direct the Board to do that which it illegally refused to do, *viz.*, keep on paying the pension. Similar reasoning applies to the *Chin Sack* and *Dumont* cases on their own facts.

Finally, as to costs. Counsel for the appellant Board relied on the Crown Costs Act, Cap. 67, R.S.B.C. 1936, and the decision of this Court (MACDONALD, C.J.A., GALLIHER and MCPHILLIPS, JJ.A., the latter dissenting) in *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284. It did not concern the Old-age Pension Act. *Rex* v. *Income Tax Commissioners* (1919), 89 L.J.K.B. 194, *supra,* was there distinguished on the ground that under the common law, "Crown" did not include its officers, servants or agents, which it was said our Crown Costs Act was expanded to include. In the present case, however, the "agent of the Crown" was acting beyond its jurisdiction. It could not, of course, be said to represent the Crown, while doing something it had no authority to do, in fact while neglecting to do what the statute commanded it to do. While so acting it could not, within the language of the Crown Costs Act, be "acting for the Crown." The report does not disclose that happened in the *Rosebery Surprise* case. In any event the point does not appear to have arisen there, and there is no reason we should not dispose of it as we have; and *vide Gentile* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 307, and *Rex* v. *Gartshore* (1919), 27 B.C. 175, at p. 179.

Counsel for the respondent relied also on the alternative ground that the Crown Costs Act does not apply to the Crown Dominion. The appellant Board, although designated by the Province under an agreement with the Dominion, is nevertheless exercising certain powers which the Province cannot give it, but which it can exercise only with the authority of the Dominion which contributes some 75 per cent. of the money the Board

expends in old-age pensions. I reach no decision as to the extent, if any, the appellant Board is agent for the Crown Dominion. It is noted that the regulations under which the Board acts are made by the Crown Dominion and not by the Crown Provincial. On this alternative point I am left in doubt as to the Board being an agent of the Crown Provincial within the meaning of the Crown Costs Act. And I cannot feel justified, therefore, in concluding that the somewhat anomalous Crown Costs Act was intended to apply in the present circumstances. In any event the Crown has no interest in resisting the jurisdiction of its own Court.

I would dismiss the appeal with costs here and below.

FISHER, J.A.: This appeal should, in my opinion, be dismissed. I agree with the reasons given by the learned judge below for his judgment except on one phase of the matter on which, with all respect, I disagree. I propose to add a few observations of my own, during the course of which I will indicate the point of disagreement.

I have had the privilege of reading the judgment of the learned Chief Justice and, as either his judgment or that of MANSON, J. in the Court below sets out most of the provisions of the statute law applicable, which includes both Dominion and Provincial legislation, I will not set out many of them hereinafter. I do not think, however, that the following sections of the Dominion Old Age Pensions Act have been fully set out in either judgment and I would like to set out such sections:

3. (1) The Governor in Council may make an agreement with the Lieutenant-Governor in Council of any province for the payment to such province quarterly of an amount equal to seventy-five per centum of the net sum paid out during the preceding quarter by such province for pensions pursuant to a provincial statute authorizing and providing for the payment of such pensions to the persons and under the conditions specified in this Act and the regulations made hereunder.

4. Every agreement made pursuant to this Act shall continue in force so long as the provincial statute remains in operation or until after the expiration of ten years from the date upon which notice of an intention to determine the agreement is given by the Governor-General to the Lieutenant-Governor of the province with which the same was made.

5. Before any agreement made pursuant to this Act comes into operation the Governor in Council shall approve the scheme for the administration of pensions proposed to be adopted by the province, and no change in such

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scheme shall be made by the province without the consent of the Governor in Council.

8. Provision shall be made for the payment of a pension to every person who, at the date of the proposed commencement of the pension

(*a*) is a British subject, or, being a widow, who is not a British subject, was such before her marriage;

(*b*) has attained the age of seventy years;

(*c*) has resided in Canada for the twenty years immediately preceding the date aforesaid;

(*d*) has resided in the province in which the application for pension is made for the five years immediately preceding the said date;

(*e*) is not an Indian as defined by the Indian Act;

(*f*) is not in receipt of an income of as much as three hundred and sixty-five dollars ($365) a year, and

(*g*) has not made any voluntary assignment or transfer of property for the purpose of qualifying for a pension.

13. When, after the grant of a pension in any province, the pensioner transfers his permanent residence to another province with which an agreement under this Act is in force, the pension shall thereafter be paid by the province to which the pensioner has removed, but such province shall be entitled to be reimbursed an amount equal to one-half of such pension by the province in which the pension was originally granted.

14. Where the pensioner, after the grant of a pension, transfers his permanent residence to another province, with which no agreement under this Act is in force, the pension shall continue to be paid by the province in which the pension was granted.

15. Where a pensioner, after the grant of a pension, transfers his residence to some place out of Canada, his pension shall cease, but his right thereto shall revive upon his again becoming resident in Canada.

20. All regulations made under this Act shall, from the date of their publication in the Canada Gazette, have the same force and effect as if they had been included herein.

2. Such regulations shall be presented to Parliament forthwith after their publication if Parliament is then sitting, or, if not, within fifteen days from the commencement of the session beginning next after such publication.

As one of the cases relied upon by the appellant, and hereinafter referred to, involves consideration of the Mothers' Pensions Act, B.C. Stats. 1931, Cap. 42 I also set out certain provisions of such Act, reading as follow:

3. (1.) Upon application made to the Superintendent by any mother, and upon the recommendation of the Superintendent, an allowance shall be made for the support or partial support of the mother and her child or children out of the moneys appropriated by the Legislature for the purposes of this Act.

(2.) The amount and the times and manner of payment of the allowance shall be governed by the provisions of this Act and the regulations.

4. No mother shall be entitled to apply for or receive an allowance under this Act unless:

(*a.*) She is a British subject or was formerly a British subject by birth or naturalization; and

(*b.*) Has been a resident of this Province for at least three years prior to making application for assistance under this Act; and

(*c.*) Has a child or children under the age of sixteen years living with her; and

(*d.*) Is without the necessary means with which to support such child or children.

5. No application for an allowance under this Act shall be granted unless the Superintendent is of opinion:

(*a.*) That the applicant is a fit and proper person to have the custody of her child or children; and

(*b.*) That it is in the best interests of her child or children that the applicant should have the custody of them.

9. (1.) The Department of the Provincial Secretary shall be charged with the administration of this Act; and there shall be in that Department an officer to be known as the "Superintendent of Welfare," who under the Provincial Secretary shall administer and carry out the provisions of this Act.

11. In the absence of any special appropriation of the Legislature available for the purposes of this Act, all moneys necessary to meet the allowances payable under this Act and the salaries and expenses necessarily incurred in the administration of this Act shall be paid out of the Consolidated Revenue Fund.

Some of the cases hereinafter mentioned show that each decision was based upon the legislation and the circumstances of each case. Having referred to the relevant legislation in the present case I have to say that I think the circumstances are largely set out in the judgment below. It is sufficient here to state that it is apparent that Henry Richard Lee, the applicant for *mandamus,* was paid an old-age pension by the Board for six or seven years prior to the 1st of September, 1941, and, on November 13th, 1941, the Board sent him a letter, reading as follows:

Dear Sir:

Re: Claim A-16,617.

This is to advise that your claim has had the attention of the Board and we are required to cancel your pension payments as from September 1, 1941.

In explanation of this, we would advise that the Old Age Pensions Act does not allow the transfer of property, and as you divested yourself of your equity in lot 3, we are without authority to continue pension payments.

If you wish your pension reinstated, this will have our immediate attention on receipt of confirmation that your interest in the property has been reconveyed and registered as formerly.

We are quoting herewith for your information section 9 (3) of the Old Age Pensions Act:

"A pension authority shall be entitled to recover out of the estate of any

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deceased pensioner, as a debt due by the pensioner to such authority, the sum of the pension payments made to such pensioner from time to time, together with interest at the rate of five per cent per annum compounded annually, but no claim shall be made by a pension authority for the recovery of such debt directly or indirectly out of any part of the pensioner's estate which passes by will or on an intestacy to any other pensioner or to any person who has, since the grant of such pension or for the last three years during which such pension has continued to be paid, regularly contributed to the support of the pensioner by the payment of money or otherwise to an extent which, having regard to the means of the person so having contributed, is considered by the pension authority to be reasonable."

Regretting the necessity of cancelling your pension payments, we are . . .

Upon the hearing of the application herein the Board did not adduce any evidence but took the position that the Court, in any event, had no jurisdiction to issue a *mandamus* in the matter. I will assume, however, that the Board is entitled to rely upon the alternative submission that, even on the merits, the respondent should not succeed. On the merits I have to say that on the material before the Court I would agree with MANSON, J. that there is nothing in the relevant statutes or regulations, Dominion or Provincial, that supports or could support the action taken by the Board. In my view the substantial questions that arise are (1) Whether or not the respondent pensioner had a legal right to a pension? (2) Whether the Board was under obligation and owed him a duty to pay him the pension and (3) Whether *mandamus* will lie? MANSON, J. dealt with these questions and I also have something to say on them.

The appellant relies upon *In re Nathan* (1884), 12 Q.B.D. 461; 53 L.J.Q.B. 229; the unreported* case of *Gartley* v. *Workmen's Compensation Board* (1932-33) and the unreported case of *Rex (Wardman)* v. *Manson and Howe* (1933). Transcripts of the unreported judgments in the *Gartley* and the *Wardman* cases have been obtained from the Court reporter. The *Gartley case,* in which MURPHY, J. refused a *mandamus* to an old-age pensioner, following the *Nathan* case, was reviewed in this Court and I agree with what MANSON, J. says [*ante,* pp. 303-04]:

It can scarcely be said that the decision in the Court of Appeal precludes me from taking the view that a *mandamus* will lie.

With respect, I have also to say that I cannot agree with the

* Since reported, *ante,* p. 217.

view taken by MURPHY, J. as to the nature of the funds administered by the Board.

The *Wardman* case was a case in which the relator had been in receipt of a pension under the Mothers' Pensions Act as aforesaid which had been stopped by the superintendent. The matter came before this Court on an appeal from MORRISON, C.J.S.C., who granted a *mandamus* ordering payment of the pension, and this Court, MCPHILLIPS, J.A. dissenting, set aside the writ, holding that it did not lie. MACDONALD, C.J.B.C. said, in part, as follows:

This is a very difficult case it seems to me. I might say in opening that it does not make any difference in my opinion whether she is living with her child or not. She has got the promise of a pension by the Government and the Government has appointed an agent for the purpose of distributing pensions amongst those that he thinks are entitled to it. The Government is not bound to give pensions and may withdraw them at any time they choose. It is just a promise of a gift, and that promise may be rescinded. In this case they have rescinded the promise. That is apparent from the fact that the Provincial Secretary is a party to this proceeding, and he is resisting it. Even if he had not refused to give the pension and even if the agent had committed a breach of his duty, it would be for the employer of that agent to deal with the matter of some person who had merely a promise of a pension, which is not a legal right, hence unenforceable. So that it makes no difference whether the woman was living with her child or not, she has not any right to any pension at all either for the child or for herself, and therefore she has no foundation upon which to launch an application for *mandamus* for a breach, if she thought fit to do it. . . . The root of the matter is the fact that a pension is being demanded, it has not been received, it is being demanded because there has been a promise of a pension and she cannot get it because the agent has made a mistake as it is alleged in refusing it to her. On that state of facts the course which this Court ought to pursue is very plain. There is no legal right here to what the plaintiff in the case is claiming, and the only thing we can do is to refuse to grant something which we have no power to grant.

MARTIN, J.A. (as he then was) said, in part, as follows:

In my opinion, this appeal should be allowed upon the first point taken by appellant's counsel, that is to say, that in the circumstances of this case, upon the peculiar sections of this statute, that is to say, sections 3, 4, 5 and 9, and also 11, a *mandamus* does not lie. . . .

MACDONALD, J.A. (as he then was) said:

I would allow the appeal on the proper interpretation of the Act and for the reason intimated during the argument. It is not a case where a writ of *mandamus* may issue; on that ground then the appeal should be allowed.

I have already indicated that the appellant relies upon the case already cited, in which the statute being construed was the

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Mothers' Pensions Act, and I have hereinbefore set out the relevant provisions of said Act. There would not appear to be any section in such Act exactly similar to section 4 of the Provincial Old-age Pension Act or section 3 or 8 of the Dominion Old Age Pensions Act. It must also be noted that in neither the Dominion nor the Provincial Old-age Pension legislation is there any section similar to section 3 (1) or section 5 of the Mothers' Pensions Act as aforesaid and the expressions used in such sections might perhaps make the legislation somewhat similar to that which was before this Court in *Literary Recreations Ltd.* v. *Sauve* (1932), 46 B.C. 116, referred to on the argument herein, and to that before the House of Lords in *Liversidge* v. *Anderson and Another* (1941), 166 L.T. 1 where the clause "If the Secretary of State has reasonable cause to believe" was held to mean not "if there is in fact reasonable cause for believing, and if the Secretary of State so believes" but "if the Secretary of State, acting on what he thinks is reasonable cause (and, of course, acting in good faith), believes." In the latter case it was held that the action of the Secretary of State, under the circumstances was not subject to the control of a Court of law. In the *Literary Recreations Ltd.* v. *Sauve* case it was held:

> The Postmaster-General having authority to prohibit the use of the mails to the plaintiff, being a matter in his entire discretion, [the matter] is not open to review by a Court.

With respect to the Dominion and Provincial legislation in question herein, I have to say that, whatever the position may be with regard to aged persons, who have not applied for or obtained the old-age pension, I am satisfied and hold, with all respect to contrary opinion, that the effect of the legislation is that Lee, having applied for and obtained a pension, had a legal right to same and that, under the circumstances here, there was a statutory obligation upon the Board and it owed him a duty to pay him the pension and to continue such monthly payments as may be required pursuant to the provisions of the legislation and regulations. I have no doubt that this was the intention of both the Dominion Parliament and the Provincial Legislature and that this intention has been carried into effect and shown beyond doubt by the language used. I hold, therefore, with all respect, that so long as such Dominion and Provincial Acts remain in operation

and the agreements made pursuant to them continue in force, it cannot be said that

> the Government is not bound to give pensions and may withdraw them at any time they choose. It is just a promise of a gift, and that promise may be rescinded.

Neither can it be said, under the circumstances in the case at Bar, that all Lee has got is the promise of a pension by the Government and that the pension is a pure bounty, payable so long as the Crown wishes it paid and no longer.

As I have said, I base my judgment on this phase of the matter upon my view that the language of the legislation is plain and admits of but one meaning. As it is or may be argued, however, that the Old-age Pension Acts show no other purpose than to carry out a bargain between the Dominion and its Provinces and that all obligations created are only obligations between the Dominion and the Province and between the Province and its servants, perhaps I may be pardoned for referring to what I think is common knowledge and may be a matter of which judicial notice may be taken. For years some people struggled to obtain legislation authorizing and providing for the payment of old-age pensions to aged persons, who might need them, against arguments by some persons that the payment of old-age pensions was a Dominion obligation and by others that it was a Provincial obligation and by others that it was no obligation at all. Finally, the Dominion Parliament and some of the Provincial Legislatures co-operated and legislation was passed and we have it before us. I think such legislation creates a legal obligation to certain aged persons but, in any event, as I have already intimated, to those aged persons who have applied for and obtained a pension.

I now come to deal with the question whether *mandamus* will lie in this case and I have first to say that I do not think that it is or can be seriously submitted by counsel on behalf of the appellant that the Board has not the money. Undoubtedly it is paying old-age pensions to pensioners, if not every day at least every month, out of the money it has received through the appropriations for payment of such (see Dominion regulation No. 21). At the time the local Legislature passed the annual Supply Act and specifically appropriated the necessary moneys for payment of

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old-age pensions for the fiscal year—April 1st, 1941, to March 31st, 1942 (see reasons for judgment of MANSON, J. [*ante*, p. 298]) the said Lee was one of the pensioners and was on what might be called, as MCPHILLIPS, J.A. calls it in the *Wardman* case, *supra*, the list (of old-age pensioners). Therefore, in my view, the Board received and had the money for payment to the pensioners of whom Lee was one.

The real submission, of course, is that the money in the hands of the Board was, and is, money in the hands of the Crown or in the hands of the Board as a servant or agent of the Crown. As already intimated, the *Nathan* case is relied upon and I will here set out certain parts of the head-note and passages from the final judgments in such case, as reported in 53 L.J.Q.B. 229. The head-note reads, in part, as follows:

> The prosecutor applied for a *mandamus* to the defendants to return excess of probate duty, under 5 & 6 Vict. c. 79, s. 23. Probate duty is paid to the defendants to and for the use of the Crown, and when received it is handed over by them to the Crown. The defendants had declined to return the duty paid, on the ground that they were not satisfied of the lawfulness of the claim:—
>
> Held, that, assuming the claimant to be entitled to some remedy, still a *mandamus* ought not to issue, for that there was a specific remedy by petition of right, inasmuch as the money was in the hands of the Crown.
>
> *The King* v. *The Lords of the Treasury* [(1835)] (5 L.J.K.B. 20) dissented from.

The Queen's Bench Division had granted a rule for a *mandamus* and the defendants appealed. Brett, M.R. said at pp. 232-3, in part, as follows:

> This money is, by reason of 55 Geo. 3, c. 184, s. 2, not money paid to these commissioners themselves, either officially or individually. In terms it is money paid to and for the use of the Crown. Therefore it is in fact to be paid to the commissioners only as the hands through which it is to pass to the Crown, and therefore it is paid to them merely as servants of and agents for the Crown. . . . The statute also enables them, without an order, in any particular case to obtain the money from some other department of the executive (which is still obtaining it from the Crown), and to take it back from the general fund and pay it to such claimants as may make out their claims. Therefore the right claim (if any) is against the Crown in respect of moneys in the hands of and belonging to the Crown. If so, no action will lie, because an action is not maintainable against the servants of the Crown. The statute gives no individual an action against the commissioners, because it raises no relation between the claimant and them. Therefore the claim must be against the Crown. But no action will lie against the Crown, although a petition of right may be presented. If, there-

fore, the claimant has any remedy at all in this case, it must be by petition of right. I say if he has any remedy at all, because if the true construction of the statute is that the right to repayment depends upon whether the commissioners are satisfied in fact—that is, whether they are the ultimate and sole judges whether the money should be returned—then not even a petition of right can be presented. It is not necessary to decide whether the commissioners have such a power or not. Speaking for myself, I must say that I should be loth to hold that that was so, and that there was no remedy for persons in the position of the claimant. But no action or suit will lie, because the money is in the hands of the Crown; and if it can be got back, it must be from the Crown. If there is any remedy—that is, if the exclusive power of dealing with this matter is not in the hands of the commissioners —I can see no reason why a petition of right should not be presented to the Crown, upon the ground that the money is in the hands of the Crown and should be paid back. If that petition is tried, it would be for the Crown, by demurrer or otherwise, to say that it cannot be maintained.

Bowen, L.J. said at p. 235:

. . . In the first instance the money has been paid to the commissioners, who have not retained it, but, according to the directions given to them, have paid it to the Crown; . . .

To my mind, there is a clear remedy by petition of right. The money is in the hands of the Crown, and there is an old constitutional way by which subjects are able to obtain back money from the hands of the Crown—namely, by petition of right. If that is a true view, and a petition of right is the proper remedy and a *mandamus* is not, of course the appeal must succeed, because a *mandamus* has been directed to the wrong persons: it cannot be directed to the Crown, and the commissioners have not the money. . . .

I think the head-note and the passages set out from the *Nathan* case show that the nature of the fund available there was altogether different from that available here. It is clearly stated in the final judgments that the money in question therein was paid to the Commissioners only as the hands through which it was to pass to the Crown. It was paid to them merely as the servants of and agents for the Crown and they had no right to hold it or to deal with it as against the orders of the Crown. Therefore, the right of the prosecutor seemed to Brett, M.R. (p. 233) "to be a right" against the Crown in respect of moneys [which are] in the hands of [the Crown] and belonging to the Crown."

In the *Nathan* case the money was paid by private individuals to the Commissioners for payment to the Crown for the use of the Crown. That is not this case. The money was not paid to the Board as the hands through which it was to pass to the Crown but was paid to the Board as the hands through which it was to

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pass to the pensioners of which the said Lee was one. In my view the *Nathan* case is clearly distinguishable from the present case on this phase of the matter and the money in the hands of the Board is not money which is in the hands of the Crown or belongs to the Crown.

I think it follows from my views, as already indicated, but in any event, I wish to state that, in my opinion, it is clear that there is at least one other remedy open to the pensioner, that is, by action against the Board and in this respect I disagree with MANSON, J. I do not agree, however, with the argument that, if the respondent had another remedy, then the writ of *mandamus* should not issue. Here again the *Nathan* case is relied upon by the appellant. In such case part of the head-note reads as follows:

> The rule governing the discretion of the Court as to granting a *mandamus* is, that where there is no specific remedy, a *mandamus* will be granted, that justice may be done. A petition of right is such a remedy, though it depends upon the *fiat* of the Attorney-General being given.

Since the *Nathan* case, however, we have had other decisions on the same question including the decision of this Court in *Rex* v. *Lennox* (1940), 55 B.C. 491 where my brother O'HALLORAN in his judgment, with which judgment three of the other members of the Court expressly agreed, said as follows at pp. 494-5:

> Counsel for the respondent also contended that *mandamus* did not lie alleging there was an alternative remedy, *viz.*, that the objection could be taken by the accused on their arraignment in due course at the Vancouver Assize. I should not regard that course as equally convenient or effective. Yet even if it were, this Court has held in *Dumont* v. *Commissioner of Provincial Police* [*ante*, 298, at p. 303], [1940] 3 W.W.R. 39, at p. 41, in the judgment delivered by my learned brother SLOAN that the existence of another remedy does not oust the jurisdiction to grant *mandamus*, but is at best an element to be considered in exercising that jurisdiction. . . .

In the *Dumont* case MACDONALD, C.J.B.C. agreed with my brother SLOAN, the Court hearing the case consisting only of three members. It may also be noted that on appeal, [1941] S.C.R. 317, at p. 321 in the *Dumont* case Sir Lyman Duff, C.J., delivering the judgment of the Court, says:

> I do not mean to throw any doubt upon the decision of the Court of Appeal touching the technical point of procedure and I have no doubt that the Commissioner's authority is vested in him as the agent of the statute and that *mandamus* will lie to compel him to perform his duty. It is unnecessary to decide whether in the circumstances of this case *mandamus* was the proper procedure, but it must be understood that on that point we are not dissenting from the view of the Court of Appeal.

Applying the principle, therefore, which has been applied by this Court several times recently, I reach the conclusion that in the present case the existence of another remedy is not sufficient to oust the jurisdiction of the Court to grant the writ. This brings me to the submission on behalf of the appellant that in any event *mandamus* does not lie as the Board is an inferior tribunal that has actually exercised its jurisdiction. In this connection reference might be made to section 4 (1) of the Old-age Pension Act, R.S.B.C. 1936, Cap. 208 and to regulations 6 (*a*) and 23 of the Old Age Pensions Regulations made pursuant to the provisions of the Dominion Act. Said section 4 (1) reads, in part, as follows:

> 4. (1.) Notwithstanding the provisions of the "Workmen's Compensation Act," the Workmen's Compensation Board shall, in addition to the duties assigned to it under that Act, be charged with the administration of this Act, including the consideration of applications for old-age pensions and the payment of old-age pensions.

Said regulations 6 (*a*) and said 23 (*b*) read as follow:

> 6. (*a*) As soon as may be after receiving any application and the documents required by these Regulations to accompany any application, the pension authority shall take all necessary steps to ascertain whether the applicant is entitled to a pension and, if he is so entitled, what rate of pension should be paid.
>
> 23. (*b*) If, after the granting of a pension, a pensioner makes any voluntary assignment or transfer of real or personal property without the approval of the pension authority the payment of his pension may be suspended until the aggregate amount of the suspended payments equals the value of the real or personal property assigned or transferred at the time of assignment or transfer.

It is or must be common ground that pursuant to said regulations the Board, on receipt of the application of the respondent Lee some six or seven years ago, took all necessary steps to ascertain whether the applicant was entitled to a pension and, if he was so entitled, what rate of pension should be paid. Undoubtedly the Board found Lee to be a person entitled to a pension at a certain rate and no question has been raised in these proceedings as to the amount. As intimated, however, the question may be raised as to the applicability of said regulation 23 (*b*) on or about September 1st, 1941. The material before the Court shows that on November 13th, 1941, the Board sent to Lee the letter as hereinbefore set out in which it said, amongst other things, "we are without authority to continue pension payments." I

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have already stated that on the material there is nothing to support the action of the Board. I now go further and make it clear that I agree with the submission of counsel on behalf of the respondent that on the material before the Court there is nothing to show that the Board ever considered or decided the question as to whether the transfer of property made by Lee on or about July 14th, 1941, was a voluntary one within the provisions of said 23 (*b*). I also agree with his submission that on the material before the Court and the authority of *Rex* v. *Board of Education,* [1910] 2 K.B. 165, Farwell, L.J., at pp. 179-82; affirmed in the House of Lords [1911] A.C. 179, the Court should regard the Board as declining jurisdiction. The Board never entered upon what may be called the real inquiry. See MACDONALD, J.A. (as he then was) in *The King* v. *Minister of Finance* (1934), 48 B.C. 412, at p. 425, citing *Rex* v. *Board of Education, per* Farwell, L.J., *supra.* I pause here to say that in my view the Board elected to stand on its position throughout these proceedings and under the circumstances of this case I would not direct an inquiry by the Board now. In the *Board of Education* case Farwell, L.J. said, in part, as follows at p. 178:

> Then it was contended that, even if this be so, this Court has no jurisdiction to interfere—the Attorney-General went so far as to say on any ground or in any way whatever. The Solicitor-General qualified the generality of this contention by saying "unless they have wrongfully given themselves or assumed a jurisdiction that they did not possess." The Solicitor-General's contention is, in my opinion, the more accurate, but it requires explanation and expansion. The point is of very great importance in these latter days, when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becomes a tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court, within the limits now well established by law. If the tribunal has exercised the discretion entrusted to it *bona fide,* not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over

such tribunals. In this case the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby: . . .

In the present case I hold that the Board in cancelling the pension, or refusing to pay it until Lee's interest in the property had been reconveyed and registered as formerly, wrongfully gave itself or assumed a jurisdiction it did not possess and in the *Board of Education* case it will be noted that it was conceded by the Solicitor-General that in such case the Court had jurisdiction to interfere by way of *mandamus* and the Court did so interfere.

It is or may be argued, however, that in the *Board of Education* case (see [1911] A.C. 179, at p. 180) the House of Lords held that the case was a proper one for a *certiorari* and a *mandamus* and that such case is, therefore, distinguishable from the present case where there is not a *certiorari*. In my view, however, a complete answer to this is the unanimous decision of this Court in *Rex* v. *Lennox, supra,* where there were no *certiorari* proceedings and yet the Court directed the *mandamus* to issue, the judgment of my brother O'HALLORAN being the principal judgment of the Court and citing with approval *Rex* v. *Board of Education, supra,* Farwell, L.J. at pp. 179-82.

Another decision of this Court, however, in *The King* v. *Junior Judge of the County Court of Nanaimo and McLean* (1941), [*ante,* p. 52] is relied upon by counsel on behalf of the appellant and it is argued that this supports the contention that *mandamus* cannot be granted in this case. I do not agree. The *McLean* case is clearly distinguishable as it was one in which the Court below was held not to have declined or refused to exercise, but to have exercised, the jurisdiction it had. In the present case I have already held that the Board must be regarded on the authority of the *Board of Education* case, applied by this Court in the *Lennox* case, *supra,* to have declined jurisdiction and I have also held that the Board never entered on the real inquiry.

It is or may be suggested, however, that in the present case the Board did reach a decision and decided to cancel the pension or not to pay it until Lee's interest in the property had been reconveyed and registered as formerly, and that this Court has no power to review the matter. I think a complete answer to this is that the Board in doing so exceeded its jurisdiction, as I have

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already held, or at least declined or failed to act judicially, and therefore this case falls within what has been called the *Lennox* case, *supra*. In such case LENNOX, Co. J. had undoubtedly reached a decision and decided not to allow the accused Moran and McLaren to elect, when they appeared before him on the 30th of September, 1940, on the ground that they had already elected on their previous appearance before him. This Court nevertheless reviewed the matter, found the accused had not elected, held that the judge below in doing as he did had "exceeded his jurisdiction or at least declined or failed to act judicially." (See judgment of my brother O'HALLORAN at p. 494, citing *Rex* v. *Board of Education* case as aforesaid) and granted the *mandamus* as I have already stated.

With all respect to contrary opinion my conclusion on this whole matter is that MANSON, J. was right in directing as he did "a *mandamus* as asked to compel the Board to do the very thing authorized by the Legislature and for which the Legislature specifically provided the money." As I have already intimated, there was a statutory obligation or duty on the part of the Board to pay the respondent the pension and to continue such monthly payments as may be required pursuant to the provisions of the said Old-age Pension Acts and regulations. In my view the Court below ordered that a peremptory writ of *mandamus* should issue directed to the Board commanding it to perform such duty. The order would appear to be in effect similar to the orders made by this Court in the *Dumont* and *Lennox* cases, *supra*. I would, therefore, affirm the order.

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

Solicitors for appellants: *MacInnes & Arnold.*
Solicitors for respondent: *Frank S. Cunliffe & Co.*

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Practice—Application for trial by jury—Refused—Appeal—Exercise of discretion by judge below—Ground for appellate Court to interfere—Rules 429 and 430.

In an action for damages for breach of contract in failing to provide finances for drilling operations and production of petroleum as a commercial enterprise on lands in the Province of Alberta, the plaintiff's application for a jury under rule 430 was refused on the ground that the case falls within the exceptions mentioned in rule 429.

Held, on appeal, affirming the decision of COADY, J. (O'HALLORAN and FISHER, JJ.A. dissenting), that the judge below having exercised his discretion in dismissing the application, the Court of Appeal will not interfere unless clearly of opinion that it has been wrongly exercised or that he has acted on a wrong principle, and there is no ground for interference in this case.

APPEAL by plaintiff from the decision of COADY, J. of the 7th of February, 1942, on an application by the plaintiff for the trial of the action by a jury under Order XXXVI., r. 6 of the Supreme Court Rules, 1925. The plaintiff's claim is for damages for breach of contract to provide finances to utilize and realize on interests, rights and privileges pertaining to certain properties being composed (a) of the south halves of legal subdivisions 13 and 14, and (b) legal subdivision 4 of section 32 in township 18, range 2, west of the 5th meridian in the Province of Alberta, and to drill for and produce petroleum and natural gas or either thereunder as a commercial enterprise, and to fulfil and satisfy a requirement regarding financial ability to complete the said operation of drilling for and producing petroleum and natural gas or either. The plaintiff claims in the alternative for damages for misrepresentation of authority, for loss of profit resulting from the said breach of contract, for damages for breach of contract to employ the plaintiff as drilling superintendent, for damages to the credit, reputation and business position of the plaintiff, for damages for loss of time for the profitable prosecution of the business of the plaintiff resulting from the said breach of contract, and for payment of expenses and liabilities incurred by the plaintiff. It was held that this is a case coming within the provisions of Order XXXVI., r. 5 of the Supreme Court Rules, 1925.

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The appeal was argued at Vancouver on the 11th and 12th of March, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

J. T. Jackson, for appellant: This is an application for a jury made under rule 430. The action is founded on an alleged breach of contract. The defendants were to provide the money for drilling for oil in Alberta. The contract was made between the plaintiff and the defendant Sweny who had authority to act for the other defendants. There is no scientific investigation in this case to bring it within rule 429: see *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56, at p. 58. The plaintiff should not be deprived of the right to a jury: see *Plowright* v. *Seldon* (1932), 45 B.C. 481; *Bell* v. *Wood and Anderson* (1927), 38 B.C. 310; *Campbell* v. *Lennie* (1927), *ib.* 422; *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78. On the question of prolonged examination of documents see *Shafto* v. *Bolckow, Vaughan & Co.* (1887), 35 W.R. 686. There is nothing complicated or intricate in this case and no prolonged examination of documents on the trial: see *Dunlop Rubber Company* v. *Dunlop,* [1921] 1 A.C. 367, at p. 373; *Lumley* v. *Gye* (1853), 2 El. & Bl. 216; *C.P.R.* v. *Parke et al.* (1896), 5 B.C. 507. The issues are simple and well defined.

H. I. Bird, for respondent Sweny: We brought our case within the exceptions in rule 429. The learned judge properly exercised his discretion: see *Maddison* v. *Donald H. Bain Ltd.* (1928), 39 B.C. 460; *Royal Bank* v. *Fullerton* (1912), 17 B.C. 11; *McArthur* v. *Rogers* (1912), *ib.* 48; *Starratt v. White* (1913), 11 D.L.R. 488; *Whitehead* v. *Corporation of City of North Vancouver* (1937), 51 B.C. 540. He has not brought himself within the cases. The particulars are of an intricate and complex character and prolonged examination of documents applies to the case. It involves a matter of scientific investigation: see *Murdoch* v. *Attorney-General of British Columbia* (1939), 54 B.C. 496; *Osenton & Co.* v. *Johnston,* [1941] 2 All E.R. 245.

L. St. M. Du Moulin, for respondents Brown and Western City Co. Ltd., referred to *American Securities Corporation* v. *Woldson* (1927), 39 B.C. 145, at pp. 149-50; *Blygh* v. *Solloway, Mills &*

Co. Ltd. (1930), 42 B.C. 531; *Alaska Packers* v. *Spencer* (1905), 11 B.C. 280; *Elk River Timber Co. Ltd.* v. *Bloedel, Stewart & Welch Ltd.* (1941), 56 B.C. 484.

G. J. Thomson, for respondent MacKenzie.

Killam, for respondent Dawson: An action for specific performance cannot be tried by a jury: see *McArthur* v. *Rogers* (1912), 17 B.C. 48.

Jackson, replied.

Cur. adv. vult.

13th March, 1942.

McDONALD, C.J.B.C. (oral): In my opinion the learned judge below exercised a sound discretion in holding that this case falls within one or more of the exceptions mentioned in Order XXXVI., r. 5. To reverse in this case, I think would be to depart from the practice laid down through long years, not only in other Courts, but in this Court itself. I feel fortified in the view I have expressed not only by the cases cited, but by the judgment of the Lord Chancellor in *Osenton & Co.* v. *Johnston* (1941), 57 T.L.R. 515, referred to by my brother SLOAN during the argument. There the Lord Chancellor said at p. 518:

> The law as to the reversal by the Court of Appeal of an order made by the judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. 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 such as those urged before us by the appellants, then the reversal of the order on appeal may be justified.

In the present case I am not at all satisfied that the learned judge has wrongly exercised his discretion, or acted upon any wrong principle.

For these reasons I would dismiss the appeal with costs to the respondents in any event.

McQUARRIE, J.A.: I would dismiss the appeal. I think the learned trial judge below exercised his judicial discretion properly and that his judgment should not be reversed unless it is

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shown that an injustice was done, or that he acted on a wrong principle, neither of which was in my opinion shown to be the case here. There are so many decisions of this Court on the subject that it seems to me the law is well settled.

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

O'HALLORAN, J.A.: This is an appeal by the plaintiff from an order dismissing his application for a jury trial. The only real question in the appeal was whether the learned judge had guided his judgment by the authoritative decisions of this Court in similar applications. As I am compelled to view it, that short question was unfortunately submerged in the submission that an appellate Court should rarely interfere with a discretionary order, and then only in the most exceptional cases. The resulting situation demands an escape from generalities and a review of the authorities relating to both questions.

Counsel for the appellant submitted in the first place that as this is a common-law action for damages, he is entitled to a jury as of right in this Province under rule 430, but subject to that right being displaced, if the respondents show the applicability of an exception mentioned in rule 429. The correctness of that submission can hardly be questioned in view of the decisions of this Court in *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* (1932), 45 B.C. 481, at pp. 482, 486 and 491.

What has just been said is emphasized at the outset since it pervades the ensuing discussion. The burden of proof is on the party opposing a jury to show the applicant is not entitled to that mode of trial. As explained by Chancellor Boyd in *Bank of British North America* v. *Eddy* (1883), 9 Pr. 468, the right to trial by jury in common-law actions was regarded as a vested right. Subsequent limitations thereto such as rule 429, have therefore been interpreted in this Province as exceptions to that right. And it is only reasonable that he who alleges an exception should be called on to prove it.

A judge may not deprive a litigant of this common-law right unless he has facts before him which establish an exception. For

example, if a party opposes a jury trial on the ground the issue "involves scientific investigation which cannot be conveniently made with a jury," the accepted mode of furnishing the judge with the supporting facts to enable his mind to function rationally and judicially, is by affidavit setting out the facts. That was not done in this case, for the learned judge had but the pleadings and affidavit of documents before him.

Counsel for the appellant submitted the learned judge deprived him of his common-law right to a jury without any facts or sufficient facts before him by affidavit or otherwise to justify the decision. That resolves itself into the submission that in doing so the learned judge (a) applied a wrong principle and omitted to apply the correct and guiding principles this Court has laid down, and (b) thereby failed to exercise a judicial discretion, which of itself is a violation of an essential of justice. If these contentions are established the order appealed from must be reversed.

Rules 429 and 430 are now set out since they are constantly referred to:

429. The Court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury, or where the issues are of an intricate and complex character.

430. In any other cause, matter, or issue other than that referred to in Rules 2A, 3, 4 and 5 [r. 429] of this Order, upon the application within four days after notice of trial has been given of [by] any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury.

For reasons already stated, rule 430 should be regarded as the master rule. Any discretion given by the use of "may" in rule 429 is to be exercised upon the foundation provided for it by rule 430. Rule 429 is not to be construed as if it stood alone. It is to be read with rule 430, but as an exception thereto. Any application the English Court of Appeal decision in *Hope* v. *Great Western Railway Co.* (1937), 106 L.J.K.B. 562 may appear to have is necessarily excluded, not only by the decisions of this Court, to which I have referred at the outset, but also by the changes in the English Rules therein mentioned.

In my view also the last clause in rule 429 reading "or where the issues are of an intricate and complex character" is not a

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third exception. Rather it is a clause which qualifies the two preceding exceptions, "prolonged examination of documents" and "scientific investigation," in the same way they are qualified by the clause "which cannot be conveniently made with a jury." This would appear to be the proper grammatical construction, and seems to have been so accepted by this Court in *Welch* v. *The Home Insurance Co. of New York, supra.*

It is not enough, therefore, to show the necessity for prolonged examination of written matter or for a scientific or local investigation. It must be shown further that such examination or investigation cannot be "conveniently made with a jury, or" arises in an action "where the issues are of an intricate and complex character." It is not enough to show the proceedings are of an intricate and complex character. The intricacy and complexity must relate to prolonged examination of documents or a scientific or local investigation. If this were not so, the exceptions would engulf the rule and the right to trial by jury would be reduced to a minimum. If that had been intended the rules would be couched in appropriate language and trial by jury would then appear as the exception instead of the rule which this Court has thus far held it to be.

It is quite true, of course, that if the pleadings show a cause of action on their face which is plainly within a previous rule 427 (not applicable in this case), then the judge may refuse a jury without affidavit evidence. *McArthur* v. *Rogers* (1912), 17 B.C. 48 is an example of that kind. It is true also that if the affidavit of documents discloses an unsual number of documents, a judge may reasonably conclude without looking at affidavit evidence, that the trial will involve a "prolonged examination of documents" within the meaning of rule 429. This Court so held in *Wilson* v. *Henderson, supra,* where the affidavit of documents set forth something like nine hundred documents.

But that is not this case. The affidavit of documents discloses some 55 documents. Not an unusual number in a damage suit in a commercial matter. Some 45 of these documents consist of letters and telegrams together with a few accounts. I am unable to find anything there which indicates the necessity for "any prolonged examination of documents or accounts" or "any scien-

tific investigation" which could not be "conveniently made with a jury," or which otherwise indicates signs of intricacy and complexity. Of course any commercial transaction involving the making of an agreement is apt to be surrounded by considerable conflicting testimony, both oral and written.

But that rather emphasizes the advantage of a jury, composed as it is of a cross-section of a fairly well educated and commercially-minded public, and certainly not less apt to be familiar with current business and financial practice than a single judge whose position and duties necessarily remove him from the atmosphere of commercial life, and *vide Plowright* v. *Seldon, supra,* McPHILLIPS, J.A. at pp. 491-2. The action is for damages for breach of an agreement, and also in part alternatively for damages against the defendant Sweny for alleged misrepresentation he had authority to act on behalf of the other defendants. It is not apparent on the face of the pleadings that the cause of action involves any of the exceptions in rule 429.

A very large sum of money is claimed but that does not alter the principle. Many witnesses may be called and the action strenuously contested, but that is not enough to bring it within rule 429. Complexity is not to be mistaken for confusion, nor is intricacy to be judged by the number of witnesses or the number of telegrams or letters. As MORRISON, J. (as he then was) said when sitting in the old Full Court in *Alaska Packers* v. *Spencer* (1905), 11 B.C. 280, at p. 288, in directing the new trial to be heard with a jury:

> Of course all these questions are susceptible of being made intricate by one counsel or the other, or one party or the other may call a cloud of expert witnesses and throw an atmosphere of mystery and difficulty about a question.

If there was in fact any serious question of this action being too complex or technical for a jury to grasp, the seven or eight defendants would have found little difficulty in establishing it on affidavit evidence when opposing the application. But no such affidavits were then filed, notwithstanding several decisions of this Court which render it imperative if the right to a jury is to be disputed. Whatever may be the practice in other jurisdictions, the practice in this Province has been long established by decisions of this Court, that the applicant for a jury in a common-law action may not be deprived of his *prima-facie* right

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to a jury in the absence of affidavit evidence, if controversy exists as to whether the exceptions in rule 429 apply. That is a rule of reason as well as of established practice.

In *Campbell* v. *Lennie* (1927), 38 B.C. 422 the judge below refused a jury in a running-down action because the application was made on the pleadings unsupported by an affidavit. This Court allowed the appeal (MCPHILLIPS, J.A. dissenting). MARTIN, J.A. (as he then was) added that if there was a controversy involving the exceptions in rule 429, affidavit evidence should have been produced. In *Welch* v. *The Home Insurance Co. of New York, supra,* the judge below had refused a jury in a case involving an issue as to whether the raft in question was a "Davis raft." This Court allowed the appeal. MARTIN, J.A. (as he then was) said at p. 80:

> All we have here is simply an affidavit of the solicitor who is obviously not informed on the technical question such as that which is relied upon to take the case out of rule 429. Therefore, as there is no material before the learned judge in the proper sense of the word upon which his decision can be legally founded, the only course open to us is to allow the appeal.

That is the case here. The appellant had an undoubted right to a jury unless the respondents showed otherwise. Having failed to produce affidavits to show that the issues involved prolonged investigation of documents or scientific investigation within the meaning of rule 429, then there was no material before the learned judge upon which he could legally found his decision and the order for jury should have gone as of right. The right to trial by jury goes deeply into our constitutional history. A litigant is not to be deprived of that right unless he is clearly within the exceptions. Where the decision is nicely balanced between the conflicting contentions, the balance should favour trial by jury.

The exception "scientific investigation" in rule 429 was referred to by counsel. I fail to find anything in the pleadings to support it within the interpretation of that term to be found in the decisions of this Court. In *Alaska Packers* v. *Spencer* (1904), 10 B.C. 473, the old Full Court upheld the order for a jury, although HUNTER, C.J. considered the issue to be scientific from a nautical viewpoint as it involved the seamanlike course to be pursued in the towing of a vessel stranded on Trial

Island near Victoria. In *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56, this Court refused to disturb an order for a jury (MARTIN and MCPHILLIPS, JJ.A. dissenting) in an action which involved an issue as to whether the loss of an operatic singer's voice was due to the injuries she had suffered in a collision.

In *Plowright* v. *Seldon, supra,* this Court upheld the jury order in an issue which involved the professional ability and skill of a medical practitioner. In *Welch* v. *The Home Insurance Co. of New York, supra,* this Court directed a jury when the lower Court had refused to do so. It involved the question whether the raft in question was the patented "Davis raft." The patent had been the subject-matter of an action for infringement in *Davis Log and Raft Patents Co.* v. *Cathels* (1927), 39 B.C. 57. In my view the four cases just cited indicate much more plainly the likelihood of "prolonged examination of documents" or "scientific investigation," not to mention intricacy and complexity in technical matters, than the case now under review.

The conclusion properly follows, with respect, that the learned judge had no proper material before him or at least had insufficient facts before him to justify refusal of the application for a jury. In doing so he either applied a wrong principle, or failed to apply the correct principles laid down in the decisions of this Court to which I have referred. In taking the course he did the learned judge failed to exercise a judicial discretion which in the nature of the case has necessarily resulted in a violation of an essential of justice, for he has deprived the appellant improperly of his common-law right and his *prima-facie* right to a trial by jury. The only course open to this Court in the circumstances is to allow the appeal.

A recent decision of the House of Lords in *Osenton & Co.* v. *Johnston* (1941), 57 T.L.R. 515 has been referred to as if it displaced the foregoing in some way, and notwithstanding what has been said, that an imperative duty is cast upon an appellate Court not to interfere with a discretionary order of a judge of first instance except in the most exceptional circumstances. I must confess I am at a loss to apprehend how it bears on the issue raised in this appeal. For if the appellant is wrong in his inter-

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pretation of this Court's decisions as examined previously, then, of course, the appeal should be dismissed and no question of the *status* of a discretionary order enters into the picture at all. On the other hand, if the appellant is right, then no authority is needed for the proposition that an appeal should be allowed whenever a judge of first instance fails to apply a principle laid down by this Court.

I have previously referred to some seven appeals to this Court relating to granting or refusing juries, but in not one of these appeals as I read them did the decision turn on any such duty of the appellate Court not to interfere with the discretion of the judge below. In fact in two of the decisions, *viz., Campbell* v. *Lennie* and *Welch* v. *The Home Insurance Co. of New York,* this Court ordered trial by jury when the judge below had refused to do so. This Court has never minimized the importance of trial by jury. It has never, to my knowledge at least, applied to an appeal of this character the considerations which are apt to arise in appeals from discretionary orders involving mere matters of practice. In some accountable way the hesitation this Court always has to interfere in purely practice decisions which are not likely to affect the merits of the case on trial, has been imported as a governing consideration into the determination of this appeal where the ground of appeal relates to the failure of the judge to follow the principles laid down by this Court in such a vital matter as the granting or refusing of trial by jury.

In *Osenton & Co.* v. *Johnston,* acting within his jurisdiction under an English rule with some of the same phraseology found in rule 429, the Master had ordered an action to be tried before an official referee. His decision was sustained by the judge in Chambers and the Court of Appeal. The House of Lords reversed the decision, thereby going a great way in interfering with the discretion of the Chamber judge, which the Court of Appeal thought had been legitimately exercised. If the reasoning advanced before us were to govern, one would have thought the House of Lords would have refused to interfere on principle where the Court of Appeal had found nothing wrong in the exercise of the discretion below. And if the House of Lords did interfere, one would think it would have been because of some

plain violation of principle, patent injustice or the desirability of authoritatively considering some decision by which the lower Courts had found themselves bound.

But it was not made clear that any wrong principle had been applied below. On the contrary, it was specifically stated that an appellate Court should interfere even where a wrong principle has not been applied, if it is clearly satisfied the Court below was wrong. It was said that discretion implies a latitude in choice. If the judge could decide but one way he would have no discretion in that sense. The House of Lords overruled the decision of the judge below because it was considered he was wrong. It was said in effect he had not given certain considerations the weight they deserved. But interference with the discretion below on that ground really places the matter on the same basis as interference with any other judgment given below. And, with deference, that appears to be the real effect of the decision in *Osenton & Co.* v. *Johnston* as will shortly be shown.

The House of Lords went a great deal further in *Osenton & Co.* v. *Johnston* than this Court was asked to go in the present case. Here the order appealed from was attacked on the ground the learned judge failed to apply principles that this Court has decided should be applied in jury trial applications. There was no such ground of attack in *Osenton & Co.* v. *Johnston* as witness the Court of Appeal upheld the Chamber judge. The Court of Appeal thought the judge was right in referring the action to an official referee, while the House of Lords found he was wrong. It seems to have been a question of judicial opinion where the decision depended largely upon the emphasis which might be given this or that circumstance among the many circumstances to be considered in order to reach a conclusion.

That is not this case. The previous decisions of this Court gave the judge no discretion but to order trial by jury in the absence of evidence to apply rule 429. When the defendants did not file an affidavit of merits he should have found the plaintiff was entitled to a jury as of right. Viewed in this light *Osenton & Co.* v. *Johnston* and other decisions on discretion really have no present application. But even if the judge in this case had a discretion similar to that in *Osenton & Co.* v. *Johnston* the

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respondents here are in no better position. That decision is really a restatement of what Lord Wright said in *Evans* v. *Bartlam* (1937), 106 L.J.K.B. 568 where the House of Lords also reversed the Court of Appeal and set aside a default judgment.

Reading the four speeches of the House in *Osenton & Co.* v. *Johnston* one may find individual observations which seem to point in more than one way, but there is one common ground of agreement, and it is that portion of Lord Wright's speech in *Evans* v. *Bartlam* quoted by the Lord Chancellor as an authoritative exposition of the applicable law. As I read and now quote that passage, it constitutes the *ratio decidendi* of *Osenton & Co.* v. *Johnston* (p. 519):

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

I interrupt the quotation here to observe, it is emphasized that an appeal from a discretionary order does not fall into a separate category. Nor is it necessary to show the judge below acted on a wrong principle, as the Court of Appeal in *Evans* v. *Bartlam* had thought it was, and as it has been said on occasion from this Bench, although I do not recall it to be expressed as the view of this Court in any reported decision. I think it may now be said that an appeal from a discretionary order may be heard in this Court without the question of discretion interjecting itself in front of the merits of the appeal, with which this Court is first concerned. We have to decide if the judge below came to what in our view as an appellate Court is the right conclusion.

This is confirmed by the precise language in the remainder of the passage which speaks for itself:

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

It is in point to add perhaps, that it is not necessary for an appellate judge to say whether he would or would not have reached the same conclusion had he been the judge of first instance, *vide* Lord Chancellor Birkenhead in *Dunlop Rubber Co.*

v. *Dunlop,* [1921] 1 A.C. 367, at p. 371. That is pure speculation. Nor is it necessary to find that the judge below has acted "on grounds which were wholly irrelevant to the matters which he had to consider," *vide Evans* v. *Bartlam, supra,* Lord Wright at p. 574.

It is enough if the Court of Appeal is satisfied the decision was not justified on the facts, or that the circumstances do not justify the order, as Lord Wright said in *Evans* v. *Bartlam* at pp. 574-5. The circumstances in which a Court of Appeal will interfere in a "typical exercise of purely discretionary powers" such as fixing a date of trial or refusing to grant an adjournment are mentioned there. Two decisions in our Court may be referred to in illustration. In *Blygh* v. *Solloway, Mills & Co. Ltd.* (1930), 42 B.C. 531, this Court refused to interfere with an order postponing an application for further and better particulars of the defence until after the defendant had made discovery.

But in *B.C. Liquor Co. Ltd.* v. *Consolidated Exporters Corporation Ltd.* (1930), 42 B.C. 481, this Court did interfere with the discretion exercised below in an application similar to the *Blygh* case. The Court governs itself by the circumstances of each, and interferes or not, according to whether it is of opinion the order was wrong or an injustice has been done. While the discretionary aspect was argued in *Maddison* v. *Donald H. Bain Ltd.* (1928), 39 B.C. 460, this Court's decision by a three-two majority to uphold the order striking out a paragraph of the defence, was governed by its opinion of the merits of the defendant's case. *Evans* v. *Bartlam* was applied in *Murdoch* v. *The Attorney-General of British Columbia* (1939), 54 B.C. 496.

What has just been said is strictly applicable to discretionary orders in practice matters. This appeal should be allowed even if it came within that limitation. But as pointed out at the outset, the impugned order was made in disregard of the principles this Court has laid down as a guide for the Court below in granting or refusing juries. To use the language of Lord Birkenhead, L.C. in *Dunlop Rubber Co.* v. *Dunlop, supra,* at p. 373, such an order was not a defensible exercise of discretion. What occurred was not in reality a mistake in the exercise of discre-

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tion, but in truth a failure to exercise discretion and as such must be regarded as a violation of an essential of justice.

To summarize: (1) The appellant was deprived of his common-law right to trial by jury, without any facts or sufficient facts by affidavit or otherwise before the learned judge to displace his *prima-facie* right to a jury trial. (2) In doing so the learned judge applied a wrong principle and failed to apply the correct principles laid down in the decisions of this Court. (3) The Court of Appeal has not only the right but the duty to review discretionary orders. (4) Whether the Court of Appeal will vary or alter a discretionary order must depend on the circumstances of each case. But speaking generally, that duty will be exercised when the Court of Appeal is satisfied the judge below was wrong in law or in fact, or that an injustice may result to one or other of the parties. (5) If I am correct in (1), what occurred here was not a mistake in the exercise of discretion, but a failure to exercise discretion resulting in a violation of an essential of practice.

I would make the order for a trial by jury I think the judge below should have made. I would allow the appeal accordingly.

FISHER, J.A.: In this matter I have first to say that I have had the benefit of reading the judgment of my brother O'HALLORAN and I agree with his statement that in numerous decisions this Court has reversed the judge below on the question of whether there should be a jury or not. As my learned brother in his extended reasons for judgment has referred specifically to such decisions and to other decisions on appeal to this Court I will not, in order to avoid repetition, discuss many of them in detail. I would like to say, however, that I am satisfied from my perusal of such decisions that this Court has not established any rule to the effect that on an appeal from a discretionary order this Court should not in any case examine anew the relevant facts and circumstances. On the contrary it is clear from such decisions that this Court has again and again on appeal from what were treated as discretionary orders examined anew the relevant facts and circumstances. Three examples may be cited. In *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56, which was an appeal from an order directing a trial with

a jury, it is quite apparent that each of at least four of the five members of the Court examined anew the relevant facts and circumstances, as shown by the material before the Court, in order to reach his own conclusion as to whether or not the material showed that the case came within one of the exceptions mentioned in our Order XXXVI., r. 5 (r. 429), so as to deprive the plaintiff of a trial by jury, and allowed or dismissed the appeal according to his conclusion. In *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78, which was an appeal from an order refusing an order for trial with a jury, the order was set aside and an order made for trial with a jury. Though MARTIN, J.A. (as he then was) indicated that he would allow the appeal because no affidavit evidence, other than that of the solicitor on the technical question involved, had been produced, it is apparent that the majority of the Court allowed the appeal on the ground that on the material before the Court the issues did not come within the exceptions mentioned in rule 429. In *Plowright* v. *Seldon* (1932), 45 B.C. 481 MACDONALD, J. had granted the plaintiff's application for a trial with a jury in an action for malpractice, opposed by the defendant on the ground that the issues were of a scientific character and the case, therefore came within rule 429. It is interesting to note at the outset that in this case an affidavit had been filed on behalf of the defendant and that MACDONALD, J. had stated (see p. 484) that he was not acting in the exercise of a discretion. It is apparent that on the appeal the members of the Court disagreed as to whether or not he had exercised any discretion (see pp. 486, 489, 492) but, in any event, it is obvious that in this case the majority of the members of the Court considered whether or not the material showed that some intricate or scientific question was involved and, having come to the conclusion that it did not, dismissed the appeal accordingly.

I pause here to add that I agree that in the cases, in which the question was whether there should be a jury or not, our Court of Appeal has followed the practice of not interfering with the discretion of the judge unless it was clearly satisfied that he was wrong. My conclusion on the cases, however, is that this means wrong on whether or not the material shows that the case comes within one of the exceptions as aforesaid though I admit that

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the result is sometimes put in this way that, if the material does not show this, then it is a plain case in which the judge has no discretion except to order that the trial be had with a jury. See especially MACDONALD, C.J.A. in *Campbell* v. *Lennie* (1927), 38 B.C. 422, at p. 423.

If I should deal with the present appeal, therefore, from an order dismissing an application for trial with a jury solely in the light of the decisions of this Court as aforesaid, I would say that I should proceed to examine the material and come to a conclusion as to whether or not it shows that the case comes within one of the exceptions mentioned in said rule 429 and decide accordingly. I would also go further and say, with all respect to contrary opinion, that the decision of the House of Lords in the case of *Osenton & Co.* v. *Johnston* (1941), 57 T.L.R. 515, cited during the argument, is not inconsistent with so proceeding. In the *Osenton* case the Lord Chancellor said, at pp. 518-9:

> The law as to the reversal by the Court of Appeal of an order made by the judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. 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 such as those urged before us by the appellants, then the reversal of the order on appeal may be justified. This matter was elaborately discussed in the decision of this House in *Evans* v. *Bartlam* (53 The Times L.R. 689; [1937] A.C. 473), where the proposition was stated by my noble and learned friend, Lord Wright (at pp. 693 and 486 of the respective reports), as follows: "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he is wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in *Gardner* v. *Jay* ((1885), 29 Ch. D. 50, at p. 58) Lord Justice Bowen in discussing the discretion of the judge as regards mode of trial says: 'That discretion, like other judicial

discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed.' "

As my brother O'HALLORAN has pointed out, one may find in the *Osenton* case individual observations, which seem to point in more than one way, but there is one common ground of agreement in that portion of Lord Wright's speech in *Evans* v. *Bartlam* quoted by the Lord Chancellor (see the foregoing passage) and the *Osenton* decision was really a restatement of what Lord Wright said in such case where the House of Lords also reversed the Court of Appeal and set aside a default judgment.

In the *Evans* v. *Bartlam* case, as reported in 53 T.L.R. 689, at p. 693, Lord Wright also said:

> Lord Justice Bowen in that case [*i.e.*, the *Gardner* v. *Jay* case] held that the appellant had not satisfied the *onus* of showing that the discretion of the judge had been wrongly exercised.
>
> But there are many cases in the books where it has been held that the appellant has satisfied the *onus* of showing that the exercise of the discretion by the judge was not justified on the facts.

Then referring to the case before him Lord Wright goes on to say at pp. 693-4, in part, as follows:

> I see no reason to interfere with the judge's order. The respondent's counsel in my judgment has entirely failed to satisfy the *onus* of showing that the judge was wrong. Order XXVII., rule 15, gives a discretion untrammelled in terms; it does not even require an affidavit as a condition, and the discretion may be exercised on any proper material though in practice an affidavit is generally required. To quote again from Lord Justice Bowen in *Gardner* v. *Jay* (29 Ch. D., at p. 58): "When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the judge why should the Court do so?" . . . As Lord Justice Kay said in *Jenkins* v. *Bushby* (7 The Times L.R. 227; [1891] 1 Ch. 484, at p. 495): "The Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion." A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiæ* once the facts are ascertained.

I think the cases referred to can be reconciled on the view that the Court of Appeal can examine anew the relevant facts in order to exercise a discretion by way of review which may reverse the order if it comes to the conclusion that the appellant has satisfied the *onus* of showing that the exercise of the discretion by

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the judge was not justified on the facts. If, however, in the course of such examination the appellate authorities should come to the conclusion that the facts were such that the exercise of the discretion by the judge might be justified or, in other words, that there was material on which he could exercise his discretion to make the order, then the appellate authorities do not reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. Applying the principle to the present case I would say that, if the appellate authorities find on the material before them that the facts are such that the action does not fall within one of the exceptions contained in rule 429, then it is a plain case where there is no material on which the judge could exercise his discretion to make the order he did and he had no discretion except to order that the trial be had with a jury.

Having in mind then both the English and British Columbia decisions as aforesaid, I have to say that I deal with this appeal on the basis that the appellant, in order to succeed, must clearly satisfy me that the judge below was wrong or, in other words, must satisfy the *onus* of showing that the exercise of the discretion by the judge was not justified on the facts. In considering, however, whether the appellant has so satisfied me or satisfied such *onus* in this particular case one must remember that, as this is a common-law action for damages, the plaintiff is entitled to a jury under Order XXXVI., r. 6, unless the defendants show that the case comes within one of the exceptions in r. 5. I note that all the learned judge below, COADY, J., says in his reasons for judgment on the point in question is:

> It appears to me from the pleadings that this is a case coming within the provisions of rule 5, Order XXXVI.

It should first be noted that COADY, J. does not indicate within which one or more of the exceptions in said rule the case appears to him to come. It may also be noted that in the passage set out reference is made only to the pleadings but the order itself refers to the proceedings as well and I deal with the matter on the assumption that the affidavit as to documents was part of the material. I also deal with the matter on the assumption, though without holding (as I do not find it necessary to hold), that the

last clause in said rule, reading "or where the issues are of an intricate and complex character" constitutes a third exception.

After perusing the material before the Court I have to say that in my view the appellant has satisfied the *onus* of showing that the exercise of the discretion by the judge was not justified on the facts. I am clearly satisfied that on the material before the Court the defendants had not discharged the *onus* which was on them to prove that the case came within one of the exceptions contained in r. 5, Order XXXVI. I, therefore, hold that this is a case where the judge had no discretion except to order that the trial should be with a jury. I would also add that, in my view, the material in each of the three hereinbefore cited cases, where trial by jury was allowed, came much closer to proving the case was within one of the exceptions than the material in the present case. I would, therefore, allow the appeal and order a trial with a jury.

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

Solicitor for appellant: *J. T. Jackson.*

Solicitors for respondent Sweny: *Bird & McLorg.*

Solicitors for respondents Brown and Western City Co. Ltd.: *Tiffin & Company.*

Solicitor for respondents Rainford and Boyd: *D. Donaghy.*

Solicitors for respondent Mackenzie: *Walkem & Thomson.*

Solicitors for respondent Dawson: *Killam & Shakespeare.*

Solicitors for respondent Malkin: *Griffin, Montgomery & Smith.*

Solicitors for respondent *W. B. Farris*: *Farris & Company.*

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Mar. 11, 24.

McCOUBREY v. THE CARVER CONSTRUCTION COMPANY, LIMITED, WOODBURY AND WOODBURY.

Mechanic's lien—Wages—Construction of dwelling-house—Filing of affidavit under section 19 of Act—Lis pendens not filed in Land Registry office—Effect of—R.S.B.C. 1936, Cap. 170, Secs. 19 and 23.

Held
mby Constr. etc.
Pluger
DLR (2d) 658.

Subsection (2) of section 23 of the Mechanics' Lien Act provides that the claimant shall file a *lis pendens* in the Land Registry office immediately after the institution of proceedings to enforce the lien, and if no *lis pendens* is filed within 31 days from the date of filing the affidavit, the lien shall be cancelled from the records of the Land Registry office.

In an action by the claimant for a declaration that he is entitled to a mechanic's lien for his wages and for enforcement of the said lien, the evidence disclosed that the claimant did not file a *lis pendens* in the Land Registry office.

Held, that the filing of a *lis pendens* is an absolute enactment and must be fulfilled, and no *lis pendens* having been filed there is no jurisdiction to hear the case.

Reld to
Downing & Wright
Plumbing, etc.
? (3ce) 728 (BCCC)

ACTION to recover $101 from The Carver Construction Company, Limited, for wages due for work done as foreman carpenter on a dwelling of the defendants Woodbury, and as against the defendants Woodbury for a declaration that he is entitled to a mechanic's lien for said wages and for the enforcement thereof. Tried by SHANDLEY, Co. J. at Victoria on the 11th of March, 1942.

Sinnott, for plaintiff.
F. C. Elliott, for defendants Woodbury.

Cur. adv. vult.

24th March, 1942.

SHANDLEY, Co. J.: In this action plaintiff claimed that the defendant, The Carver Construction Company, Limited, was indebted to him in the sum of $101 for wages due as foreman carpenter for work done on the dwelling of the defendants Woodbury, and as against the said defendants Woodbury for a declaration that he is entitled to a mechanic's lien for his said wages and for enforcement of the said lien.

The first contention of counsel for the defendants Woodbury

was that the lien had ceased to exist because the particulars set out in the plaintiff's affidavit filed under the provisions of section 19 of the Mechanics' Lien Act were not sufficient. I cannot agree with this contention because section 20 says a "substantial compliance" only with section 19 is required. I am of opinion there was a substantial compliance with the section. If the defendants wanted further and better particulars they could have demanded them before the trial of the action.

However, the second contention of counsel for the said defendants Woodbury, *viz.*, that the action should be dismissed because the plaintiff had not filed a *lis pendens* in the Land Registry office, is more serious. Subsection (1) of section 23 of our Mechanics' Lien Act, R.S.B.C. 1936, Cap. 170, states that every lien shall absolutely cease to exist after the expiration of 31 days after filing of the affidavit mentioned in section 19, unless the claimant in the meantime has instituted proceedings to realize his lien in the County Court registry in which the lien was filed. Subsection (2) of said section 23 states that the claimant shall file a *lis pendens* in the Land Registry office immediately after the institution of proceedings to enforce the lien, and if no *lis pendens* is filed within 31 days from the date of filing the affidavit the lien shall be cancelled from the records of the Land Registry office.

In this case the claimant did not file a *lis pendens* in the Land Registry office.

Subsection (1) of section 23 of the Interpretation Act, R.S.B.C. 1936, Cap. 1, provides that the word "shall" is to be construed as imperative.

In *Woodward* v. *Sarsons* (1875), L.R. 10 C.P. 733, it was held that the general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

I am of the opinion that the filing of a *lis pendens* is an absolute enactment and must be fulfilled. In *Barker* v. *Palmer* (1881), 8 Q.B.D. 9, the plaintiff brought an action in the county court to recover lands. The then County Court Rules provided as follows:

> The summons in an action brought to recover lands shall be delivered to

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Shandley, Co. J.

the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof.

The plaintiff in that case delivered the summons 39 clear days, and the bailiff served it upon the defendant 38 clear days before the return day. The trial judge ruled that the service was good. His decision was reversed on appeal. Grove, J. at p. 10, says:

> In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court, and there is no such power here.

I am of the opinion that the filing of a *lis pendens* is an absolute enactment and must be fulfilled, and no *lis pendens* having been filed I have no jurisdiction to try the case.

The action against the defendants Woodbury is therefore dismissed with costs.

Action dismissed.

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Mar. 10, 19.

REX v. McDONALD.

Criminal law—Attempting to break and enter—Circumstantial evidence only—Sufficiency of to found conviction—Appeal—Criminal Code, Secs. 459 and 571.

On a charge of attempting to break and enter under sections 459 and 571 of the Criminal Code, accused was convicted on circumstantial evidence only.

Held, on appeal, affirming the decision of LENNOX, Co. J., that the test to apply is "viewing the evidence as a whole, can it be said that the facts proven from which the Crown asks that the inference of guilt be made are of such a nature and so related to each other as to lead the guarded discretion of a reasonable and just man to the conclusion of guilt and to no other conclusion." Considering the evidence as a whole and in the light of the defence relied upon by the appellant, the cumulative effect of the circumstances established leads irresistibly to the conclusion of guilt and is inconsistent with any other rational hypothesis.

APPEAL by accused from his conviction by LENNOX, Co. J. on the 4th of December, 1941, on a charge of attempting to break and enter a suite in the Nottingham Apartments, Vancouver, under sections 459 and 471 of the Criminal Code. The occupant

of suite 22 on the upper floor in said apartment heard someone attempting to open the door of his suite, but when he opened his door no one was within sight. Two or three minutes later accused was seen at the door of suite 4 on the lower floor talking to the occupant. He was arrested and pieces of celluloid were found in his pocket. This material can be used in opening the locked door of a suite.

The appeal was argued at Vancouver on the 10th of March, 1942, before SLOAN, O'HALLORAN and FISHER, JJ.A.

Murdock, for appellant: On November 22nd, 1941, the accused was in the Nottingham Apartments. The evidence was that the occupant of suite 22 on the upper floor of the building heard someone at his door attempting to enter. When he went to the door and unlocked it he did not see anyone outside. A minute or two later accused was seen on the lower floor talking to the occupant of suite 4. He was suspected by the man in charge of the apartment and was arrested, when some celluloid was found in his pocket. This is all the evidence that was given against him; purely circumstantial and not sufficient ground for conviction: see *Rex* v. *McEwan & Lee* (1932), 59 Can. C.C. 75; *Rex* v. *Bookbinder* (1931), 23 Cr. App. R. 59; *Rex* v. *Wallace* (1931), *ib.* 32; *Rex* v. *McDonald* (1939), 72 Can. C.C. 351.

W. S. Owen, for the Crown, referred to *Rex* v. *Jenkins* (1908), 14 B.C. 61; *Fraser* v. *The King,* [1936] S.C.R. 296; *Rex* v. *Comba,* [1938] O.R. 200, at p. 211.

Murdock, replied.

Cur. adv. vult.

On the 19th of March, 1942, the judgment of the Court was delivered by

SLOAN, J.A.: In this case proof of guilt was made, almost, if not wholly, by circumstantial evidence.

In *Rex* v. *McEwan* (1932), 59 Can. C.C. 75, at pp. 80 and 81 the late Mr. Justice McGillivray, in delivering the judgment of the Appellate Division of the Supreme Court of Alberta, said, after reviewing the authorities, that in cases of this nature,—

the test which an appellate Court should apply is this—viewing the evidence

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as a whole, can it be said that the facts proven from which the Crown asks that the inference of guilt be made, are of such a nature and so related to each other as to "lead the guarded discretion of a reasonable and just man to the conclusion" of guilt and to no other conclusion. *Loveden* v. *Loveden*, [(1810)] 2 Hag. Con. 1, 161 E.R. 648. If so a conviction will not be disturbed; if not, it will be set aside.

Considering the evidence as a whole, and in the light of the defence relied upon by the appellant we are of opinion that the cumulative effect of the circumstances established leads irresistibly to the conclusion of guilt and is inconsistent with any other rational hypothesis.

The appeal from the conviction is, therefore, dismissed.

We see no valid ground for interference with the sentence and the appeal therefrom is also dismissed.

Appeal dismissed.

GUERARD AND GUERARD v. RODGERS AND RODGERS.

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March 9, 10;
April 14.

Motor-vehicles—Negligent driver—Liability to passenger—Expense sharing —"Transporting a passenger for hire or gain"—R.S.B.C. 1936, Cap. 195, Sec. 74B—B.C. Stats. 1938, Cap. 42, Sec. 3.

On the 16th of June, 1941, the defendant Rodgers being ill, decided to go with his wife in their automobile from Kelowna to Vancouver to consult a specialist. He went to his barber to have his hair cut and when there he told him (the plaintiff W. J. B. Guerard) of his contemplated trip. Guerard then suggested that he and his wife go with them and he would pay a portion of the expenses. The four started away on the same afternoon and Guerard paid for meals and a room for the night for Rodgers at Ashcroft, in all $6.50. Rodgers paid for the gasoline. The next day at about 3 o'clock in the afternoon, when about four miles east of Abbotsford, the car skidded, went off the road and turned over in a ditch. It was raining since they left Chilliwack, and they passed a caution sign "Slippery when wet" shortly before the accident, and Mrs. Rodgers was driving at about 40 miles an hour. Mrs. Guerard suffered a fractured pelvis and other injuries, and Mr. Guerard minor injuries. In an action for damages it was held that the accident was caused by the negligent driving of Mrs. Rodgers owing to excessive speed in the circumstances prevailing, but that the action be dismissed as the plaintiffs' right of action was taken away by section 74B of the Motor-vehicle Act.

Held, on appeal, affirming the decision of FISHER, J., that the accommodation extended by the defendants was not done with the object of obtaining hire or gain, and section 74B of the Motor-vehicle Act is a bar to the action.

APPEAL by plaintiffs from the decision of FISHER, J. of the 27th of November, 1941 (reported, *ante*, p. 171) in an action for damages for injuries received as a result of an automobile accident on June 17th, 1941, near Abbotsford, B.C. The plaintiffs were passengers in the defendants' car which was being driven by the defendant Mrs. Rodgers. The accident occurred in the course of a journey from Kelowna to Vancouver. Both plaintiffs and defendants reside in Kelowna and had been friends for many years. Mr. Rodgers was advised by his physician that he was suffering from cancer and that he should consult a specialist in Vancouver. He and his wife decided to take the trip to Vancouver, and shortly before the time fixed to start, the plaintiff Guerard suggested that he and his wife would like to

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take the trip with them, to which Rodgers agreed, and Guerard suggested that he would help to share the expenses of the trip. Later Guerard telephoned Mrs. Rodgers informing her that he and his wife were to go with her, and that he had arranged with Mr. Rodgers about defraying expenses, to which she replied that any arrangement made with her husband would be all right. On the way they stopped at Kamloops where Guerard paid the bill for the whole party for dinner, and on staying at Ashcroft for the night Guerard paid Rodgers $2 for his room and paid the breakfast bill. Guerard again paid for the lunch for the party at Hope, and this was all he paid on the trip. When about four miles from Abbotsford it was raining and Mrs. Rodgers was driving at about 40 miles an hour. The car skidded off the road into a ditch, where it overturned. Mrs. Guerard suffered a fractured pelvis and other injuries and Mr. Guerard minor injuries. It was held on the trial that there was negligence on the part of Mrs. Rodgers in driving so fast on a wet slippery pavement, but the action was dismissed on the ground that their right of action was taken away by section 74B of the Motor-vehicle Act.

The appeal was argued at Vancouver on the 9th and 10th of March, 1942, before MCDONALD, C.J.B.C., SLOAN and O'HALLORAN, JJ.A.

Fraser, K.C., for appellants: The learned judge should have held that the plaintiffs were within the first exception in section 74B of the Motor-vehicle Act and were passengers for gain. The question of law for determination is the scope and meaning of the phrase "for hire or gain." Appellants' contention satisfies the cardinal construction for interpretation of Acts that the grammatical and ordinary sense of the words used in the Act is to be adhered to unless such would lead to an absurdity or some repugnance or inconsistency with the rest of the statute: see Maxwell's Interpretation of Statutes, 8th Ed., p. 3; *Perry* v. *Skinner* (1837), 2 M. & W. 471, at p. 475. We must look at the precise words and construe them in their ordinary sense: see *Heydon's Case* (1584), 2 Co. Rep. 18; *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61, at p. 106; *Maltison* v. *Hart* (1854), 14 C.B. 357, at p. 385; *The Canadian Northern Ry. Co.* v. *The King* (1922), 64 S.C.R. 264, at pp. 270-1; *Vacher & Sons, Limited* v. *London*

Society of Compositors, [1913] A.C. 107, at p. 118. This interpretation leads to no absurdity: see *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (1933), 102 L.J.P.C. 90, at p. 95; *The King* v. *Krakowec et al.,* [1932] S.C.R. 134, at p. 141. We must ascertain the ordinary and grammatical meaning of the word "gain": see *Rex* v. *Oberlander* (1910), 15 B.C. 134, at pp. 137-8; *Dominion Creosoting Co.* v. *Nickson Co.* (1917), 55 S.C.R. 303, at p. 318; *Thompson* v. *Yockney* (1912), 3 W.W.R. 591; *Robertson* v. *Day* (1879), 49 L.J.P.C. 9, at pp. 12-13. To treat a word as surplusage is not justifiable: see *Taranki Electric Power Board* v. *New Plymouth,* [1933] A.C. 680; *Williams* v. *Box* (1910), 44 S.C.R. 1, at p. 24; *Rex ex rel. Appleton* v. *Billisky,* [1925] 3 W.W.R. 774, at p. 779. The word "business" does not apply: see *Adamson* v. *Melbourne and Metropolitan Board of Works,* [1929] A.C. 142. The Court will not enter into speculations as to the motive of the Legislature: see *Holme* v. *Guy* (1877), 5 Ch. D. 901, at p. 905; *Ashmore* v. *Bank of British North America* (1913), 18 B.C. 257, at p. 260; *Swartz* v. *Wills,* [1935] S.C.R. 628, at p. 629; *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, at p. 430; *The King* v. *Krakowec,* [*supra*]. There must be no construction to make any alteration in the common law except by clear enactment: see Craies's Statute Law, 4th Ed., 119; *Arthur* v. *Bokenham* (1708), 11 Mod. 148, at p. 150; *Minet* v. *Leman* (1855), 20 Beav. 269, at p. 278; *Betsworth* v. *Betsworth,* [*ante,* p. 206]; [1942] 1 W.W.R. 445, at p. 451; *Muller* v. *Shibley* (1908), 13 B.C. 343; *Canadian Pacific Ry. Co.* v. *Carruthers* (1907), 39 S.C.R. 251; *Boyer* v. *Moillet* (1921), 30 B.C. 216; *Gaby* v. *Palmer* (1916), 85 L.J.K.B. 1240, at p. 1244; *Black Diamond Oil Fields* v. *Judge Carpenter* (1915), 9 W.W.R. 158; *Gordon* v. *Hebblewhite,* [1927] S.C.R. 29; *Swanton* v. *Goold* (1858), 9 Ir. C.L.R. 234; *Rolfe and The Bank of Australasia* v. *Flower, Salting & Co.* (1865), L.R. 1 P.C. 27.

L. St. M. Du Moulin (*W. H. K. Edmonds,* with him), for respondents: The plaintiffs were not transported for "hire or gain" within section 74B, subsection (*a*). The question is what was the real object of the defendants in transporting the plaintiffs. To invoke subsection (*a*) there must be a finding of fact

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that the real object of the defendants in furnishing transportation to the plaintiffs was hire or gain. The question should be: What were the defendants transporting the plaintiffs for? To support the "real object" test see *Bampton* v. *Regem,* [1932] 4 D.L.R. 209; *Rex* v. *Cherry and Long,* [1924] 2 W.W.R. 667; *Rex* v. *James* (1903), 6 O.L.R. 35; *McCann* v. *Hoffman* (1937), 70 P.2d 909; *Rogers* v. *Vreeland* (1936), 60 P.2d 585. *Fuller v. Tucker* (1940), 103 P.2d 1086. The plaintiffs only paid $7 towards expenses of defendants. The payments made by Guerard are neither "hire" nor "gain": see *Shaw et al.* v. *McNay et al.,* [1939] 3 D.L.R. 656; *Starkweather* v. *Hession* (1937), 73 P.2d 247; *Stephen v. Spaulding* (1939), 89 P.2d 683; *Ocean Accident & Guarantee Corporation* v. *Olson* (1937), 87 Fed.2d 465; *Carboneau* v. *Peterson* (1939), 95 P.2d 1043; *Voelkl* v. *Latin* (1938), 16 N.E.2d 519; *Raul* v. *Rowe,* 119 S.W.2d 190. Friendly journeys such as this were the cause of the enactment: see *Shaw et al.* v. *McNay et al.,* [1939] 3 D.L.R. 656. In construing section 74B the words "hire" or "gain" should be considered together as coloured one to the other: see *Fraser* v. *Pere Marquette R.W. Co.* (1909), 18 O.L.R. 589, at p. 602; *Welch* v. *Ellis* (1895), 22 A.R. 255; *Heck* v. *Brann,* [1938] 2 D.L.R. 716. The evidence shows there was no negligence on the part of the defendants: see *McKimmie* v. *Strachan,* [1936] O.W.N. 218; *McMillan* v. *Murray,* [1935] S.C.R. 572; *English* v. *North Star Oil Ltd.,* [1941] 3 W.W.R. 622; *Wing* v. *London General Omnibus Co.,* [1909] 2 K.B. 652. The plaintiff, with full knowledge, agreed to incur the risk: see *McDermid* v. *Bowen* (1937), 51 B.C. 525; *Delaney* v. *City of Toronto* (1921), 49 O.L.R. 245; *Stewart* v. *Godwin,* [1934] O.W.N. 49.

Fraser, replied.

Cur. adv. vult.

14th April, 1942.

MCDONALD, C.J.B.C.: This case was tried before FISHER, J., whose judgment is reported [*ante,* p. 171]. It is contended before us that the judgment dismissing the action is wrong, the plaintiffs' main contention being that upon the evidence as set out by the learned judge there was an enforceable contract whereby the

defendants agreed to transport the plaintiffs for hire or gain. I think, on the evidence, there was no such contract. Defendant Rodgers, being under sudden necessity to drive to Vancouver from Kelowna, went to the plaintiff Guerard, his barber, to have his hair cut. He told Guerard of his trouble and of his intention. Guerard asked if he and his wife might go along as passengers. Rodgers expressed his willingness to extend that accommodation. Thereupon Guerard, evidently not wishing to appear small, and being appreciative of Rodgers's kindness, volunteered to pay a part of the expenses. I think it is clear on the evidence that Guerard himself so viewed the situation—at least until long after the accident in question, and after he had consulted his solicitor. What was so informally said by the parties, I am satisfied, was not intended to create and did not create any legal obligation on either side.

The only substantial question before us is: What is the meaning of the words "transporting for hire or gain"? I think the meaning is plain and that the learned judge reached the right conclusion. It is not of great importance that we should ascertain by just what process the learned judge reached his conclusion, if on the plain reading of the statute his conclusion is right. True, he did examine many other cases, and this much, at least, may be said, that no authority was cited to him or to us which goes to show that the decision is wrong. Some discussion has taken place as to the sense in which the word "for" is used in the statute. I think it is used in the sense mentioned under IV. 8, at p. 410, Vol. IV. of the New English Dictionary, the meaning being "with the object or purpose of." Under this heading the learned writers of the Dictionary give several examples of such use through long years, as for instance (translating from the old English forms), "the Englishmen never departed from their battles for chasing of any man" and "[He] set sail . . . for the relief of Epidamnus."

I think it is quite clear that the accommodation extended by the defendants was not done with the object of obtaining hire or gain, and that section 74B (*a*) is a bar to the action. The most that could be said is that Guerard partially indemnified the defendants in respect of their expenses.

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I would, therefore, dismiss the appeal with costs here and below.

SLOAN, J.A.: In my view the learned judge below reached the right conclusion and I would therefore dismiss the appeal.

O'HALLORAN, J.A.: I am unable to hold on the record presented, that the respondents were driving the appellants to Vancouver for "hire or gain" within the meaning of section 74B (*a*) of the Motor-vehicle Act as amended in 1938.

The appellants' arrangements for the trip were hurried and distinctly sketchy. What occurred points to the more likely probability that the respondent husband and wife as they were about to leave for Vancouver, took the appellant husband and wife along as friends and companions for the trip.

In so deciding I attach to "gain" its reasonable and natural meaning. But I do not accede to the submission that section 74B (*a*) confines liability only to those engaged in the business of carrying passengers as is done in apt language in the Ontario and New Brunswick counterpart sections, for which *vide Shaw et al.* v. *McNay et al.*, [1939] 3 D.L.R. 656, and *Poirier et al.* v. *Warren* (1942), 16 M.P.R. 213.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Alexander & Fraser.*
Solicitor for respondents: *L. St. M. Du Moulin.*

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April 24.

REX *EX REL.* MATHESON v. MARIO GALEAZZI.

Criminal law—Government Liquor Act—Consumption of liquor in a public place—In a motor-vehicle parked near a highway—R.S.B.C. 1936, Cap. 160, Sec. 39.

The site of the Tyee barbecue adjoins the Island Highway in Nanaimo County. The building is a short distance back from the highway and the space between the building and the highway is clear ground without obstruction from the highway, and the public are permitted to travel in off the highway and park in front of the building. The accused parked

his car in front of the building and was found consuming liquor in a public place contrary to section 39 of the Government Liquor Act.

Held, on appeal to the county court, that the adjoining property in front of the barbecue building is a public place within the definition of a public place under the Government Liquor Act, that the car of the accused was parked on that place, and he was properly convicted.

APPEAL by accused from his conviction by the police magistrate for the county of Nanaimo at Cumberland on a charge that he unlawfully did consume liquor in a public place, to wit: in a motor-vehicle parked near the Island Highway at Royston, in the county of Nanaimo, B.C., contrary to section 39 of the Government Liquor Act. Argued before HANNA, Co. J. at Cumberland on the 24th of April, 1942.

Bainbridge, for appellant.
Spinks, for the Crown.

HANNA, Co. J.: Going through the evidence submitted to this Court the Island Highway is mentioned and adjoining the site of the Tyee barbecue. There is some doubt as to whether the offence took place on one or the other, it might have been partially on both. It is observed that the highway is a public place in the definition. The site occupied by the barbecue is clear ground in front of the barbecue building. There are no restrictions, fences, or gates. There is an open driveway. There is no marking where the highway stops, or where the highway allowance stops, and the barbecue property in front of the building starts. According to evidence submitted the public are permitted to travel in off the highway and park in the lot in front of the building. There is no entrance fee to be paid; there is no application to be made, apparently it is without restriction. It would appear that the accused sitting in this car was parked as a member of the public with permission. I find that the adjoining property in front of the barbecue building is a public place within the definition of a public place under the Government Liquor Act, and I find that the car of the accused was parked on that place in front of the barbecue. That it was parked in a public place. Now I find that a car is an instrument of conveyance and not a place, and so far as the Government Liquor Act is concerned it might as well be claimed that a chair was a place. I think the car is a part

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of the larger place which is the area before the barbecue and therefore I find that the accused was consuming liquor in a public place when in the area in front of a barbecue or on the highway in front of that area.

Under the circumstances I will treat this as a test case and not award any costs.

Appeal dismissed.

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March 17, 20, 31.

RENNER v. HADDEN.

Negligence—Automobile collision—Defendant runs out of gas—Left side of truck left five or six feet on pavement—Lack of effort to get assistance—Run into by plaintiff's car—No lights on stalled truck—Liability.

Followed se v DeWolfe 5 R(2d) 90 (NSSC) & also 1 NSR(2d) 789 (NSSCAppD)

On the 24th of December, 1941, the defendant was driving his truck northerly on the Pacific Highway, and at about 10 p.m., when half a mile from Cloverdale, he ran out of gas. He left the truck on the east side of the road, his left wheels being from five to six feet on the pavement. He left the front and rear lights on and walked to Cloverdale where he visited three service stations which were closed, and went to the home of one operator who was out at the time. He made no report to the police and made no further effort to get assistance. He then went to a dance with a friend, but finding the dance was not on, he and his friend went home. On the way they passed the truck at about 11.15 p.m., and they both swore the lights were still on. It was a crisp night with good visibility. On the same night the plaintiff loaned his car to his brother, who with two relatives in the car was driving towards Cloverdale on the Pacific Highway and at about 11.30 o'clock he ran into the rear of the defendant's truck. He was going at about 25 miles an hour. A car was coming in the opposite direction, and when about 10 or 15 feet away from the truck the driver states the lights from the approaching car dimmed his vision, and as the truck had no lights on he did not see it, his own lights being dimmed owing to the approaching car. A police officer heard the crash, arrived shortly after, and said the truck lights were not on. In an action for damages:—

Held, that there was negligence on the part of the defendant, as after a few casual efforts to find a regular service station the defendant abandoned his efforts to find someone to remove his truck from the highway, and proceeded to attend a dance. The evidence of the officer is accepted as to the truck lights being out at the time of the accident, and there was no evidence that the plaintiff's brother was driving negligently.

ACTION for damages owing to an automobile collision, resulting from the defendant negligently leaving his truck stalled on

the highway. The facts are sufficiently set out in the reasons for judgment. Tried by WHITESIDE, Co. J. at New Westminster on the 17th and 20th of March, 1942.

Marsden, for plaintiff.
McGivern, for defendant.

Cur. adv. vult.

31st March, 1942.

WHITESIDE, Co. J.: The plaintiff claims damages from the defendant because the latter on the evening of the 24th of December, 1941, left his truck stalled and unattended on the Pacific Highway at a point about half way between the old Great Northern Depot and the town of Cloverdale a distance of about half a mile south of Cloverdale.

The defendant who is a soldier had been allowed to leave his barracks and go to his home which is situate about 3½ miles south of Cloverdale at 7.05 p.m. on the day in question. He proceeded to his home and afterwards in company with his wife started out in his truck to go to Murrayville, B.C. for an evening's entertainment. He travelled northerly on the Pacific Highway till when he reached the point above mentioned he ran out of gas. This occurred at 10 o'clock p.m. He managed by using his starter to shunt the truck farther over to his right so that when it finally came to a complete standstill the truck was facing north towards Cloverdale with its right front wheel and its right dual wheels just off the pavement on the shoulder of the road and the remaining part of his truck resting on the pavement in such a manner as to partly block the east side of the driveway to the extent of about five and one-half or six feet. Leaving the truck in this position the defendant left it with its front and rear lights on and walked to Cloverdale to get help to move his truck off the pavement. He called at three different service stations but found all were closed because gas stations at that time all closed at 7 p.m. and he had not left Vancouver until 7.05 p.m. Besides calling at the three stations referred to and finding no one in charge he went to the residence of one service-station operator but found him away from home. The defendant did not report the fact that his truck was stalled on the highway for want of

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Whiteside, Co. J.

gasoline to the police and did nothing further to obtain help to remove his truck from the highway. On the contrary the defendant met a friend of his named Harris and with him proceeded on his way to attend a dance at Murrayville. When he arrived at Murrayville he found that the dance was not held so he and his friend Harris in a short time returned to their homes. On the way home they passed the defendant's truck at 11.15 p.m. Its lights were still burning both front and rear and the defendant and his friend Harris both say that they conferred with one another to decide whether they would turn the truck lights off to save the battery from running down or whether the defendant would leave the truck with its lights burning and the latter decided to leave the truck lights on and did so and went on home and the defendant was not aware that anything had happened to the truck until the following day.

On that same evening of December 24th, 1941, the plaintiff loaned his Plymouth sedan automobile to his brother Oscar Renner to enable him together with another brother of the plaintiff Harold Renner and a sister Ida Renner to go to some entertainment at Fort Langley. The Renner home was situated about 100 yards south of the Welcome Gate shown on Exhibit 1 and about a quarter of a mile off the highway. The weather was cold and crisp that night and the visibility was good. The plaintiff's witness Oscar Renner who was driving the automobile says that before he entered upon the highway he stopped and looked to see if any car was approaching and says that if the truck had then had its lights burning he could have seen them. There was a car approaching from Cloverdale. He could see its lights coming towards him. The lights of this car approaching him struck across his vision when he was only 10 or 15 feet distant from the defendant's parked truck and slightly dimmed his vision.

He was travelling about 25 miles per hour and had dimmed or lowered his lights when meeting the car coming towards him from Cloverdale and said he had no time to turn his lights up again before crashing into the rear of the defendant's truck which the plaintiff's witness says was then standing without lights on. When the crash occurred the noise of it attracted the

attention of Mr. Charles Stewart Cameron an officer of the R.C.M.P. of many years' experience. Mr. Cameron was on the McLellan Road about a quarter of a mile from the scene of the accident when the crash occurred and proceeded to the scene at once. When he arrived at the scene he found the truck angling across the highway and facing north-east without any lights on at all. He then instructed Oscar Renner to turn the truck lights on which the latter did. Oscar Renner, Harold Renner and Ida Renner all of whom were seated in the front seat of the plaintiff's automobile stated in their evidence that at the time of the collision the truck had no lights on and that at the time of the collision their own vision had been affected by the lights of the approaching car. Ida Renner said that she did not see the truck at all until her brother turned its lights on as instructed by officer Cameron. The defendant and his witness Harris both say the lights of the truck were on at 11.15 p.m. when they passed it. There is no evidence that anyone interfered with the truck lights between 11.15 and 11.30 when the collision occurred. I however accept the evidence of officer Cameron that the truck's lights were not on when the collision occurred or at all events when he arrived on the scene.

Mr. *McGivern* on behalf of the defendant submitted that running out of gas was not negligence on the part of the defendant. The case of *Johnston* v. *McMorran* (1927), 39 B.C. 24 seems to sustain Mr. *McGivern* in that case. There the plaintiff ran out of gas. He did, however, so conduct himself after the gas had run out that MACDONALD, J.A. (p. 27) found that no

> negligence [could] be attributed to him on the evidence because he suddenly ran out of gasoline. He had no reason to anticipate this dilemma: quite the contrary. He did everything which an ordinary prudent man is required to do.

I do not think that such a finding could be made on behalf of this defendant assuming that it was not negligence on the defendant's part to run out of gasoline. I think his negligence began when after a few casual efforts to find a regular service station open at 10 o'clock, he abandoned his efforts, if one can so refer to his enquiries at Cloverdale, to find someone to remove his truck from the highway he proceeded to attend a dance at Murrayville. The defendant was living in a district where he is well

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known. He made no effort whatever to get men to help him with the task of rolling the truck on a cement pavement to a place where the truck could not, whether lighted or not, have been a menace to highway traffic. The defendant might have applied to the police at Cloverdale for assistance in the way of gas supply or man power, or horse power. He might have taken any one of these steps. His friend Harris on cross-examination admitted that he could have moved the truck if there had been a rope available. I find that there is no evidence that the plaintiff was driving negligently. In my opinion the plaintiff comes well within the case of *Hall* v. *West Coast Charcoal and Wood Products Co. Ltd.* (1935), 50 B.C. 18.

There must be judgment for the plaintiff for the sum of $406.50 and costs.

Judgment for plaintiff.

Folld.
v. Columbia etc
4 DLR 596

d.
on v. Scott.
1 DLR
698

Apld
ers v. Begg
2] 1 D.L.R. 313

Folld
wick. v. Moore
2 DLR 362

Apld.
Ros. Realty Ltd. v
ntal Hotel
2 (3d) 194 (BCCA)

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March 6, 9;
April 14.

JACKSON v. MACAULAY NICOLLS MAITLAND AND COMPANY LIMITED AND WILLETT.

Vendor and purchaser—Sale of land—Interim receipt signed by parties—Deposit of $500 as part of purchase price—Assumption of mortgage in part payment—Description of mortgage in interim receipt incomplete—Tender of assignment of vendor's right to purchase—Insufficiency of title—Purchaser repudiates—Action to recover deposit.

The plaintiff entered into an agreement with the defendant to purchase a property and paid the defendant $500, being a deposit on account of the purchase price. They signed an interim agreement which set out the price as "$7,500 payable on the following terms, namely: $4,000 cash on completion of agreement, of which the deposit shall form a part, the balance . . . : By assuming 1st mortgage of $3,500 @ 6%." There was no mortgage on the property and the vendor did not have a complete title at the time but had an agreement to purchase on which a balance of $3,500 with interest at 6 per cent. was due. Six days after the interim agreement was signed the plaintiff called to complete the sale but instead of being offered a deed subject to a mortgage, was offered an assignment of the vendor's rights under her agreement to purchase. The plaintiff wanted to consult his solicitor as to this document and next day his solicitor wrote the defendant's agents repudiating the deal because "the variance between the documents and the interim receipt is so great." The vendor's solicitors then wrote to the plaintiff

threatening to forfeit his deposit. There were certain negotiations with a view to a settlement, but finally the plaintiff's solicitor wrote repudiating the deal and demanding return of the deposit. An action for the return of the deposit paid to the defendant's agents was dismissed.

Held, on appeal, reversing the decision of ELLIS, Co. J., that there never was a complete agreement, but only an agreement incomplete in an essential term, in that the only description of the mortgage was that it should be for $3,500 at 6 per cent. This would probably have sufficed if there had been an existent mortgage, but there was none. This leaves complete uncertainty as to the identity of the proposed mortgagee and the duration of the proposed mortgage. His right to recover the deposit where there was never a completed contract is covered by authority.

APPEAL by plaintiff from the decision of ELLIS, Co. J. of the 14th of November, 1941, in an action for the return of $500 deposited by the plaintiff on the 15th of July, 1941, with the defendant Macaulay Nicolls Maitland & Co. as agents for the defendant Mrs. Willett on a house to be purchased for $7,500, paying $4,000 in cash and assuming a mortgage for $3,500 with interest at six per cent. per annum. On the 15th of July an interim receipt agreement was signed by Macaulay Nicolls Maitland & Co. as agent for the owner, and by the plaintiff, which included the words that:

This receipt is given by the undersigned as agent and subject to the owner's confirmation, and upon the same being confirmed by the owner, it shall form a binding agreement of sale and purchase.

The plaintiff was not the registered owner of the property at that time, only having an agreement for sale, and when the document was presented to the plaintiff, it was an assignment of the agreement for sale. The plaintiff then repudiated the transaction.

The appeal was argued at Vancouver on the 6th and 9th of March, 1942, before MCDONALD, C.J.B.C., O'HALLORAN and FISHER, JJ.A.

Bray (*Meagher*, with him), for appellant: This is an action for moneys had and received. An interim receipt was signed by the parties. It is not an offer in the legal sense. It is an invitation to the vendor to treat or negotiate: see *Scammell & Nephew, Ltd.* v. *H. C. & J. G. Ouston* (1940), 110 L.J.K.B. 197. Being an invitation to treat, it cannot be converted into a contract by acceptance. Before acceptance we withdrew the offer and

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repudiated. The defendant was not in a position to give title. The interim receipt is dated the 15th of July, 1941, and she was not in a position to give title until the 15th of September following. The terms of the mortgage were not in the interim receipt: see *Townley* v. *City of Vancouver* (1924), 34 B.C. 201; *Murphy* v. *McSorley,* [1929] S.C.R. 542; Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 91, note (*q*). There was failure to give title: see *Parkes* v. *Sanderson* (1911), 2 O.W.N. 586; *Davies* v. *Davies* (1887), 36 Ch. D. 359; *Langan* v. *Newberry* (1912), 17 B.C. 88, at p. 99; *Hyde* v. *Wrench* (1840), 3 Beav. 334; *Dunn* v. *Alexander* (1912), 17 B.C. 347. The $500 was paid without consideration.

Dryer, for respondent: The offer can be accepted verbally and what happened after July 15th related to the performance of the contract and not to the making of it: *Stevenson* v. *Davis* (1893), 23 S.C.R. 629, at p. 632. The parties continued to negotiate after the time fixed had expired: see *Webb* v. *Hughes* (1870), L.R. 10 Eq. 281. They must give reasonable notice before repudiating. The difficulty was not a matter of title but a matter of conveyance: see *Re Hucklesby and Atkinson's Contract* (1910), 102 L.T. 214; *Bostwick and Curry* v. *Coy* (1915), 21 B.C. 478; *Rogerson & Moss* v. *Cosh* (1917), 24 B.C. 367. When the intention of the parties is clear the Court will endeavour to carry out that intention: see *Foley* v. *Classique Coaches, Ld.,* [1934] 2 K.B. 17; *Hillas and Co. Limited* v. *Acros Limited* (1932), 147 L.T. 503. The terms of a mortgage must be interpreted liberally: see Broom's Legal Maxims, 10th Ed., 361; *Reynolds* v. *Foster* (1913), 9 D.L.R. 836; *Martin* v. *Jarvis* (1916), 31 D.L.R. 740, at pp. 744-6; *Peterson* v. *Bitzer* (1920), 48 O.L.R. 386, at pp. 388-9; *DeLaval* v. *Bloomfield,* [1938] 3 D.L.R. 405, at p. 408.

Bray, in reply, referred to *Weiner* v. *Harris* (1909), 79 L.J.K.B. 342.

Cur. adv. vult.

14th April, 1942.

MCDONALD, C.J.B.C.: I am forced to the conclusion that this appeal must be allowed.

The action is brought by an intending purchaser of land

against the owner for return of deposit paid to her agents under an interim agreement for sale. The interim agreement set out the price as

> $7,500 payable on the following terms, namely: $4,000 cash on completion of agreement, of which the deposit shall form a part, the balance as follows: By assuming 1st mortgage of $3,500 @ 6%.

Actually there was no mortgage on the property; the wording was apparently the result of the salesman's mistake, he having forgotten the state of the title. The vendor did not have a complete title at the time; she had a right to purchase, on which a balance of $3,500 with interest at 6 per cent. was due.

The plaintiff purchaser called on the agents six days after the interim agreement was made, in order to complete the deal, and instead of being offered a deed subject to a mortgage, was offered an assignment of the vendor's rights under her right to purchase. Plaintiff raised no specific objection then, and asked leave to submit the document to his solicitor, which was granted. Next day his solicitor wrote to the vendor's agents repudiating the deal because "the variance between the documents and the interim receipt is so great." The same day the vendor's solicitors wrote to the plaintiff threatening to forfeit his deposit unless he completed his purchase within 48 hours. The two solicitors had an interview on that on the next day, in which both expressed hopes of a settlement, and the next day the vendor's solicitors wrote to the plaintiff's solicitors, stating that if the plaintiff preferred a mortgage this could be arranged, and offering to meet any reasonable demands. However, next day the plaintiff's solicitor wrote finally repudiating the deal and demanding return of the deposit. The owner's solicitors answered that the deposit would be forfeited unless the plaintiff gave notice by the next day that he would complete. Action followed, first against the vendor's agents only; then she was added as defendant. At the trial the claim against the agents was abandoned.

The trial, to my mind, was largely taken up with irrelevant matters. The plaintiff did a good deal of quibbling about the identity of the vendor, claiming that he thought her brother, who had represented her, was the vendor. Nothing really turned on the vendor's identity, and I am satisfied that this was mere subterfuge. Another objection stressed was that a good title was

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not shown, and undoubtedly up to the time of repudiation, the vendor never had anything more than a right to purchase. The vendor's agents and solicitors insisted that she could give title, and would, if the purchaser would show willingness to go on. This ability was not really shown except by inference; but I am not basing my decision on that. The real strength of the plaintiff's position, though apparently it was not grasped until he reached this Court, is that there never was a complete agreement, but only an agreement incomplete in an essential term, in that the only description of the mortgage was that it should be for $3,500 at 6 per cent. This would probably have sufficed if there had been an existent mortgage. Actually there was none. This leaves complete uncertainty as to, *inter alia,* the identity of the proposed mortgagee (for the materiality of identity see *Gordon* v. *Street,* [1899] 2 Q.B. 641) and the duration of the proposed mortgage. Such uncertainty, in my view, precludes the existence of any complete contract: *Scammell (G.) and Nephew, Ld.* v. *Ouston (H. C. and J. G.),* [1941] A.C. 251, and *Murphy* v. *McSorley,* [1929] S.C.R. 542.

I do not think the respondent succeeded in distinguishing these cases. The respondent's strongest authorities are those handed in since the hearing, and they show considerable difference of opinion in Ontario, most of the decisions being summarized in Boyd, C.'s judgment in *Martin* v. *Jarvis* (1916), 37 O.L.R. 269. The main decisions in conflict are *McDonald* v. *Murray et al.* (1883), 2 Ont. 573; (1885), 11 A.R. 101, and *Reynolds* v. *Foster* (1912), 21 O.W.R. 838, (1913), 23 O.W.R. 933. Both these decisions dealt with the question whether an agreement for sale that provides for leaving part of the purchase price simply "on mortgage" at a given rate, but fixing no other terms, such as duration, is a complete agreement.

Reynolds v. *Foster, supra,* was a direct decision of the Court of Appeal that such an agreement is incomplete and unenforceable. In *Martin* v. *Jarvis, supra,* Boyd, C. considered that *McDonald* v. *Murray, supra,* was a directly contrary decision of the Court of Appeal, and he declared his preference for *McDonald* v. *Murray,* which was prior in time. I cannot accept Boyd, C.'s view. The Divisional Court certainly decided as he said, but it

was reversed by the Court of Appeal on other grounds. It is true that the Justices of Appeal seem to have assumed that the agreement was binding, and Patterson, J.A. in terms accepted the Divisional Court's view on the mortgage. But this was *obiter* and it was unnecessary for the Court to pass on that question. Moreover, in all the Courts, the whole question of the mortgage was treated as a minor point, and very little of the attention of counsel or Courts seems to have been directed to it. *Reynolds* v. *Foster, supra,* on the other hand, is a clear-cut and unanimous decision of five Justices of Appeal directly in point and a far stronger authority in my view than *McDonald* v. *Murray. Lightbound et al.* v. *Warnock* (1882), 4 Ont. 187, also relied on by Boyd, C., was only a decision of a single judge following *McDonald* v. *Murray* before it was appealed.

The solution proposed in *McDonald* v. *Murray, supra,* for settling the terms of a mortgage left unsettled by an agreement for sale, is that the mortgagor should fix his own terms, not only as to duration, but presumably as to interest dates, etc. To me this solution seems to border on the absurd, and I entirely agree with what was said against it in *Reynolds* v. *Foster, supra,* on appeal. The same solution was open in *Scammell (G.) and Nephew, Ld.* v. *Ouston (H. C. and J. G.), supra,* but not accepted, and must, I think, be treated as discredited.

In the present case, too, we have the added uncertainty of the mortgagee's identity. Obviously the mortgagor cannot pick his own mortgagee, nor in view of *Gordon* v. *Street, supra,* does it seem arguable that the vendor can force any mortgagee she chooses on the purchaser. In *Peterson* v. *Bitzer* (1920), 48 O.L.R. 386; (1921), 62 S.C.R. 384, one of the documents evidencing a contract held not to be too uncertain, stated that a mortgage was to be "assumed," though it did not then exist. However, as shown in the judgment of Meredith, C.J.O., which the Supreme Court of Canada adopted, the actual agreement was that the purchaser was not to assume any mortgage, but to give a mortgage to the vendor, so that there was no uncertainty as to the mortgagee. Here no one suggests that this was to be done; both parties contracted in the mistaken belief that there was an existing mortgage to be assumed. In *Peterson* v. *Bitzer, supra,* the contract fixed the duration of the mortgage.

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The appellate decision in *DeLaval Co. Ltd.* v. *Bloomfield,* [1938] O.R. 294 goes a long way, though the facts do not much resemble those here. In my view it goes too far, and I cannot see how it is to be reconciled with the decision in *Scammell (G.) and Nephew, Ld.* v. *Ouston (H.C. and J. G.), supra.* At all events, the House of Lords' decision is more closely in point here.

The vendor's solicitors state in their letter of 23rd July that the plaintiff had originally proposed to pay all cash, and if he was still of the same mind, the deal could be closed at once. Actually, however, this proposal was not proved, and evidence of it would have been inadmissible, either because it would vary the written contract, or would merely show intentions that had been superseded.

It has been suggested that the purchaser was bound to tender a conveyance to the vendor before he sued. This principle can, however, have no application where there never was a completed contract. Here obviously, the conveyance would have had to be drawn subject to a mortgage, but no such mortgage existed, and hence it could not be described.

We have still to decide whether the plaintiff can recover back his deposit which was paid as earnest-money. It is clear that the vendor could not have sued to enforce an agreement; but should the Court actively assist the plaintiff? The only ground on which assistance could be refused would be that the plaintiff must seek equity. Actually, however, the plaintiff could sue at law by action for money had and received: Halsbury's Laws of England, 2nd Ed., Vol. 7, p. 287. And even in equity I do not see how he could be refused relief. He was induced to pay the deposit by misrepresentation (though innocent) as to the state of the title, and even in equity he was entitled, on discovering this, to refuse further negotiations to complete an incomplete contract. Furthermore, his right to recover where there was never a completed contract is covered by authority: see *Chillingworth* v. *Esche,* [1924] 1 Ch. 97.

This case does not resemble *Soper* v. *Arnold* (1889), 14 App. Cas. 429, where it was held that a purchaser could not recover back his deposit, forfeited for his default, on his discovering the

vendor's lack of title, a lack unknown at the time of default. In that case there was a binding contract; here there was none.

On the hearing it was suggested from the Bench that the objection to the contract might not be open to the plaintiff on his pleadings. The plaint is certainly badly drawn, in places almost unintelligible; but paragraph 6 alleges:

> . . . nor were the terms and conditions settled for an acceptance of the offer . . .

That I think goes far enough for the plaintiff's purposes.

Now as to costs. Though much of the trial was taken up with irrelevancies raised by the plaintiff, he had to take action to recover his deposit, and is entitled to his costs below. But he succeeds here on a point not argued below, and if his case had been properly presented, and not so as to obscure the real point, I think the trial judge might well have decided it otherwise. The plaintiff appellant is thus largely to blame for the necessity of this appeal, and I would, therefore, allow the appeal without costs.

O'HALLORAN, J.A.: The interim agreement provided for payment of the balance of $3,500 "by assuming 1st mortgage of $3,500 @ 6%." No mortgage was then in existence, nor were its terms or proposed terms of repayment agreed upon. An agreement which depends upon an essential term of this uncertain description is too vague to constitute a contract: *vide Murphy* v. *McSorley*, [1929] 4 D.L.R. 247.

I would allow the appeal.

FISHER, J.A.: This appeal should in my opinion be allowed for the reasons given by the learned Chief Justice. I have only to add that further consideration of the matter has satisfied me that the case of *Thomas* v. *Brown* (1876), 1 Q.B.D. 714, relied upon by counsel for the respondent, is distinguishable on two grounds:

(1) In the *Thomas* case there was a contract but the contention was raised by the plaintiff, though not decided, that the memorandum was insufficient under the Statute of Frauds. At p. 723 Mellor, J. says:

> . . . but the vendee chooses to set up this question about the Statute

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of Frauds, and to say, "Although I can have the contract performed if I please, I repudiate it."

In the present case, as the learned Chief Justice has pointed out, there never was a complete contract.

(2) In this case both parties acted under the mistaken belief that there was an existing mortgage to be assumed. Actually there was no such existing mortgage. The money was, therefore, paid here by the appellant without knowledge of the real facts. This was not so in the *Thomas* case. See Mellor, J. at p. 721.

Appeal allowed.

Solicitors for appellant: *Fleishman & Meagher.*
Solicitors for respondents: *Ellis & Dryer.*

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March 17, 18, 19; *April* 20.

IN RE REMBLER PAUL, DECEASED. THE ROYAL TRUST COMPANY v. ROWBOTHAM *ET AL.*

Will—Construction of—Executory devise—Vesting—Disposition of residue of estate—Order to refund payments made on previous order—Appeal.

A testator by clause 9 of his will directed that the trustee therein named shall pay to each of his four grandchildren the sum of $600 a year as long as he shall live. Clause 12 provides: "Subject to the other provisions of these presents I give, devise, and bequeath all the residue of my estate, real and personal, to the said Susan McAinsh Paul. My trustee shall pay the income from the same to her from the time she is of age, but shall not hand over the principal until all the annuitants herein mentioned have died, and she is thirty years of age." Clause 15 provides: "Should Susan McAinsh Paul die leaving issue, her issue shall receive all the benefits under these presents which she would have had if alive, and she may distribute these benefits as she pleases among her issue by will. Should the said Susan McAinsh Paul die without leaving issue, the General Hospital at Kelowna shall receive all the benefits, and all the estate real and personal, which she would have received hereunder if alive." On originating summons it was held that if Susan McAinsh Paul survives the annuitants, having attained the age of 30 years, she shall have the *corpus* and then only a life interest therein.

Held, on appeal, reversing the decision of MANSON, J., *per* MCDONALD, C.J.B.C., MCQUARRIE and FISHER, JJ.A., that Susan McAinsh Paul took a vested estate in the residue which can be divested by her death before

the death of the last annuitant, but which will become indefeasible if she outlives the annuitants. If she dies first leaving issue, they take equally if she makes no appointment by will, otherwise according to her appointment. If she dies leaving no issue then living, then the hospital takes.

Per SLOAN and O'HALLORAN, JJ.A.: That Susan took an absolute interest with right of possession postponed until after the death of the last annuitant.

On the petition of Susan McAinsh Paul an order had been made on the 18th of June, 1940, authorizing the trustee to advance to the said Susan McAinsh Paul the sum of $4,000, as to $1,500 forthwith and as to the remainder in quarterly instalments of $250 each. Of the said sum of $4,000, $2,250 was paid up to the date of these proceedings. It was ordered that said order of the 18th of June, 1940, was wrongly made; that the trustee do not advance any further sum from the *corpus* of the estate to said Susan McAinsh Paul under said order, and that the trustee do charge the said Susan McAinsh Paul with such sums as may have already been paid to her under said order, and collect the same from the income of the said residue from time to time payable to her under the will.

Held, affirming the decision of MANSON, J. (SLOAN and O'HALLORAN, JJ.A. dissenting), that the order is that the trustee simply retain what comes to its hands until the estate has been recouped in the said sum of $2,250. There is ample authority for this and the majority of the Court is satisfied that he was justified in making the order which he did.

APPEAL by Susan McAinsh Rowbotham from the decision of MANSON, J. of the 4th of September, 1941 (reported, 56 B.C. 469), on the construction of the will of Rembler Paul, deceased, of the 15th of July, 1916. The testator specifically devised certain lands to the appellant Susan McAinsh Paul (now Rowbotham), subject to a life interest in a portion to one John Symonds and certain other lands as a burial plot, and by other provisions of the will, after directing conversion, made specific bequests to John Symonds $500 a year, to Rose Cady $600 a year, to each of four grandsons $600 a year, and his shares in stocks, mines and oil fields to Susan McAinsh Paul. Then followed the residuary disposition, clause 12, set out in the headnote. Clause 13:

During the minority of the said Susan McAinsh Paul my trustee shall, out of the rents or income from the real or personal estate hereby left to her, provide for her maintenance and education on a liberal scale, and give her a reasonable personal allowance, and any surplus shall be capitalized and dealt with in the same way as the other real and personal estate left to her by these presents; Provided further that my trustee may insist on

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the said Susan McAinsh Paul being placed under suitable guardianship as a condition of paying over any money during her minority.

Clause 15, set out in the head-note. By codicil the testator directed that the lands specifically devised to the appellant be converted into money subject to the life interest of John Symonds, and that the proceeds go into the general funds of the estate, with power to use in payment of duties at the discretion of the trustee, and further directed that in case of death without issue of Susan McAinsh Paul, the annuities out of the residue in favour of the respective grandsons be increased to $1,000. The testator died on the 18th of November, 1916. The beneficiaries John Symonds, Rose Cady and Robert Paul have since died, and there remain surviving the testator the appellant Susan McAinsh Paul and three of the grandsons. Susan McAinsh Paul married Harry E. Rowbotham, now deceased, and has two children aged six and seven years. The surviving beneficiaries and the children are those concerned in the interpretation of the residuary bequest. The application before MANSON, J. was to determine the respective interests in the residuary estate, and so far as concerns the appellant to determine (1) whether she had a vested interest, and (2) whether the trustee could make advances to her prior to the death of the annuitants. The residuary estate consists of the capital sum of $66,500 invested in bonds, and the estimated revenue therefrom for the year commencing the 25th of March, 1941, is $3,092.66, leaving after payment of the three annuities to the three grandchildren of $600 each, the sum of $1,292.66 payable to Susan McAinsh Paul. On the hearing of the application MANSON, J. held that there was vested in the appellant, subject to the rights of the surviving annuitants, a life interest in the residue, and as special power to appoint by will among her issue and that the issue born and unborn of her took an interest in the remainder of the residue, subject to a gift over in the event of her dying without leaving issue, to the Kelowna Hospital Society with a right of the annuitants to have the *corpus* of the residue held by the trustee until the death of the last survivor of them. From this decision Susan McAinsh Paul has appealed for a declaration that she has a vested interest in the residue, subject only to the prior charge to the surviving annuitants, and that after making pro-

vision for the annuitants the trustee has power to make advances to her.

The appeal was argued at Vancouver on the 17th, 18th and 19th of March, 1942, before McDONALD, C.J.B.C., McQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Locke, K.C. (*G. Roy Long,* with him), for appellant: Under the will the gift of the *corpus* of the residue to Mrs. Rowbotham vests in her immediately upon the death of the testator. The handing over of the principal is postponed merely to secure the annuities. Clause 12 indicates an immediate interest with a mere postponement of the *corpus*: see *In re Jackson's Will* (1879), 13 Ch. D. 189; Theobald on Wills, 9th Ed., 473; Williams on Executors, 12th Ed., Vol. II., p. 796; *Saunders* v. *Vautier* (1841), Cr. & Ph. 240; *Potts* v. *Atherton* (1859), 28 L.J. Ch. 486; *Jones* v. *Mackilwain* (1826), 1 Russ. 220; *Lane* v. *Goudge* (1803), 9 Ves. 225; *In re Gossling. Gossling* v. *Elcock,* [1903] 1 Ch. 448. The estate vested at the time of the death of the testator: see *In re Bevan's Trusts* (1887), 34 Ch. D. 716; *Browne* v. *Moody* (1936), 105 L.J.P.C. 140. The postponement of handing over is merely to secure the life annuities: see Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 372, par. 417; *In re Roberson. Cameron* v. *Hasgard,* [1937] S.C.R. 354; *In re Robinson Estate,* [1930] 2 W.W.R. 609, at p. 619; *In re Scott Estate* (1937), 52 B.C. 278; *In re Jones* (1898), 67 L.J. Ch. 211; *Re Walker* (1925), 56 O.L.R. 517, at pp. 521-2. Clause 15 of the will shows she gets the *corpus* of the estate absolutely. It is desirable to give effect to the whole of the will. The payment to her of the *corpus* on her reaching 30 years of age follows the death of the annuitants: see *Monkhouse* v. *Holme* (1783), 1 Bro. C.C. 298; 28 E.R. 1143. Clause 15 does not limit the absolute gift to Mrs. Rowbotham in clause 12: see *Gee* v. *Mayor, &c., of Manchester* (1852), 21 L.J.Q.B. 242; *Clayton* v. *Lowe* (1822), 5 B. & Ald. 636. Whatever clause 15 gives, it is only in the event of Susan's death during the lifetime of the testator: see *Wood* v. *Johnson* (1939), 54 B.C. 426. The matter was determined by a previous order: see *In re Pavich* v. *Tulameen Coal Mines Ltd.* (1939), 53 B.C. 371; *In re Seibel,* [1925] 3 W.W.R. 636. The Court will advance to her the

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enjoyment of the *corpus* provided it does not prejudice third persons: see *In re Blake* (1937), 106 L.J. Ch. 99; *Harbin* v. *Masterman* (1895), 65 L.J. Ch. 195.

J. O. Gill, for children of Susan: All that clause 12 means is that if Susan survives the annuitants then the residue vests in her. By clause 15 if she dies her issue shall receive all the benefits she would have had if she had lived. If there are inconsistencies the latter part of the will prevails. There is no vesting in Susan until she survives all the annuitants: see Jarman on Wills, 7th Ed., pp. 860, 1157 and 1376; *Wharton* v. *Masterman,* [1895] A.C. 186; *Sherratt* v. *Bentley* (1834), 2 Myl. & K. 149; *Re Adam's Trusts. Re The Trustee Relief Act* (1865), 13 L.T. 347; *Mannox* v. *Greener* (1872), L.R. 14 Eq. 456, at p. 461; *Shields* v. *Shields,* [1910] 1 I.R. 116; *Constable* v. *Bull* (1849), 3 De G. & Sm. 411; *Reid* v. *Reid* (1858), 25 Beav. 469; *Atkins* v. *Hiccocks* (1737), 1 Atk. 500.

J. A. MacLennan, for annuitants and the Kelowna Hospital Society: The intention of the testator is to be gathered from the fair and literal meaning of the language of the will, which is not ambiguous: see *In re Browne,* [1934] S.C.R. 324, at p. 328; *Comiskey* v. *Bowring-Hanbury,* [1905] A.C. 84, at p. 88. It is submitted that by clause 12 there was no absolute gift in respect of the residue, as it is expressly limited and made subject to the other provisions in the will. The cases appellant referred to, namely, *In re Foss Estate,* [1940] 3 W.W.R. 61; *Hancock* v. *Watson,* [1902] A.C. 14; *In re Scott Estate* (1937), 52 B.C. 278; *In re Ganong Estate. Ganong et al.* v. *Belyea et al.,* [1941] S.C.R. 125, do not apply. Clause 10 contemplates the trustee administering the will: see *Barnardo's Homes* v. *Special Income Tax Commissioners,* [1921] 2 A.C. 1, at p. 10; *Ng Aun Thye* v. *Ewe Keok Neoh,* [1933] 3 W.W.R. 129, at p. 132. The Court will not interpret a will in such a way as to render any portion inoperative: see *Peacock* v. *Stockford* (1853), 3 De G. M. & G. 73. The benefits given by clause 12 must be construed as subject to the other provisions of the will. When there is a "gap" in the payment of the interim interest, there is no vesting: see *Hanson* v. *Graham* (1801), 6 Ves. 239, at p. 249; *Hardcastle* v. *Hardcastle* (1862), 1 H. & M. 405; *In re Wintle.*

Tucker v. *Wintle,* [1896] 2 Ch. 711. Where there is an inconsistency the latter clause prevails: *Sherratt* v. *Bentley* (1834), 2 Myl. & K. 149, at p. 161; *Fyfe* v. *Irwin,* [1939] 2 All E.R. 271. Restrictions placed on the right of alienation may show that only a life interest was intended: see Halsbury's Laws of England, 2nd Ed., Vol. 34, p. 339; *In re Sanford. Sanford* v. *Sanford,* [1901] 1 Ch. 939, at p. 942. Clause 2 of the codicil is inconsistent with an absolute gift of the residue: see *In re Wilcock. Kay* v. *Dewhirst,* [1898] 1 Ch. 95, at p. 98; *In re Venn. Lindon* v. *Ingram,* [1904] 2 Ch. 52, at p. 56.

Bruce Robertson, for The Royal Trust Co.: The trust company has no personal interest in the order appealed from and seeks only to have the respective rights of the parties determined by the Court so that the plaintiff may administer the estate accordingly. The trust company is interested in the proviso in the order appealed from which follows the declaration that the order of the 18th of June, 1940, was not binding on some of the defendants, and submits that if said declaration is varied, similar protection should be provided to the trust company.

Locke, in reply: Clause 12 of the will means an absolute gift to Susan subject to the annuities.

Cur. adv. vult.

20th April, 1942.

MCDONALD, C.J.B.C.: We have here to construe the will and codicil of one Rembler Paul, on the construction of which the order appealed from has been made, upon originating summons. The will gave certain real estate to the plaintiff trustee, on trust to pay appellant the rents after she became of age, and to convey to her when she attained the age of 30. The codicil revoked this direction, directed sale, and directed that the proceeds should fall into residue. So we have no concern with the devise, except so far as the form of disposition may throw light on other dispositions, by analogy. The will also set aside a small parcel as a family graveyard and set up a fund to supply $100 yearly for upkeep; but no difficulty arises as to this.

Subject to the above, there is a trust for conversion of the whole estate. Next followed two annuities for life, which have lapsed through the death of the annuitants. Next is a direction

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to pay annuities for life, to four grandsons, three of whom are now living. This is followed by a bequest to the appellant of all the deceased's shares, mines and oil fields. We are not now concerned with this, except so far as it may suggest some general scheme of disposition.

The first paragraph of the will to cause difficulty is paragraph 12. This reads:

> Subject to the other provisions of these presents I give, devise, and bequeath all the residue of my estate, real and personal, to the said Susan McAinsh Paul. My trustee shall pay the income from the same to her from the time she is of age, but shall not hand over the principal until all the annuitants herein mentioned have died, and she is thirty years of age.

Paragraph 13 deals with allowances to the appellant during minority; but since she is now over 30 years of age, they do not concern us. Paragraph 14 attempted to impose certain conditions of residence, etc., on the appellant, but these were held void by a former order of Court, and we need not consider them.

The next important paragraph is No. 15, which reads:

> Should Susan McAinsh Paul die leaving issue, her issue shall receive all the benefits under these presents which she would have had if alive, and she may distribute these benefits as she pleases among her issue by will. Should the said Susan McAinsh Paul die without leaving issue, the General Hospital at Kelowna shall receive all the benefits, and all the estate real and personal, which she would have received hereunder if alive.

Paragraph 2 of the codicil reads as follows:

> In case of the death without issue of Susan McAinsh Paul, the annuity of each of my four grandsons mentioned in clause 9 of my said will shall be increased to One Thousand Dollars ($1,000.00) a year, as long as he shall live.

The judgment appealed from has ruled, *inter alia*:

(1) That the will did not vest the residue referred to in paragraph 12 in the appellant, but gave her the life estate subject to the life annuities, and gave her a special power of appointment by will among her issue; (2) that subject to the rights of appellant and the annuitants, appellant's issue take a remainder in the residue, subject to a gift over if appellant dies without issue; (3) that subject to the annuitants' rights, the respondent hospital takes the residue absolutely if appellant dies without issue; (4) that the trustee must hold the *corpus* of the residue intact until the last annuitant dies.

It is fairly obvious that the key to this case is the question whether the appellant took a vested interest in the *corpus* of the

residue. If she did not, then it is difficult to quarrel with the learned judge's consequential rulings. If she did take a vested interest, then it will be necessary to consider a number of further points.

The learned judge did not succeed in reconciling all the provisions of paragraphs 12 and 15; his construction required him to ignore the inferential but clear intention shown in paragraph 12 that the *corpus* of the residue should be "handed over" on the death of the last annuitant. Of course, such a rejection may be justified, if necessary, and if a contrary paramount intention elsewhere appears. The learned judge evidently felt that a vested interest was incompatible with an apparent gift over to appellant's issue, with her having a power of appointment among her issue (which would be pointless if her title was indefeasible) and with the gift over to the hospital, and the increase of annuities on her death without issue.

On the other hand, appellant's counsel contended that not only was the appellant's title vested, but that any gifts over, and the power of appointment were only meant to take effect on a condition that could not now be fulfilled, *viz.*, the appellant's predeceasing the testator. He based this construction, not on any special language in the will, but on a rule of construction for deciding the date to which such conditions were referable. On this he cited many cases, relying perhaps most strongly on *Gee* v. *Mayor, &c., of Manchester* (1852), 17 Q.B. 737. These cases indicate that such dates are governed by presumptions, in the absence of compelling language.

After consideration, I cannot agree with either the learned judge below or appellant's counsel; my conclusion is that the appellant did not merely take a life estate, but a vested interest in the *corpus,* subject however to divestment if she dies before the death of the last annuitant. Divestment will be in favour of her issue, if she leaves issue, otherwise in favour of the hospital. If she leaves issue, they will take equally, unless by her will she otherwise appoints among them. If the hospital takes, it takes subject to the increase of the annuities under paragraph 2 of the codicil.

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This construction, I think, reconciles paragraphs 12 and 15 and is not repugnant to any provision of either.

The following are my reasons for not accepting MANSON, J.'s views: Paragraph 4 of the will, which created a graveyard, required the trustee to set aside a fund to provide for its permanent upkeep, "before finally dividing the estate." Of this phrase, MANSON, J. said [56 B.C. 469, at p. 473]:

> There can be no "final dividing" of the estate if under paragraph 12 there be an absolute gift of the residue to a single beneficiary.

I cannot see the force of this. As the will then stood, even if appellant took the residue absolutely, there was still a conveyance to be made to her under paragraph 3, there was the graveyard to be set aside, and the fund for its maintenance, and even the residue could not be "handed over" until the annuitants were all dead; so I can see nothing inapt in the phrase "final dividing." If, as I hold, the vested gift might be divested before appellant had a right to possession, so that several of her issue might take, the last objection to the phrase "final dividing" disappears.

The learned judge seems to me to blur the distinction between vesting and vesting in possession or indefeasibly. He seems to assume that there is no middle course between the appellant's taking only a life estate and her taking the *corpus* "absolutely" or indefeasibly. That assumption seems to me wrong. He also attributes considerable significance to the word "benefits" in paragraph 15, and suggests that if the testator had meant to give the *corpus* and not merely the income, he would have referred to the issue as receiving appellant's *"corpus"* and not "benefits." One answer to this is that any attempt to confine the word "benefits" to income creates most serious difficulty; for then there would be no words to give the *corpus* to the issue on the appellant's death leaving issue; yet it cannot be doubted that this was intended, otherwise there would be an intestacy as to *corpus* if she dies leaving issue.

The learned judge also attached much significance to the words "subject to the other provisions of these presents" with which paragraph 12 begins. I think he has read too much into them. Such words would naturally refer to the annuities already given, and the directions to pay debts and death duties. It would be a strange intention to impute to the testator that he meant para-

graph 12 to be "subject" to repugnant clauses elsewhere. Obviously if the testator had realized there was any repugnancy, he would have eliminated it. In any case, on my construction of the two paragraphs, there is no repugnancy.

The judgment below seems to me to finish quite unconvincingly. It says [56 B.C. 469, at p. 475]:

> The "other provisions of these presents" are conditions precedent to the gift of the residue to Susan and these conditions include the stipulation that she is not to have the *corpus* of the residue until all the annuitants have died and she has attained age 30. Only if she survives the annuitants having attained age 30 shall she have the *corpus*, and then only a life estate therein.

I cannot understand this. Obviously the learned judge means that when appellant attains 30 years and all the annuitants have died, appellant acquires something she did not possess before. But what? He allows her even then only a life estate, which gives her exactly what she had before. She had the income before; now he gives her a "life estate in the *corpus*": To me this is a meaningless distinction.

Paragraph 12 says:

> I give, devise, and bequeath all the residue of my estate, real and personal, to the said Susan McAinsh Paul.

Then follow directions as to the payment of income and a postponement of the payment of *corpus*. But I find nothing whatever to prevent the vesting of *corpus*.

So far I agree with appellant's contentions. But she is not content to have the *corpus* vested. She claims to have it vested indefeasibly, subject only to the annuitants' rights. She claims that the words in paragraph 15 giving the residue to her issue or the hospital on her death, which if operative show that her title is not indefeasible, have ceased to be operative, because they must be deemed to refer only to her death before the testator.

It is quite true that there are definite rules for referring gifts over, on death without issue, to particular dates. But in my view these rules do not sustain appellant's claim. The governing principle is stated in Halsbury's Laws of England, 2nd Ed., Vol. 34, pp. 487-8:

> A gift over of property, given to a person absolutely, in the event of his death is construed as a gift over in the event of his death before the period of distribution or vesting, unless some other period is indicated by the context . . . if the gift is postponed to a life estate, the gift over *prima facie* takes effect only on a death before the tenant for life.

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Similar statements can be found in Williams on Executors, 12th Ed., Vol. II., pp. 813, 814, and Jarman on Wills, 7th Ed., Vol. 3, p. 2102.

Here the vested gift is vested at once but the date for "distribution" or giving of possession is postponed to life estates. If there had been no annuitants to postpone possession, then the appellant's contention would be sound, the gift over would only take place on death before the testator. But here we are within the second part of the rule; where possession is deferred, then the gift over takes effect on death at any time before the right to possession has accrued.

The case of *Gee* v. *Mayor, &c., of Manchester, supra,* like the other cases cited on the point for the appellant, is distinguishable on the ground that there the right to possession of the gift, by the person whose death was in question, was not postponed.

The rule to which I have referred is usually known as the rule in *Edwards* v. *Edwards* (1852), 15 Beav. 357, where it was laid down as an invariable rule. In *O'Mahoney* v. *Burdett* (1874), L.R. 7 H.L. 388, the House of Lords held that the rule was not invariable, and could be governed by context, so that there might be divestment, even after a right to possession accrued. But Lord Hatherly at p. 403 and Lord Selborne at p. 406 both said that where a will provided for a general distribution at a certain date, that showed that the death which would cause a gift over was referable to that date. Here we have that factor.

Later cases to the same effect are *Lewin* v. *Killey* (1888), 13 App. Cas. 783 and *Christian* v. *Taylor,* [1926] A.C. 773. The three cases last mentioned dealt with realty or leaseholds, but their principle was applied to ordinary personalty in *Ward* v. *Brown,* [1916] 2 A.C. 121.

I therefore hold that the appellant took a vested estate in the residue which can be divested by her death before the death of the last annuitant, but which will become indefeasible if she outlives the annuitants. If she dies first, leaving issue, they take equally if she makes no appointment by will, otherwise according to her appointment. If she dies leaving no issue then living (see section 27 of the Wills Act), then the hospital takes,

subject to the increase in annuities effected by paragraph 2 of the codicil.

The formal order of MANSON, J. describes the interest of the issue as a reminder. This was right enough under his ruling that appellant took only a life interest. But if, as I hold, she took more, then the situation is changed. In my view, the dispositions in favour of the issue and the hospital are not contingent remainders, but executory bequests, though the distinction may not have practical importance.

Since the appellant's interest is not indefeasible, it follows that she is not entitled to receive any further capital while any of the annuitants still lives. The indication in the will that no *corpus* should be "handed over" during their lives might not be a bar to payments that would leave enough to secure the annuities; but since the annuities, on my construction, may be increased to $3,000, which would exhaust the present income, any partial distribution would be impracticable, even if only the annuitants required protection. Apart from their rights, the contingent rights of the issue and hospital compel us to adhere to the strict terms of the will as to distribution: see *Berry* v. *Geen,* [1938] A.C. 575.

There remains to be considered the order which I myself made, while on the Supreme Court Bench, on 18th June, 1940. That order was made on a petition by the trustee respondent for directions, under section 79 of the Trustee Act, on an affidavit of the present appellant stating that no other person than herself was interested in the *corpus* of the residue. If I am right in the conclusion which I have reached as to the true construction of the will, the statement contained in that affidavit is incorrect, though I am fully satisfied that both the trustee and its advisers believed it to be true. The doubts as to the true construction of the will apparently did not arise until recently, when the appellant was pressing for further advances. It was no doubt because of the view held by the trustee in June, 1940, that no notice of the hearing of the petition was served on any of the parties now before us, though the appellant must have had knowledge of the application since, as stated, she made an affidavit in support, and fairly obviously, the application was made at her instance.

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The learned judge below held that the order of 18th June, 1940, was wrongly made, and directed the trustee to withhold further payments of income to the appellant until the sum of $2,250 paid pursuant to that order is made up. I did not understand it to be seriously contended before us that the parties, who had no notice of the proceedings in June, 1940, are necessarily bound by that order, but it was contended that the order could not be attacked in these proceedings by way of originating summons.

Reference was made to cases such as *In re Lart. Wilkinson* v. *Blades,* [1896] 2 Ch. 788 and *Young* v. *Holloway,* [1895] P. 87. In my opinion these cases have no application here.

The official guardian, representing the applicant's infant children who live with her, advises us that he does not ask the order below to stand as to this sum of $2,250, and he brings to our attention the case of *In re Warren. Weadon* v. *Reading,* [1884] W.N. 112 as an authority which might justify us in holding that the order in question ought not to be attacked in the present proceedings. No doubt it would be quite proper under the circumstances here to accede to the official guardian's suggestion, were it not for the fact that other parties may be vitally concerned, *viz.,* the annuitants and the hospital. The opinion of the official guardian does not help us so far as these latter parties are affected. After a good deal of consideration and an examination of the authorities, I am satisfied that MANSON, J. was justified in making the order which he did.

The case of *In re Warren, supra,* is really not in point. There the originating summons was taken out to compel administration where there was no estate to administer, it having been already distributed. In effect one beneficiary was trying to compel the trustee to apply for a money judgment against another beneficiary. There are several reasons why he could not do that. On originating summons all the Court does is to make declarations of right. That is all that MANSON, J. has done here. His order is that the trustee simply retain what comes to its hands until the estate has been recouped in the said sum of $2,250. There is ample authority for this: see *Re Reading. Edmonds* v. *Reading* (1916), 60 Sol. Jo. 655; *In re Ainsworth. Finch* v. *Saith,*

[1915] 2 Ch. 96; *In re Musgrave. Machell* v. *Parry,* [1916] 2 Ch. 417, and Halsbury's Laws of England, 2nd Ed., Vol. 33, p. 327, par. 565.

I think, therefore, that that portion of the learned judge's order which relates to the payment of $2,250 to the appellant must stand.

On the whole, I think the appeal should be allowed on the matter of the construction of the will, and should be dismissed in so far as it relates to the order of 18th June, 1940. The costs of all parties should be paid out of the estate.

MCQUARRIE, J.A.: I agree with the reasons given by the Chief Justice.

SLOAN, J.A.: It seems to me that the language of Lord Eldon in *Duffield* v. *Duffield* (1829), 3 Bligh (N.S.) 260, at p. 331, is relevant herein. He said:

> . . . the judges from the earliest times were always inclined to decide, that estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession.

In my opinion Susan McAinsh Rowbotham takes an absolute gift of the residue with her right of possession postponed until the death of the last annuitant and that she is presently entitled to be advanced from the *corpus* provided such advances do not jeopardize the security of the annuitants.

It seems to me that what the testator intended by paragraph 15 was this: in the event of Susan dying with living issue before all the residue of his estate fell into her possession, the children of Susan, or such of them as she might appoint, would be entitled upon such conditions as Susan might impose, to all the benefits which she at and from the date of her death would have been entitled to receive under the will had she continued to live, *i.e.,* if she died at her present age and at the present stage of the distribution of the estate the benefits accruing to the children would be the income from the *corpus* during the lifetime of the

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annuitants with the right to advances thereon, as aforesaid, and the *corpus,* or remainder thereof, upon the death of the last annuitant.

The manifest intention of the testator was the protection of his daughter Susan and her children provided the annuitants were secured in their payments.

The construction I put upon the questioned paragraphs 12 and 15 will, I believe, effectuate his intention.

Should Susan die without leaving living issue, the Kelowna General Hospital will be entitled as and from the date of her death to whatever benefit Susan would have been entitled to receive had she continued to live.

Counsel for the appellant submitted the reference in paragraph 15 to Susan's death ought to be construed as contemplating that event during the lifetime of the testator. That is, I agree, the usual construction to be placed upon expressions of like character, but I also think that regard must be had to the inescapable circumstances of each case. It seems to me most improbable that the testator in 1916, with a grandson then 23 years old, from which circumstance I would infer that he was at least 70, would, at that age, contemplate that Susan, then age 7, would predecease him leaving issue. That is one reason, at least, which has driven me to construe paragraph 15 in the manner previously indicated.

It follows from the view I hold the learned judge below erred in directing that the respondent The Royal Trust Company charge Susan with the advances made to her pursuant to the order of the 18th of June, 1940.

I would, therefore, with deference, allow the appeal and answer the questions in accordance with the views herein expressed.

O'HALLORAN, J.A.: I am in substantial agreement with my brother SLOAN and would allow the appeal accordingly.

FISHER, J.A.: I agree with the conclusions of the learned Chief Justice for reasons to be given hereafter. I have also now to say that after a conference the Chief Justice and I agree

that questions 1, 2, 5, 7, 9, 10, 12, 13, 14 and 15, hereinafter set out, should be answered as follows:

1. Has the residue of the estate (which is referred to in paragraph 12 of the will and is hereinafter referred to as "the residue") vested in Susan McAinsh Paul (who is now Susan McAinsh Rowbotham, and is hereinafter called "Mrs. Rowbotham")? Yes.

2. If the answer to question 1 is Yes, is Mrs. Rowbotham's interest in the residue subject to be divested and, if so, upon what event? Yes, if she dies before the death of the last survivor of the annuitants.

5. Have the issue, born or unborn, of Mrs. Rowbotham now any interest in the residue by virtue of the will and codicil? Yes, contingent on the death of Mrs. Rowbotham before the death of the last survivor of the annuitants and issue surviving her.

7. Has the General Hospital at Kelowna now any interest in the residue by virtue of the will and the codicil? Yes, contingent on the death of Mrs. Rowbotham without issue living at her death before the death of the last survivor of the annuitants.

9. Who is entitled to receive and give a good receipt for the residue or any part thereof which may be or become receivable by the General Hospital at Kelowna? The Kelowna Hospital Society.

10. Is each of the anuitants referred to in paragraphs 7, 8 and 9 of the will entitled to have the whole of the *corpus* of the residue held by the trustee of the estate until the death of the last survivor of such annuitants? Yes.

12. In the event of the death hereafter of Mrs. Rowbotham without issue, will the annuity of each of the then surviving grandsons mentioned in clause 9 of the will be subject to be increased to $1,000 a year so long as he shall live? Yes.

13. Is the order of this Court made herein the 18th day of June, 1940, binding upon the defendants, Paul Rowbotham, Susan Ann Rowbotham, Reginald L. Paul, Lisle Paul, Percy Paul, or the Kelowna Hospital Society? No.

14. May the plaintiff, The Royal Trust Company, advance further sums from the *corpus* of the said estate to the said Susan Paul Rowbotham under the said order? No.

15. Should the plaintiff, The Royal Trust Company, charge the said Susan Paul Rowbotham with such sums as may have already been paid to the said Susan Paul Rowbotham under the said order and itself collect the same from the income of the said residue from time to time payable to her under the said will? Yes.

1st May, 1942.

FISHER, J.A.: I have already indicated that I agree with the conclusions of the learned Chief Justice and I will now give my reasons for doing so. As the judgment of the Chief Justice sets out many paragraphs of the will verbatim, a summary of most of the other paragraphs, and also the existing circumstances and what the judgment appealed from ruled on many aspects of the

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matter, I do not find it necessary to set out again all these matters in detail but will set out only paragraphs 12 and 15 of the will, reading as follows: [already set out in the judgment of McDONALD, C.J.B.C.].

If I understand correctly the submissions of counsel for the appellant, the said Susan McAinsh Paul, who is now Susan McAinsh Rowbotham (hereinafter called Mrs. Rowbotham), they are as follow:

(1) Clause 15 of the will should be rejected as repugnant to other provisions of the will. (2) In any event clause 15 of the will, if not rejected for repugnancy, does not limit the absolute gift to the appellant, contained in clause 12, according to which it is submitted the *corpus* of the residue vested indefeasibly in Mrs. Rowbotham immediately upon the death of the testator, subject only to the prior charge in favour of the annuitants mentioned, with right to possession postponed until all the annuitants had died and she was thirty years of age. (3) After making provision for the three annuitants still living the trustee has power to make advances to the appellant from the *corpus* as she is now over thirty years of age.

In support of the first submission it is argued that clause 15 cannot be read consistently with any of the clauses of gift to the appellant and that an immediate vesting in interest is indicated in the following respective clauses, by the words "my trustee shall hold for the benefit of Susan McAinsh Paul" in clause 2; "I bequeath to Susan McAinsh Paul" in clause 11 and "I give, devise, and bequeath all the residue of my estate" in clause 12. *Saunders* v. *Vautier* (1841), Cr. & Ph. 240; 41 E.R. 482 is relied upon. It is contended that there is a paramount intention in the clauses, other than 15, to benefit the appellant by absolute gift and that intention may well be given effect to over the ambiguous statements in clause 15.

As to the first submission, I have only to say that I think the will can be construed so as to give effect to all the words of the will and reject nothing and it is or must be common ground that if possible the will should be so construed, the Court having always carefully to consider the whole will to see what is the intention of the testator as expressed therein.

In support of the second submission it is contended that clause 15 contemplated exclusively the death of Mrs. Rowbotham preceding the testator. It is also contended that the expression "in case of the death without issue of Susan McAinsh Paul," used in the second paragraph of the codicil, refers to her death before the testator. *Gee* v. *Mayor, &c., of Manchester* (1852), 21 L.J.Q.B. 242; 17 Q.B. 737 is especially relied upon. In such case Lord Campbell, C.J. said at pp. 245-6:

It appears to be an established rule that where a bequest is simply to A., and "in case of his death" or "if he die" to B., A. surviving the testator takes absolutely—see Powell on Devises, Vol. 2, p. 758, and Williams on Executors, p. 1000, and the cases there cited. The time of dying is referred of necessity to the lifetime of the testator; otherwise, as A. must die at some time, the bequest would be cut down to an interest for life. The present case seems to us to be within the same rule, for the dying of A. with or without issue is as certain and inevitable an event as the dying of A. simply. For these reasons, we are of opinion that we must construe the last clause in this will as referring to the death of the devisees in the lifetime of the testator, in order to give effect to all the words of his will and to reject nothing. In so doing we are not adding to his will or introducing new words into it, but only construing the words which the testator has used himself. These words as they stand are capable of being referred to death in his lifetime or to death generally at any time. We think that the case of *Clayton* v. *Lowe* [(1822), 5 B. & Ald. 636] was well decided, ...

With reference to this submission of counsel on behalf of the appellant I have first to say that it should be noted that in Jarman on Wills, 7th Ed., Vol. 3, pp. 2102-05, in the midst of comment upon many cases, including the *Manchester* case, *supra; Clayton* v. *Lowe* (1822), 5 B. & Ald. 636, approved by Lord Campbell in the *Manchester* case; *Gosling* v. *Townshend* (1853), 2 W.R. 23 (in which case Lord Cranworth, L.C. disapproved of the principle of the *Clayton* decision) and *Bowers* v. *Bowers* (1870), 5 Chy. App. 244, at p. 248 (where Lord Hatherley, L.C. disapproves of the principle), and other cases the writer says, in part, as follows:

Mr. Jarman continues (First ed. Vol. II., p. 693):

"In all the preceding cases it will be observed, that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, *i.e.*, to take effect in possession, so that the Court was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred: but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment under them is otherwise

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postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution. In such case, the original legatee, surviving that period, becomes absolutely entitled."

At one time it was supposed that there was a general rule to the effect that "where there is an absolute gift to vest in possession at a future time, and a gift over in case the legatee should die without issue living at his decease, this *prima facie* is to be taken to mean if he should die without issue before he is entitled to call for delivery, as it would be very inconvenient that, after delivery, the subject of gift should be liable to go over." (See *In re Heathcote's Trusts* [(1873)] 9 Chy. App. 45, at p. 51). This rule was known as the fourth rule in *Edwards* v. *Edwards* [(1852)] 15 Beav. 357, but it has now been authoritatively settled by the House of Lords in the two cases of *O'Mahoney* v. *Burdett* [(1874)] L.R. 7 H.L. 388, and *Ingram* v. *Soutten* [(1874), *ib.*] 408, that where the original gift is deferred, as well as where it is immediate, the substituted gift will *prima facie* take effect whenever the death under the circumstances described occur. . . .

The rule being as thus laid down in the House of Lords, it is to be considered what species of context will exclude it, and confine the operation of the gift over to death occurring before the period of possession. . . .

A question of this nature arose in *Galland* v. *Leonard* [(1818)] 1 Swanst. 161, where a testator gave the residue of his personal estate to trustees, upon trust to place the same out at interest during the life of his wife, and pay her a certain annuity, and upon her death to pay and divide the said trust moneys unto and equally between his two daughters, H. and A.; and in case of the death of them his said daughters, or either of them, leaving a child or children living, upon trust for the children in manner therein mentioned; and the testator declared that the children of each of his daughters should be entitled to the same share his, her or their mother would be entitled to if then living; and in case of the death of his said two daughters without leaving issue living, then over. Sir T. Plumer, M.R., held that the testator intended only to substitute the children for the mother, in the event of the decease of the latter during the widow's life, and that the daughters who survived her (the widow) became absolutely entitled. "In this case," as Mr. Jarman remarks (First ed. Vol. II., p. 694), "the frame and terms of the bequest showed that the testator contemplated the death of the widow as the period of distribution, and any doubt which his previous expressions may have left on this point is dispelled by the clause entitling the children to the share which their parents, if living, would have taken."

In *O'Mahoney* v. *Burdett* (1874), L.R. 7 H.L. 388, 403) Lord Hatherley shows the importance of the consideration as to the date of distribution and its bearing on the question of defeasance:

. . . ; in those cases where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to

pass from the hands of the executors, the Courts have laid hold of that circumstance to say, "We hold this defeasance to be before that period of distribution arrives," . . .

See also *Ward* v. *Brown*, [1916] 2 A.C. 121.

Having in mind the authorities hereinbefore cited I have to say that I think the present case is one in which there was a gift over, which it may be noted there was not in the *Saunders* case, *supra*, and the two concurrent or alternative gifts are preceded by a life or other partial interest and the way is open therefore to a third construction, *viz.*, that of applying the words in question to the event of death occurring before the period of possession or distribution. I also think that the will here, read as a whole, provided for a general distribution at a certain date, that clauses 12 and 15 read together show that the testator contemplated the death of the last survivor of the annuitants (hereinafter called the last annuitant), under the circumstances now existing, as the period of distribution as well as the period of possession and so the operation of the gift over is confined to the death of Mrs. Rowbotham before the death of the last annuitant.

There is an expression contained in paragraph 15 to which I would like to make special reference. This is the expression "all the benefits under these presents which she would have had if alive." The question naturally arises as to what under the will are "the benefits" which she (*i.e.*, Mrs. Rowbotham) would have had, if alive, as these are the benefits which the issue will receive if she should die leaving issue and which the General Hospital of Kelowna will receive if she should die without issue. It must be noted that these benefits are those which she would have received if alive, that is if she had continued to live, and in my view these benefits are the interest until the death of the last annuitant and the *corpus* of the residue upon the death of the last annuitant. It follows that the interest of Mrs. Rowbotham in the *corpus* of the residue, which is only defeasible by her death before the death of the last annuitant, becomes indefeasible if she is alive upon the death of the last annuitant. Hence, if divestment takes place by her death before the death of the last annuitant, her issue, if she leaves issue, will receive the interest until the death of the last annuitant, and the *corpus* of the residue indefeasibly upon such death (taking equally unless by her will

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she otherwise appoints among them). If such divestment takes place and she dies leaving no issue living at her death, the said hospital takes the same benefits subject to the increase in annuities effected by paragraph 2 of the codicil. I have only to add, though it may not be necessary to do so, that in my view it follows that, in the event of issue living at the death of Mrs. Rowbotham and taking as aforesaid but dying before the death of the last annuitant, the benefits will go according to law, as the hospital never takes unless Mrs. Rowbotham dies without issue living at her death.

As to the third submission, I am of the opinion that, in view of the contingent rights of the issue and the hospital, the appellant is not entitled to receive any portion of the *corpus* before the death of the last annuitant.

With reference to the order made the 18th of June, 1940, I have only to say that I think the appeal should be dismissed in so far as it relates to such order for the reasons given by the learned Chief Justice.

Appeal allowed in part; Sloan and O'Halloran, JJ.A. would allow the appeal in toto.

Solicitor for appellant: *G. Roy Long.*

Solicitors for respondent The Royal Trust Company: *Robertson, Douglas & Symes.*

Solicitors for respondent Lisle Paul: *Bredin & Fillmore.*

Solicitors for respondents Reginald L. Paul, Percy Paul, and The Kelowna Hospital Society: *Norris & McLennan.*

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Criminal law—Murder—Common intent to commit a felony—Death resulting in furtherance of felonious act—Evidence of accident—Jury not charged on manslaughter—Common law of England—Operative effect in British Columbia—Criminal Code, Secs. 259 and 260.

A girl named Rosella Gorovenko occupied room 11 in the Piccadilly Hotel in Vancouver where she lived with the accused Billamy. The evidence disclosed that in the afternoon and early evening of the 16th of January, 1942, the four accused were in Rosella's room where they entered into a planned common design to rob with violence a small store operated by one Chapman and his wife, and another small store operated by a Japanese family named Uno. A quart bottle of rum procured by Rosella was consumed by the party during this time. At about 7 o'clock in the evening Hughes and Berrigan with the girl went across the road to a restaurant while Billamy and Petryk went to find a car. They stole a car and brought it back near the hotel. All five then went to the beer parlour in the hotel where they remained until a minute or two after 8 o'clock, when the four accused got into the stolen car and drove to a lane adjoining the Chapman store on its north side. Berrigan and Billamy with Petryk, who had a revolver, entered the store. Petryk shot off the revolver, narrowly missing Chapman, and about $40 was taken from the till. Hughes remained outside as he was known by Chapman and his wife. They then drove to the Japanese store which was about a block and a half away. Hughes with the revolver entered the store, followed by Berrigan and Billamy. At the back of the store was a living-room, the entrance to which was covered by two hanging curtains. Deceased's mother was in charge of the store at the time and Hughes went to the entrance to the living-room and fired two shots through the curtains, the first striking deceased on the left wrist and the second on the same arm. Deceased then came through the curtains and grappled with Hughes. Deceased's mother states the third shot that hit deceased on the head and killed him was fired when the two men were together. Deceased's brother, who followed him into the store from the living-room states that Hughes broke away from deceased, and when going towards the front door turned and fired the shot when five or six feet away. The evidence of one Vance, an expert, was that as there were no powder marks on deceased's head the bullet was shot from a distance of some feet. Shortly after 9 o'clock the car in which the accused were driving stalled in the sand on Kitsilano Beach. The four men got out, Hughes visiting a girl friend with whom he went to a dance, and the three others getting a taxi went back to Rosella's room in the Piccadilly Hotel, where they were joined by Hughes after 11 o'clock. The four accused were convicted on a charge of murder.

Held, on appeal, McDONALD, C.J.B.C. and FISHER, J.A. dissenting, that there be a new trial.

Per McQUARRIE and SLOAN, JJ.A.: The learned judge in charging the jury

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said: "You must find each of them guilty or not guilty. There is not, with respect to any of them, any middle course. It is guilty or not guilty." The charge is erroneous in law because of non-direction amounting to misdirection in that the learned trial judge erred in not instructing the jury that if they believed that the gun was accidentally discharged during a struggle between Hughes and the deceased they could find a verdict of manslaughter. There should be a new trial.

Per O'HALLORAN, J.A.: There should be new trials upon two grounds: (1) As to Hughes, although there was some evidence which pointed to an accidental shooting or at most an unlawful killing without premeditation, the jury were not instructed in regard to manslaughter; (2) as to the other appellants, the judge did not leave it to the jury to decide whether murder was or ought to have been known to be a probable consequence of the prosecution of their common purpose of robbery. Their criminality is governed by section 69, subsection 2 of the Criminal Code.

Per MCDONALD, C.J.B.C.: The main defence is that the learned judge ought to have left it open to the jury to find a verdict of manslaughter based on the evidence of deceased's mother in preference to that of deceased's brother and inspector Vance, then it was open to the jury to find that the fatal shooting was accidental. No such verdict was open to the jury following *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479, and *Rex* v. *Elnick*, [1920] 2 W.W.R. 606. The English common-law definition of murder is the law of British Columbia. These men, pursuant to a concerted plan, committed a felonious act in the course of or in the furtherance of which the deceased was fatally shot, and they are guilty of murder.

Per FISHER, J.A.: Hughes gave no evidence at all and never swore that he did not intend to fire the shot and did not intend to kill. No jury of reasonable men could fairly find on the evidence that the gun accidentally went off when the shot was fired. Hughes had immediately before that fired two shots which wounded the deceased; no jury of reasonable men could find that his intention and state of mind changed "in a matter of seconds." It is not necessary to express an opinion on the soundness of the view expressed in *Rex* v. *Elnick* (1920), 33 Can. C.C. 174 that section 262 of the Code makes culpable homicide manslaughter only when it is not murder either by common law or under the Code, since the culpable homicide in the present case was undoubtedly murder under the Code.

APPEALS by accused from their conviction before SIDNEY SMITH, J. and the verdict of a jury at the Spring Assize at Vancouver on the 18th of April, 1942, on a charge of murder. The facts are sufficiently set out in the head-note and reasons for judgment.

The appeal was argued at Vancouver on the 9th, 10th, 11th, 12th, 15th, 16th and 17th of June, 1942, before MCDONALD, C.J.B.C., MCQUARRIE, SLOAN, O'HALLORAN and FISHER, JJ.A.

Branca, for appellant Hughes: There was evidence that the shot fired by Hughes and which killed the deceased was fired accidentally: see *Rex* v. *Deal* (1923), 32 B.C. 279. The gun went off in the struggle between them by accident: see *Reg.* v. *Porter* (1873), 12 Cox, C.C. 444; *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136, at p. 140. The learned judge failed to call the attention of the jury to such evidence: see *Wu* v. *Regem,* [1934] S.C.R. 609, at p. 616. Failure to do so entitles accused to a new trial: see *Brooks* v. *Regem* (1927), 48 Can. C.C. 333, at p. 351; *Rex* v. *Dell'Ospedale* (1929), 51 Can. C.C. 117, at p. 120. He should have dealt specifically with the question of manslaughter. It is common ground that the jury were told it was either murder or nothing. There was no charge on the question of accident: see *Rex* v. *Hogue* (1917), 39 D.L.R. 99; *Reg.* v. *Doherty* (1887), 16 Cox, C.C. 306. As to the duty of a trial judge in putting to the jury a lesser offence see *Rex* v. *Scherf* (1908), 13 B.C. 407; *Rex* v. *Higgins* (1829), 3 Car. & P. 603; Archbold's Criminal Pleading, Evidence & Practice, 30th Ed., 404; *Rex* v. *Clewes* (1830), 4 Car. & P. 221; *Rex* v. *MacAskill,* [1931] S.C.R. 330, at p. 331; *Rex* v. *Kovach* (1930), 55 Can. C.C. 40; *Rex* v. *West* (1925), 44 Can. C.C. 109; *Rex* v. *Harms,* [1936] 3 D.L.R. 497. The learned judge failed to instruct the jury that it was open to the jury to find drunkenness on the facts: see *Rex* v. *Studdard* (1915), 25 Can. C.C. 81; *Rex* v. *Blythe* (1909), 15 Can. C.C. 224. On the *onus* of proof and question of reasonable doubt see *Clark* v. *Regem* (1921), 61 S.C.R. 608, at p. 615; *Picariello et al.* v. *Regem* (1923), 39 Can. C.C. 229, at p. 236 *et seq.; Reg.* v. *Monkhouse* (1849), 4 Cox, C.C. 55. As to the effect of common intent and consequences see *Rex* v. *Appleby* (1940), 28 Cr. App. R. 1, at p. 8. On the question of drunkenness see *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479, at p. 502; *Reg.* v. *Doherty* (1887), 16 Cox, C.C. 306; *Rex* v. *Allen* (1911), 16 B.C. 9; *Rex* v. *Garrigan* (1937), 52 B.C. 89. Statements made by the co-defendants of Hughes when he was not present were allowed in that were highly prejudicial to him. The learned judge failed to instruct the jury in this regard: see *Rex* v. *Switzyk,* [1925] 1 D.L.R. 1015, at p. 1017. The identification of the prisoners was weak and was not dealt with

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in the charge: see *Rex* v. *Hewston and Goddard* (1930), 55 Can. C.C. 13, at p. 16. That there was misdirection that justifies a new trial see *Rex* v. *Krawchuk,* [1941] 2 D.L.R. 353; *Rex* v. *Markadonis,* [1935] 2 D.L.R. 105, at p. 108, [1935] S.C.R. 657, at p. 661; *Rex* v. *George* (1936), 51 B.C. 81, at pp. 93-4; *Rex* v. *Frampton* (1917), 12 Cr. App. R. 202; *Rex* v. *Phillips* (1924), 18 Cr. App. R. 115; *Rex* v. *Bundy* (1910), 5 Cr. App. R. 270; *Wu* v. *Regem,* [1934] S.C.R. 609; *Rex* v. *Bagley* (1926), 37 B.C. 353; *Rex* v. *Krafchenko* (1914), 17 D.L.R. 244, at p. 255; *Rex* v. *Whitehouse* (1940), 55 B.C. 420; *Rex* v. *Rennie* (1939), *ib.* 155. Rosella Gorovenko was the chief witness as to common intention. She was an accomplice and there was no corroboration of her evidence.

Schultz, for appellant Petryk: We have five grounds of appeal: 1. The evidence of the Chapman hold-up is inadmissible. 2. There is no evidence to show that Petryk participated in the crime. 3. The learned trial judge erred in that he failed to put the defence adequately to the jury. 4. He failed to direct the jury fully and adequately on the law of common purpose and particularly as to participation, abandonment of purpose and probable consequences. 5. He misdirected the jury as to what constitutes corroboration of the evidence of an accomplice, Rosella Garovenko with respect to the crime charged against Petryk. They show Petryk was at Chapman's store but not at the Jap store where the deceased was shot. There was no evidence of a car at the Jap store and Hughes was the only one identified at the Jap store. That the evidence of the Chapman hold-up is inadmissible see *Brunet* v. *Regem* (1928), 50 Can. C.C. 1; *Thompson* v. *Regem,* [1918] A.C. 221. That the evidence must be confined to the Jap hold-up see *Koufis* v. *Regem* (1941), 76 Can. C.C. 161; *Rex* v. *Paul* (1912), 19 Can. C.C. 339. That the robbery at the Chapman store has no relevancy to the robbery in the Jap store see *Rex* v. *Bodley,* [1913] 3 K.B. 468, at pp. 471-2; *Rex* v. *Fisher,* [1910] 1 K.B. 149, at p. 152; *Makin* v. *Attorney-General for New South Wales,* [1894] A.C. 57; *Rex* v. *Bond* (1906), 75 L.J.K.B. 693; *Rex* v. *Morrison* (1923), 33 B.C. 244. On second point it must be shown that Petryk was at the Jap store. There is no evidence to show that

he was there: see *Rex* v. *Betts and Ridley* (1930), 22 Cr. App. R. 148, at p. 154; *Rex* v. *Appleby* (1940), 28 Cr. App. R. 1, at p. 9; *Reg.* v. *Curtley* (1868), 27 U.C.Q.B. 613; *Rex* v. *Dunbar* (1936), 51 B.C. 20. He was not there and there was abandonment of the enterprise by him: see *Rex* v. *Whitehouse* (1940), 55 B.C. 420, at p. 425. On the conflicting theories as to when the fatal shot was fired, there was misdirection: see *Rex* v. *McKenzie* (1932), 58 Can. C.C. 106; *Rex* v. *Johnston* (1931), 57 Can. C.C. 132. Murder is not a probable consequence of a common design to hold up the store: see *Rex* v. *Bannister* (1936), 66 Can. C.C. 352; *Rex* v. *Scott and Killick,* [1932] 2 W.W.R. 124, at p. 128; *Rex* v. *Short* (1932), 23 Cr. App. R. 170; *Rex* v. *Silverstone* (1931), 55 Can. C.C. 270, at pp. 272-3; *Rex* v. *Edmeads* (1828), 3 Car. & P. 390; *Rex* v. *Pearce* (1929), 21 Cr. App. R. 79; *Rex* v. *Rice* (1902), 5 Can. C.C. 509. As to the evidence of Rosella Gorovenko, the learned judge said certain evidence was corroboration when it was not corroboration at all: see *Rex* v. *Baskerville,* [1916] 2 K.B. 658, at p. 667; *Rex* v. *Phillips* (1924), 18 Cr. App. R. 115; *Rex* v. *Parker* (1924), *ib.* 103, at p. 104; *Rex* v. *Charavanmuttu* (1930), 22 Cr. App. R. 1, at p. 4; *Rex* v. *Rudge* (1923), 17 Cr. App. R. 113.

Burton, for appellant Billamy: There is no evidence against Billamy except the uncorroborated evidence of Rosella, an accomplice. The refusal to grant a separate trial was a serious handicap to our defence: see *Rex* v. *Murray and Mahoney,* [1917] 1 W.W.R. 404; [1917] 2 W.W.R. 805; *Rex* v. *Prosko and Genousky* (1921), 40 Can. C.C. 109; *Reg.* v. *Jackson and Another* (1857), 7 Cox, C.C. 357; *Rex* v. *Wiser and McCreight* (1930), 42 B.C. 517; *Reg.* v. *Weir* (1899), 3 Can. C.C. 351; *Rex* v. *Martin* (1905), 9 Can. C.C. 371, at pp. 382-3; *Rex* v. *Hewston and Goddard* (1930), 55 Can. C.C. 13, at p. 32; *Rex* v. *Bywaters* (1922), 17 Cr. App. R. 66. There was not sufficient warning in reference to evidence applicable to one of the accused but not to the others: see *Rex* v. *Tavener and Tobitt* (1928), 21 Cr. App. R. 63.

Hurley, for appellant Berrigan: There was error in not warning the jury that statements made in Berrigan's presence and not assented to by him in some manner were of no eviden-

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tiary value against him and could therefore not be held to be corroborative of the evidence of Gorovenko: see *Stein* v. *Regem,* [1928] S.C.R. 553. There was error in failing to draw to the jury's attention facts to show Gorovenko was an accomplice which brought her within section 69, subsection 2 of the Criminal Code. There was a common design to commit an unlawful act in which she was involved: see *Vigeant* v. *Regem,* [1930] S.C.R. 396; *Rex* v. *Ratz* (1913), 21 Can. C.C. 343, at p. 344; *Hubin* v. *Regem,* [1927] S.C.R. 442; *Rex* v. *Christie,* [1914] A.C. 545, at p. 553. The learned judge said that corroboration would be found in the evidence of four certain witnesses. There was error in not referring to their evidence with particularity: see *Rex* v. *MacDonald,* [1939] 4 D.L.R. 60, at p. 62; *Rex* v. *Fenglubaum* (1919), 14 Cr. App. R. 1, at p. 3; *Rex* v. *Beauchesne* (1933), 60 Can. C.C. 25, at p. 31; *Rex* v. *McClain* (1915), 23 D.L.R. 312; *Hodge's Case* (1838), 2 Lewin, C.C. 227; Wills on Circumstantial Evidence, 7th Ed., 428. There is no evidence that Berrigan was in the Jap store. The two men with Hughes had left the store before the fatal shot was fired. There was abandonment by the two men: see *Rex* v. *Cobbett* (1940), 28 Cr. App. R. 11; *Rex* v. *Swityk,* [1925] 1 D.L.R. 1015. He should have charged as to whether there was a fourth man implicated in the crime: see *Rex* v. *Illerbrun,* [1939] 3 W.W.R. 546, at p. 549. The learned judge misdirected the jury as to Gorovenko's evidence in saying that if they believed her "it was all they need to consider in her respect": see *Gouin* v. *Regem,* [1926] S.C.R. 539, at p. 544; *Rex* v. *Nowell* (1938), 54 B.C. 165, at pp. 169-170; *Rex* v. *Krawchuk* (1941), 75 Can. C.C. 219, at p. 223.

Bull, K.C., for the Crown: It is a very simple case. Hughes was identified by the mother, brother and sister of the deceased, and shortly after the hold-up he told the witness Doidge of the shooting. Hughes then went back to the hotel where he met the other three implicated in Rosella Gorovenko's room. The Crown rests on section 69, subsection 2 of the Criminal Code. The four men were in Rosella's room in the Piccadilly Hotel on Pender Street in Vancouver at the same time when they decided to hold up the Chapman and Uno stores. There was a common intention

on their part to hold up the stores. Shortly after the shooting in the Uno store their car was stalled on the beach and the four men got out, where four used shells were found. Rosella lived with Billamy and later that night the four men were again together in Rosella's room. They claimed the learned judge should have charged on manslaughter on two grounds: First, that the jury might have found the gun went off by accident in the scuffle, and second, on drunkenness. We say that on the facts there is no such defence, and secondly it would not be a defence: see *Wu* v. *Regem,* [1934] S.C.R. 609, at p. 616. There is no foundation in evidence for accident or drunkenness. Where they are doing an unlawful act and someone is killed it is murder. They were doing an unlawful act when the Jap was killed: see *Rex* v. *Garrigan* (1937), 52 B.C. 89; *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479. Irrespective of sections 259 and 260 of the Code, the common law of England applies and when in doing a felonious act another is killed by accident it is murder: see *Rex* v. *Elnick,* [1920] 2 W.W.R. 606; *Taylor* v. *Mackintosh* (1924), 34 B.C. 56. Malice aforethought is eliminated: see *Rex* v. *Beard* (1920), 14 Cr. App. R. 159; *Rex* v. *Burgess and McKenzie* (1928), 39 B.C. 492; *Rex* v. *Eberts* (1912), 2 W.W.R. 542; *Rex* v. *Fred MacTemple,* [1935] O.R. 389; *Rex* v. *Gelbert* (1907), 5 W.L.R. 295; 38 S.C.R. 284; *Rex* v. *Barrett* (1908), 8 W.L.R. 877; *Rex* v. *Appleby* (1940), 28 Cr. App. R. 1, at p. 8; *Reg.* v. *Porter* (1873), 12 Cox, C.C. 444. On the question of drunkenness see *Director of Public Prosecutions* v. *Beard,* [1920] A.C. 479, at p. 504; *Rex* v. *Hewston and Goddard* (1930), 55 Can. C.C. 13, at p. 51; *Rex* v. *Garrigan* (1937), 52 B.C. 89. In the course of or in furtherance of the felonious act see *Rex* v. *Rennie* (1939), 55 B.C. 155. Section 259 is not exhaustive and the common-law principle applies: see Snow's Criminal Code, 5th Ed., 117 and 119. On the question of drunkenness see *McAskill* v. *Regem* (1931), 55 Can. C.C. 81. It is not the duty of the judge to refer to manslaughter in his charge and he should say intent is irrelevant if the killing is in the course of or in furtherance of robbery with violence. I think section 260 has no application. On the claim that evidence of the Chapman hold-up is inadmissible, the venture was the hold-up

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of the two stores, it was part of the common intent of the accused: see *Rex* v. *George* (1934), 49 B.C. 345; *Rex* v. *Sowash* (1925), 37 B.C. 1, at p. 22. Severance of the trial is within the discretion of the trial judge: see *Rex* v. *Davis* (1914), 19 B.C. 50; *Baker* v. *Regem*. *Sowash* v. *Regem*, [1926] S.C.R. 92; *Prosko* v. *Regem* (1922), 63 S.C.R. 226. Section 1014 of the Code is a complete answer to any slips the learned trial judge may have made: see *Rex* v. *Rice* (1902), 4 O.L.R. 223.

Branca, in reply: Because of section 260 of the Criminal Code the common law of England does not apply: see Archbold's Criminal Pleading, Evidence & Practice, 30th Ed., 404. See also *Rex* v. *Higgins* (1829), 3 Car. & P. 603; *Rex* v. *Clewes* (1830), 4 Car. & P. 221; *Smith* v. *Blandy* (1825), Ry. & M. 257; *Rex* v. *Stasiuk* (1942), 50 Man. L.R. 51.

Schultz, in reply, referred to *Baker* v. *Regem*. *Sowash* v. *Regem*, [1926] S.C.R. 92; *Rex* v. *Bannister* (1936), 66 Can. C.C. 357; *Rex* v. *Davis* (1914), 19 B.C. 50.

Burton, in reply, referred to *Prosko* v. *Regem* (1922), 63 S.C.R. 226.

Hurley, in reply: Sections 259 and 260 of the Criminal Code are exhaustive of the law of murder.

Cur. adv. vult.

30th June, 1942.

MCDONALD, C.J.B.C.: The appellants Hughes, Petryk, Billamy and Berrigan were convicted of murder, by a jury sitting with SIDNEY SMITH, J. The uncontradicted evidence, direct and circumstantial, disclosed that the four appellants entered into what they no doubt believed to be a carefully planned common design to rob with violence a small store operated by George Richard Chapman and his wife Winifred Chapman, and another small store in the immediate vicinity operated by a family named Uno. In furtherance of this design they provided themselves with a .22 calibre revolver with ammunition for same, and Petryk and Billamy stole a motor-car to be used by all four. By prearrangement they drove the car to a lane at the rear of the Chapman store. Hughes, being well known to the Chapmans, did not enter the store, and the jury obviously drew the only reasonable inference, namely, that he remained in charge of the car.

In the Chapman store Petryk, during the robbery, fired a shot which barely missed Mr. Chapman. Again the jury drew the only reasonable inference, namely, that the four then proceeded in the car the short distance to Uno's store. On this occasion Hughes, Billamy and Berrigan entered, Hughes carrying the revolver. The Uno family live in small quarters at the back of the store and separated therefrom by two hanging curtains. When the bandits entered the store, Mrs. Uno, who was in charge at the moment, made an exclamation which indicated to her family that a hold-up was in progress. Almost immediately Hughes went to the curtains and recklessly fired two shots, the first bullet striking Yoshyuki Uno on the left wrist and the second on the same arm, as Yoshyuki sat on a chesterfield. Yoshyuki then came through the curtains and sought to gain possession of the revolver in Hughes's hand. Mrs. Uno, who was obviously highly nervous and excited, stated in evidence that during this effort on the part of Yoshyuki the revolver was again discharged and Yoshyuki fell to the floor. It was this third shot which entered Yoshyuki's head and caused his death. Yukio Uno, a brother of the deceased, followed Yoshyuki into the store, and he states in evidence that it was after Hughes had parted from Yoshyuki and had reached the doorway some five or six feet away, that Hughes fired the fatal shot. Counsel for Hughes on the trial, in cross-examination of inspector Vance, who is an expert in these matters, elicited the opinion that as there were no powder marks on Yoshyuki's head the bullet was shot from a distance of some feet. I mention this conflict in the evidence, if it may be so called, merely to show that it was clearly open to the jury, if they saw fit, to find that the fatal shot was in fact fired when Yoshyuki and Hughes were standing at some distance apart.

It would serve no useful purpose to detail at length the evidence as to the events preceding and following the events which I have mentioned. It will suffice to say that every part of the evidence fits into every other part, with the result that in my opinion, even aside from the direct evidence, the Crown was able to weave a web of circumstances from which an honest jury could not well allow the appellants to escape.

For more than four days we have heard argument from counsel

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for each of the four appellants, and we have had cited to us some scores of authorities. The learned judge's conduct of the trial and his charge to the jury are assailed from every side. For the most part I offer the opinion with some assurance that these attacks are without merit and entirely unfounded, and I am impelled to say that I do not recall any case that has come under my observation which was conducted with more conspicuous fairness and meticulous care. It is unnecessary to say that a judge's charge must be viewed as a whole. Everyone knows that if some defence is open and has escaped the attention of both judge and counsel, that defence is always open on appeal, even though no objection was taken at the trial. Nevertheless, when I am asked to consider objections to a charge I sometimes recall what the late Mr. Justice Beck of Alberta once said to the effect that it is at least some evidence of the fairness of a charge that no objection was taken when opportunity offered. In the present case at the conclusion of his charge the learned judge invited objections, acceded to every request made by defence counsel, and was finally told in effect, that his charge was satisfactory.

As to the many authorities cited in argument and the extracts read therefrom, I respectfully submit that we must exercise a little common sense in applying judicial expressions of opinion or decisions, and should try to extract the principle of the decision and apply it to the facts before us.

What may be described as the main attack upon the learned judge's charge is that, instead of telling the jury they must convict of murder or acquit, he ought to have left it open to them to find a verdict of manslaughter. This argument is based firstly upon the suggestion that if Mrs. Uno's evidence was accepted in preference to that of the deceased man's brother and inspector Vance, then it was open to the jury to find that the fatal shooting was accidental.

In my opinion no such verdict was open, and I base this opinion upon the decision of the Court of Appeal and of the House of Lords in *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479. I also rely on the considered judgment of Cameron, J.A. in *Rex* v. *Elnick*, [1920] 2 W.W.R. 606. I am satisfied that the law of England in this matter is the law of British Columbia.

Much more might be said upon this branch, but I think these decisions are decisive. In the present case the appellants entered into a common design to commit an unlawful offence, that is to say, robbery with violence, and in my opinion in such a case accident is not a defence. As to the case of *Reg.* v. *Porter* (1873), 12 Cox, C.C. 444, referred to in *Rex* v. *Appleby* (1940), 28 Cr. App. R. 1, I think the facts are clearly distinguishable. If they are not, then I submit that the *Beard* case is the governing decision.

But, apart altogether from specific authority, I submit the following as a sound proposition of law. If A and B pursuant to a concerted plan enter X's store to rob it, A being armed with an exposed lethal weapon; and A fires two bullets which wound X; and X, in defence of himself and family, seizes A's wrist with the view of preventing further violence and is fatally wounded by a bullet from the weapon in A's hand, then A and B are guilty of murder. I know of no sound authority to the contrary either in England or in Canada. Putting the facts in their most favourable light for the appellants, that is this case. The discussion of cases where the facts are entirely different leads to confusion and not to clarity of thought.

Alternatively, it is said that a verdict of manslaughter was open on the ground that the appellants, or at least some of them, including Hughes, were so drunk as to be incapable of forming the intention to commit murder. In the first place it is to be noted that on the evidence the intent was present before any liquor was proven to have been taken. In my view the simpler answer is that there is no word of evidence from any quarter to substantiate any finding of drunkenness to the extent above indicated. There is evidence that the appellants were drinking during the hour or so immediately preceding the carrying out of their plans, but there is no evidence that they were so drunk as is now suggested, and again I rely for my opinion upon the decision in the *Beard* case. I shall only add that in *McAskill* v. *Regem* (1931), 55 Can. C.C. 81, the Supreme Court of Canada, and in *Rex* v. *Garrigan*, 52 B.C. 89; [1937] 3 W.W.R. 109, the Court of Appeal in British Columbia accepted the view, if I understand these decisions, that the rules applicable to drunkenness as laid down in the *Beard* case should govern this Court.

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I have read the evidence and the learned judge's charge time and again and I suggest that no one could ascertain from the cross-examinations which took place, just what defence any one of the accused was relying upon except a general denial. A great part of the long trial was taken up with an attempt to break down the Crown witnesses, and the verdict of the jury is evidence of just how well these attempts succeeded. In his charge to the jury the learned judge did make reference to the question of accident and to the question of drunkenness, and he did say to the jury that they could give such weight as they saw fit to the evidence on these matters. With respect, I think the learned judge would have been well advised to tell the jury to ignore the evidence on both these issues, if they may be called such. If I am right in the conclusions which I have stated above, then certainly what the judge said could not possibly have hurt the accused, but on the contrary, might have given a pretext to a dishonest jury to find a way out.

It would appear, so far as I can gather, from the cross-examinations of Crown witnesses that Hughes's real defence was an *alibi,* and it should not be necessary to point out that this defence is entirely inconsistent with any defence based on accident or drunkenness.

As to the objection that evidence was improperly admitted as to the Chapman robbery, it is only necessary to say that the common intent embraced the armed robbery of both stores, and all that was necessary was that the learned judge should warn the jury as he did, that they were not trying the accused for the offence of robbing the Chapman store, but that nevertheless the evidence was admissible as a part of the narrative.

It was further objected that the learned judge erred in refusing the applications of Petryk, Billamy and Berrigan to sever the trials. The record shows that the learned judge gave careful consideration to these applications. In *Rex* v. *Davis* (1914), 19 B.C. 50 this Court held, as have many other Courts, that the question of severance on a joint indictment is a matter for the discretion of the trial judge, soundly exercised. In my opinion, on the authorities, we have no right to interfere with the judge's ruling, and in any event I think he was right.

Again it was said that the learned judge erred in failing to put it to the jury, as a question of fact, to decide whether or not certain statements made by one of the appellants in the presence of another or others were made under such circumstances as to call upon such other or others to admit or repudiate such statements. So far as I have been able to find, there is not any evidence in such statements, wherein any other of the appellants was implicated. I am further of opinion that the learned judge gave ample warning to the jury that any statement made by any one of the appellants in the absence of another was evidence against himself only, and not against any other person.

As to the argument that some of the appellants abandoned the enterprise, I find no evidence of anything of the kind, and there is certainly no evidence of any timely notice of intention to abandon.

Finally, I think that, except, of course, upon the question of manslaughter, we should, even if I am wrong in what I have said in regard to the other objections, apply the provisions of section 1014, subsection 2 of the Criminal Code, because I am of opinion that in any event no substantial wrong or miscarriage of justice has actually occurred.

I would dismiss the appeals.

McQUARRIE, J.A.: There were two main defences advanced on behalf of the appellants, namely, (1) accident, and (2) drunkenness, and it was argued by counsel for the appellants that under both heads there was evidence which would have warranted the jury in finding a verdict of manslaughter. The learned trial judge's charge prevented them from doing so. He charged them that it was a case of murder or acquittal. In my opinion there was some evidence on which a verdict of manslaughter could have been found, although clearly such evidence is not very strong.

As to (1) there was the evidence of Ciminelli and Rosella L. Gorovenko that the appellant Hughes, after the shooting of the deceased, made a statement to them separately to the effect that the third and fatal shot was accidental. There was also the evidence of the mother of the deceased that the third shot was fired in a struggle between Hughes and the deceased. It was urged that the first two shots were meant as intimidation. I

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must pause, however, to remark that it is difficult to understand how any jury could come to the conclusion that the firing of shots through a curtain, without knowing what was behind it, could have been for the purpose of intimidation solely. Notwithstanding my own opinion on the subject, there may have been some evidence on which the jury might have found a verdict of manslaughter. I must admit that the point is a very fine one, but in this case I think the accused should have been given the benefit of the doubt. The jury should have been given the privilege of considering whether their verdict should be manslaughter.

As to (2) there was evidence that there had been considerable drinking before the commission of the crime, but I think the judge's charge in that connection was unobjectionable.

In conclusion, I agree that the appeals should be allowed and new trials ordered, for the reason that the learned trial judge did not charge the jury that they might find a verdict of manslaughter —see *Rex* v. *Roberts,* [1942] 1 All E.R. 187, *Rex* v. *Cobbett* (1940), 28 Cr. App. R. 11 and *Rex* v. *Krawchuk,* [1941] 2 D.L.R. 353, at p. 373.

SLOAN, J.A.: The appellants, having been convicted of murder at the Vancouver Spring Assize, seek a new trial upon several grounds, the chief one of which is that the learned judge below erred in law in his charge to the jury.

Appellants submitted there was evidence adduced at the trial which, if believed by the jury, would justify the verdict of manslaughter and that the learned trial judge erred in not instructing the jury that manslaughter was a possible verdict.

In my opinion, with deference, this objection is fatal to the conviction and a new trial must be had.

It is my view that the charge herein is erroneous in law because of non-direction amounting to misdirection in that the learned trial judge erred in not instructing the jury that if they believed that the gun was accidentally discharged during a struggle between Hughes and the deceased they could find a verdict of manslaughter.

It is clear that Hughes's statements when put in at the trial by the Crown became evidence in his favour—*Eberts* v. *Regem* (1912), 47 S.C.R. 1, at p. 31; *Rex* v. *Silverstone* (1931), 55 Can.

C.C. 276, at p. 279; *Trial of Lord de Clifford,* [1936] W.N. 4 and *Rex* v. *Krawchuk,* [1941] 2 D.L.R. 353. And while I concede that such evidence is meagre and untested by cross-examination (but confirmed to a degree by the evidence of Mrs. Uno) nevertheless it is some evidence of the absence of intent and the weight of it is for the jury. *Rex* v. *Krawchuk, supra,* and *Rex* v. *Roberts,* [1942] 1 All E.R. 187.

The learned trial judge in his charge did instruct the jury as to the elements necessary to found a verdict of murder under section 259 of the Code, but he did not tell them how they might bridge the gap from murder to manslaughter under that section in the circumstances of this case. In other words, he failed to instruct them adequately upon the legal consequences that would flow from a finding of fact that the gun was accidentally discharged.

In my opinion the jury ought to have been told by the learned trial judge that under section 239 (*d*) they must decide whether the gun was discharged by the accused Hughes as his intentional "act" or whether it was discharged accidentally, and that if it was discharged accidentally during the robbery the verdict should be manslaughter and not murder. True he did refer to the defence of accident, as follows:

> . . . Counsel spoke about an accident. Is it an accident? If you find Hughes came in and fired these shots and the deceased Japanese grappled with him in self-defence in an effort to protect himself, and thereby was shot, it is for you to say if that is an accident. . . . Then he [counsel for Hughes] spoke about an accident, and then I said it was for you to decide under that section of the Code [section 25] whether under the circumstances that took place when the Japanese was shot—the firing of the two shots, the act of the Japanese in grabbing the gun in self-defence, it then going off—if you find all that is what happened, it is for you to say whether that was an accident; and whether the real truth of the matter may not have been given by the Japanese son—that Hughes got free and while running to the door turned round and fired the fatal shot. All these matters are for you.

The point is, however, that nowhere in the charge is any instruction given that if the jury attached sufficient weight to the evidence of accident to raise in their minds a reasonable doubt, the verdict should be manslaughter—*Mancini* v. *Director of Public Prosecutions* (1941), 28 Cr. App. R. 65. In fact, the learned trial judge took manslaughter from the jury by directing them as follows:

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> You must find each of them guilty or not guilty. There is not, with respect to any of them, any middle ground. It is guilty or not guilty [of murder].

Counsel for the Crown sought to sustain the charge to the jury by submitting that even if the shooting was accidental the killing was murder as it took place during an unlawful act, *i.e.*, a "hold-up," and that the defence of manslaughter was not in law open to the appellants. In answer to a question from the Bench, Crown counsel said "I do not rely upon either section 259 or 260 of the Code, but upon the common law of England." I rather think he took that position from necessity rather than from choice. Under section 259 (*d*) (the only subsection in point on this aspect of the case), manslaughter would be open to the jury, as I pointed out above, if they considered the gun was discharged accidentally, as an accidental occurrence cannot be said to be the doing of an "act" within the meaning of that subsection. The act must be intended and an accident is an unintentional happening not consciously directed to an object lawful or unlawful.

Similarly under section 260 (not commented upon by the trial judge) manslaughter is also a possible verdict. That section stripped of its irrelevant wording, reads as follows:

> In case of . . . robbery, . . . , culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue—if he means to inflict grievous bodily injury for the purpose of facilitating the commission of [the crime] . . . , and death ensues from such injury.

The essence of that section is found in the words "if he means to inflict grievous bodily injury for the purpose of facilitating the commission of the crime." A finding of fact that the gun was accidentally discharged would be a direct negation that the offender meant, *i.e.*, intended to inflict grievous bodily harm for the purpose of facilitating the commission of the crime. Accident is the antithesis of intent.

It follows from what I have said that the defence of accident resulting, in the circumstances of this case, if successful, in a verdict of manslaughter, ought not to have been excluded from the consideration of the jury by anything contained in sections 259 and 260. In truth under those sections accident is a defence either absolute or qualified as here.

Mr. *Bull*—no doubt appreciating the situation—took refuge

in the English common law citing to us the old classic common-law illustration, *viz.*, A shooting at a fowl with intent to steal it and accidentally kills B, commits murder. He finally relied upon the common-law definition of murder as applied in *Rex* v. *Beard* (1919-20), 14 Cr. App. R. 110 and 159. Lord Reading, L.C.J. said at p. 116:

> By the law of England . . . an act of violence [causing death] done in the course or in furtherance of a felony involving violence, . . . beyond all question and beyond the range of any controversy . . . is murder.

In the House of Lords the Lord Chancellor said at pp. 186-7:

> In the Court of Criminal Appeal two separate and independent points of misdirection were raised on behalf of the prisoner: (1) that the learned judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional, but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter; and (2) that the learned judge wrongly directed the jury on the defence of drunkenness, and gave a direction which was not in accordance with the decision in *Meade's* case, [[1909] 1 K.B. 895] and was applicable only to the defence of insanity. The first objection failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law, and there can be no doubt as to its soundness.

I am unable to see how *Beard's* case is of any assistance to the Crown on this branch of the appeal and for three reasons: First, I can see no distinction between the definition of murder in *Beard's* case and that contained in section 259 (*d*) of the Code—the elements essential to the crime of murder under the circumstances of that case if found by the jury, are all included therein. Secondly, an accidental discharge of a gun cannot be said to be "an act of violence" in the same category as forcibly placing a hand upon the mouth of a struggling girl—an act not accidental, but deliberate; and thirdly, if *Beard's* case does define murder in terms differing from the statutory codification of the elements of that crime by the Criminal Code, then the Code definition is dominant and governs. One of two positions must be true: the common-law components of murder expressed in *Beard's* case are the same as those contained in the Code, or they are not. If not, then such common-law definition of murder must have been

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"altered, varied, modified or affected" by the Code, and in consequence, by section 11 thereof, the common law is abrogated to the extent to which it has been so "altered, varied, modified or affected." And see the English Law Act, R.S.B.C. 1936, Cap. 88, Sec. 2—*The Union Colliery Company* v. *The Queen* (1900), 31 S.C.R. 81.

It follows from what I have said that it matters not whether the common-law definition of murder is the same or different than that contained in sections 259 and 260 of the Code—in either event the said sections govern. And because under these said sections of the Code the verdict of manslaughter, under the circumstances of this case, was open to the jury if they took a certain view of the facts, that possibility ought not to have been taken away from them by the learned trial judge—*Rex* v. *Dinnick* (1909), 3 Cr. App. R. 77; *Rex* v. *Hogue* (1917), 39 D.L.R. 99; *Rex* v. *Deal* (1923), 32 B.C. 279; *Rex* v. *Dell'-Ospedale* (1929), 51 Can. C.C. 117; *Mancini's* case, *supra; Rex* v. *Roberts, supra.*

Crown counsel pressed upon us the case of *Rex* v. *Elnick,* [1920] 2 W.W.R. 606. If it can be said that that case decided the English common-law definition of murder continues to exist in Canada even where repugnant to the specific definitions of that offence in the Code, then in my view, with deference, that decision is in conflict with section 11 of the Code, and where there is a conflict between a statute of the Parliament of Canada and the Court of Appeal for Manitoba, I must, with great respect, be guided by the statute.

It seems to me when the Federal Parliament in a statutory code specifically and expressly defines what are the constituent elements of the crime of murder in Canada then it has not only entered the field but occupied it to the exclusion of all definitions of murder which are an extension of or a limitation upon that definition.

Crown counsel submitted that *Rex* v. *Beard* had been approved by the Supreme Court of Canada in *McAskill* v. *Regem* (1931), 55 Can. C.C. 81. That is true as far as *Beard's* case deals with the defence of drunkenness as affecting intent. As far as the other aspects of that decision are concerned, it seems clear that

if the principles enunciated therein are now reflected in sections 259 and 260 of the Code any approval thereof is unnecessary, and if not incorporated in those sections, an approval is, by reason of section 11 of the Code, a legal impossibility.

Crown counsel also drew to our attention the fact that no relevant objection was taken to the charge below. If I may be permitted I would refer to what I said on that subject in *Rex* v. *Munroe* (1939), 54 B.C. 481, at p. 488—observations in which MARTIN (then) C.J.B.C. expressed his agreement (p. 482).

It is not without significance that the jury in this case attached to their verdict of guilty of murder the following recommendation: "Under the circumstances we the jurors recommend the strongest possible plea for mercy for the four men."

In the language of Crocket, J. in *Rex* v. *Krawchuk, supra,* at p. 375:

> The fact that the jury in returning their verdict of guilty of murder accompanied it with a strong recommendation of mercy makes it clear that they at last felt that there were extenuating circumstances to be taken into consideration.

Because the jury seemed to be leaning toward a verdict of manslaughter, had it been open to them, and because Crown counsel disclaimed any intention of requesting its application, I do not think this is a case in which the provisions of section 1014, subsection 2 should be applied. Under all the circumstances of this case I am unable to say that the jury, if properly directed, must inevitably have returned a verdict of guilty of murder.

In leaving this case I would once more refer to the language of Idington, J. in *Minguy* v. *Regem* (1920), 61 S.C.R. 263, at p. 270:

> Those accused of crimes may, in the majority of cases, be at bottom in some minds entitled to very little consideration. But we must guard their rights as sacredly as possible, and remember that society is not well served by the conviction of any man unless by due process of law strictly adhered to.

As it is my opinion the conviction against the appellant Hughes should be quashed and a new trial ordered it follows I would make the same direction in the cases of those other appellants jointly tried with him.

O'HALLORAN, J.A.: A Japanese store in Vancouver was held up by the appellant Hughes assisted by two unidentified men.

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In the course thereof Hughes shot and killed a son of the proprietor. The prosecution presented to the jury in the joint trials a chain of evidence that (1) Hughes and the other three appellants had planned to rob the Japanese store; (2) the four men met together immediately before they left to prosecute the plan of robbery; and (3) a few hours after Hughes had shot the man he joined the other three under circumstances to indicate the four of them had acted together in a joint and exciting enterprise.

The learned judge charged the jury Hughes was guilty of murder or nothing, and that if they acquitted Hughes they must acquit the other three. The four were convicted of murder. With respect, I would direct new trials upon two grounds: (1) As to Hughes, the learned judge did not instruct the jury in regard to manslaughter. He put it to them as murder or nothing; (2) as to the other three appellants, the learned judge did not leave it to the jury to decide whether murder "was or ought to have been known to be a probable consequence of the prosecution" of their common purpose of robbery.

As to the first point, there was some evidence upon which the jury could have found manslaughter. Hughes's separate statements to Ciminelli and the girl Rosella pictured the fatality as an accidental shooting or at most an unlawful killing without premeditation. The prosecution made these statements evidence for Hughes, by using them as part of its case against him, and *vide Rex* v. *Higgins* (1829), 3 Car. & P. 603; 172 E.R. 565. The testimony of the mother of the deceased who described the struggle between her son and Hughes, is in my view capable of an interpretation consistent with these statements of Hughes. How the jury would regard that evidence if they were properly instructed, is, of course, another question.

There was, therefore, some evidence which pointed to unlawful killing without premeditation. But the jury were not instructed upon manslaughter, and their minds were not directed to the significance of the material evidence in that respect. Manslaughter was a verdict open to them therefore as a matter of law, but they were prevented from considering that verdict or returning it. In *Rex* v. *Roberts,* [1942] 1 All E.R. 187 manslaughter had not been charged, and counsel for the prosecution before the

Court of Criminal Appeal had submitted that no reasonable jury could have reached a verdict of manslaughter. The Court of Criminal Appeal seemed disposed to take much the same view, but added significantly, at p. 193:

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

Study of *Rex* v. *Roberts* discloses evidence of premeditated killing which does not exist in the case at Bar. The evidence to justify manslaughter in that case was admittedly slight indeed. Yet the Court of Criminal Appeal reduced the conviction of murder to manslaughter as it had done in *Rex* v. *Cobbett* (1940), 28 Cr. App. R. 11. *Rex* v. *Krawchuk,* [1941] 2 D.L.R. 353 (which contains both the judgments of the Supreme Court of Canada and our own Court) is another recent case in point. The majority of this Court directed a new trial, where a defence of provocation admittedly unsatisfactory and slight though it was, had not been put to the jury. The Court did so because it was unable to say that if the minds of the jury had been directed to the significance of the supporting evidence in that respect, the jury could not have returned a verdict of manslaughter. That view was affirmed by a majority of the Supreme Court of Canada.

Allied to this phase of the appeal is a question which arose during the argument concerning the judge's duty in directing the jury's attention to the evidence and in placing defences before the jury. It must be exceedingly rare indeed where it is the judge's duty to refer to all the evidence of every witness. As was said in *Rex* v. *Roberts, supra,* each judge should be left to sum up a case in his own way so long as he does not misdirect the jury in law or in fact. But that does not absolve the judge from presenting to the jury the material evidence related to the case for the prosecution and the defence respectively.

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

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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 *Rex* v. *Krawchuk* (1940), 56 B.C. 7 the late Chief Justice MACDONALD said at pp. 11 and 15, the trial judge should place the evidence before the jury "in such a way that they will appreciate it." My own observations in that case as to the necessity of relating the material evidence to the defence are found at p. 27.

In the Supreme Court of Canada both Crocket, J. and Kerwin, J. (with whom Taschereau, J. agreed) expressed themselves directly to this point. The former said at p. 375:

> This particular piece of evidence, however, was in the record, and, unsatisfactory and slight as it may perhaps appear, with all respect I am of opinion that the accused was entitled to have the jury's attention directed to it and its possible implications in the light of the testimony . . . as bearing upon the question of provocation.

The latter said at p. 376:

> On the question of provocation, the only real important bit of evidence is contained in this document and I am of opinion that the jury should have had it placed before them for consideration in connection with that question. The mere fact that the trial judge referred to it when dealing with insanity and that it was handed to the jury upon their retiring to consider their verdict, is not sufficient. A trial judge need not refer to every piece of evidence but to omit to mention the only evidence on one branch of the defence is an omission to place that defence before the tribunal of fact.

Vide also *Rex* v. *McKenzie* (1932), 58 Can. C.C. 106, MACDONALD, C.J.B.C. at p. 115.

The learned judge referred to accident and told the jury "If you acquit Hughes you must acquit the other three." Nowhere does the learned judge instruct the jury upon unlawful killing without premeditation. It was murder or nothing for all four. I obtained the impression that it was suggested in this Court that as counsel for the appellant had stressed accident as a defence, there was no duty upon the judge below to put manslaughter to the jury, the two defences being mutually exclusive, for if it were accident it could not be manslaughter, and *vice versa*.

Lord Reading, L.C.J. discussed that point in *Rex* v. *Hopper*, [1915] 2 K.B. 431, when he said at p. 435:

> . . . it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence—we say no more than that—upon which a question

ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand.

That view was approved by the House of Lords in *Mancini* v. *Director of Public Prosecutions* (1941), 28 Cr. App. R. 65, where Viscount Simon, L.C. said at p. 72:

> The fact that a defending counsel does not stress an alternative case before the jury . . . did not relieve the judge from the duty of directing the jury to consider the alternative, if there was material before the jury which would justify a direction that they should consider it.

Vide also *Wu* v. *Regem,* [1934] S.C.R. 609, at p. 616.

I agree with my brother SLOAN that the definition of murder as found in our Criminal Code would not prevent a jury returning a verdict of manslaughter in the circumstances of this case, if they had been properly instructed, and if the evidence had been related to that defence, and they had accepted that evidence as pointing to unlawful killing without premeditation. I concur in the opinion of my brother SLOAN in that respect. In any event, however, I regard manslaughter as open for consideration on the facts of this case: *vide Reg.* v. *Porter* (1873), 12 Cox, C.C. 444, approved in *Rex* v. *Appleby* (1940), 28 Cr. App. R. 1, at p. 5 and *Reg.* v. *Serne* (1887), 16 Cox, C.C. 311. In this respect I have read with interest the reference to *Mancini's* case in the Notes of 58 L.Q.R. 34-38.

Rex v. *Elnick,* [1920] 2 W.W.R. 606 was founded on *Rex* v. *Beard* (1920), 89 L.J.K.B. 437. But I do not think that Lord Birkenhead's language in the latter case denies the view I have expressed, when what he said is interpreted as it must be, in the light of the facts of the case (choking a girl in the course of raping her) to which he was then addressing his mind. The only point for decision in the *Beard* case before the House of Lords related to drunkenness. Any other observations were incidental or narrative. *Reg. v. Serne, supra,* was referred to therein on the meaning of "malice aforethought" at p. 444 but without any hint of disapproval.

If the House of Lords in the *Beard* case had intended a view contrary to that which I have expressed, one would have expected the Court of Criminal Appeal in *Rex* v. *Appleby, supra,* to be governed by it. But in that case Humphreys, J. in giving the judgment of the Court said of *Reg.* v. *Porter, supra,* that its head-note correctly mirrored the view expressed by Brett, J. in

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1873, and that the Court was not aware it had been dissented from in modern times. The head-note to which that reference is made reads:

> If a prisoner, having been lawfully apprehended by a police-constable on a criminal charge, uses violence to the constable, or to anyone lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder: And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter.

In this case there is some evidence that the killing resulted from an accidental shooting in the course of a struggle. That is for the jury to pass on. It is not for the trial judge or the Court of Appeal to go into the jury-box or otherwise usurp the functions of the jury. It would occur to one that if Hughes intended to shoot to kill, he would have shot the Japanese before the latter could close and wrestle with him; that he would not have waited until the Japanese had grasped his gun hand. In the *Elnick* case there was no evidence of a struggle. In the *Beard* case the act of choking was inseparable from the act of raping. In this case there is evidence the firing of the gun occurred accidentally. It was for the jury to say whether they believed that firing was accidental. And if I read the *Appleby* case correctly that has been the law of England for at least 70 years. While the learned trial judge does refer to accident, he does not relate it to manslaughter, and in this connection *vide Rex* v. *Krawchuk, supra.*

In regard to the second branch of the appeal, the criminality of the three other appellants Petryk, Billamy and Berrigan is governed by section 69, subsection 2 of the Criminal Code. They joined with Hughes in planning to rob the Japanese store. The learned judge instructed the jury their guilt was fixed by Hughes's guilt. He instructed them that Hughes was guilty of murder or nothing, and accordingly the other three appellants were also guilty of murder or nothing. With respect, that was error. For even if Hughes were properly found guilty of murder, the other three appellants could not be found guilty of murder, unless the jury on proper instructions had found that the other three appellants knew or ought to have known, that murder was a probable consequence of proceeding with the joint plan of robbery. But that was not put to the jury.

If Hughes was guilty of murder, did he fire the gun in fur-

therance of the common object, or in furtherance of some purpose of his own? That was for the jury, *vide Reg.* v. *Jackson and Another* (1857), 7 Cox, C.C. 357, and the summing up to the jury of Bramwell, B. at p. 360. In *Rex* v. *Bannister* (1936), 66 Can. C.C. 352 the Appeal Division of the New Brunswick Supreme Court granted a new trial, on the ground that whether the accused knew or ought to have known that murder was a probable consequence of the common purpose of kidnapping was for the jury to determine, and should not have been taken from the jury.

It would appear in this connection that neither of the two men with Hughes took part or assisted him in his struggle with the deceased. Again, if the evidence of the brother of the deceased was accepted and Hughes stepped back five or six feet to the door before firing the fatal shot, it would seem as if his two assistants had run from the store before he fired the fatal shot. But again these are matters for the jury upon proper instruction.

I would, therefore, allow the appeals and direct new trials.

FISHER, J.A.: Counsel on behalf of the above-named appellant Robert Hughes first submits that there was error in the directions given to the jury by the learned trial judge in reference to the defences of accident and drunkenness. The real submission is that the learned trial judge should have directed the jury, as he did not, that a verdict of manslaughter might be returned. With regard to such submission, I have first to say that every summing-up must be judged in connection with the facts of the particular case—see *Rex* v. *Appleby* (1940), 28 Cr. App. R. 1, especially at p. 5. The rule that an accused person at his trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. *Wu* v. *Regem,* [1934] S.C.R. 609, *per* Lamont, J., delivering the judgment of the Court. In *Mancini's* case (1941), 58 T.L.R. 25 Viscount Simon, L.C. said at p. 27:

> The language employed by Lord Sankey [in *Woolmington* v. *Director of Public Prosecutions,* 51 T.L.R. 446; [1935] A.C. 462] does not assert and does not imply that in every charge of murder, whatever the circumstances, the judge ought to devote part of his summing-up to directing the jury on the question of manslaughter, or that the jury ought to consider it. If the evidence before the jury at the end of the case does not contain material on

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which a reasonable man could find a verdict of manslaughter instead of murder, it is no defect in the summing-up that manslaughter is not dealt with.

In *Eberts* v. *Regem* (1912), 47 S.C.R. 1, where the question of provocation was raised on the appeal and the application for a new trial was based upon the contention that the trial judge should have instructed the jury that it was open to them to find the prisoner guilty of manslaughter only, Davies, J., in whose opinion Anglin and Brodeur, JJ. concurred, said as follows at pp. 21-22:

> . . . Looking at all the circumstances and facts surrounding the unfortunate shooting of the officer, as detailed in the evidence, I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while "in the heat of passion caused by sudden provocation."
>
> I think, reading the charge of the trial judge as a whole and in the light of all the facts given in evidence, it cannot be said that his direction to the jury that they must either acquit the prisoner or find him guilty of murder, occasioned such a substantial wrong or miscarriage on the trial as would give us jurisdiction to set aside the conviction or direct a new trial.

Idington, J., in whose opinion Sir Charles Fitzpatrick, C.J. concurred, said at p. 25:

> No jury could properly return such a verdict. It would, therefore, have been idle or worse for the learned trial judge to have entered upon an exposition of the law bearing on manslaughter and thus needlessly perplexed the jury.

In *Rex* v. *Hopper* (1915), 11 Cr. App. R. 136 Lord Reading, L.C.J. said in part as follows at pp. 140-1:

> After consideration of all the circumstances we have come to the conclusion that the question ought to have been left to the jury so as to enable them, if they thought right, and if they rejected the view that it was murder, to return a verdict of manslaughter. The reason we have come to this conclusion is not from any new view of the law, but because there was sufficient evidence of facts and circumstances to justify the jury, if they took a certain view of them, in finding manslaughter. . . .
>
> The Court is of opinion that, whatever be the defence put forward by counsel, it is for the judge at the trial to put such questions to the jury as appear to him properly to arise on the evidence, even if counsel has not suggested such questions.

I think that the cases hereinbefore referred to contain the principles to be applied in coming to a conclusion as to whether or not in the present case the trial judge should have put to the jury the defences of accident and drunkenness and directed them that a verdict of manslaughter might be returned. It is clear that the conclusion must depend upon the nature of the evidence and

I propose first to set out all or at least a considerable portion of the evidence on which counsel for the said appellant would appear to rely in support of the defence of accident.

The relevant evidence would appear to be as follows: (I might say that in order to avoid repetition in dealing with the other three cases I am including some evidence that relates more particularly to one or more of the other cases).

The witness Oiyo Uno, the mother of the deceased Yoshyuki Uno says in part as follows:

Where is your living-room? Right behind the store room.

Do you remember the night of the 16th of January of this year, when some people came into your store? Yes.

Where were you sitting when the men came into the store? I was sitting in the living quarters.

Is there a bell which rings when the store door opens? Yes.

And did you hear the bell? Yes.

And you went into the store? Yes.

What time was that? Twenty minutes after 8, maybe 25 after 8.

Who were in the living-room at the time? Myself, my husband and two daughters and two sons.

What did you do when you went into the store? After the bell rang, you mean?

Yes? Three men were there.

. . . . .

They did not mention anything at all to me, then I said, "What do you want?" The first one said, "cigarettes."

What did you do when he said that? I just turned over to the counter and tried to get the cigarettes for him.

. . . . .

Yes, what did you say, anything? On the way to the cigarettes, the man standing at the end pointed a gun to me.

. . . . .

I understood you to say he was standing nearest the door? Yes.

There were two men ahead of him, were there? Yes.

. . . . .

When the first man you said pointed a gun at you, not Hughes, but the other man, when he pointed a gun at you, that is the man who had the light brown coat on, then you said in Japanese some words? Yes.

What did you say? "Came." Well, I had previously on another occasion been held up in the store, and I already said "they came."

When you said in Japanese the equivalent of "came" in English, that was for your family's benefit? Yes.

What was the next thing happened? Almost at the same time the man fired a shot towards the inside of the living-room.

Which man was that? Mr. Hughes.

The one now in the soldier's uniform? Yes.

Where did he fire the shot from? Where was he? He was standing at the side of the door.

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Which side of the door? The south side of the door.

You mean the door into the living-room? Yes.

. . . . .

Then what happened after the first shot, what was the next thing you saw? I heard a second shot.

From the same place? From the same place.

. . . . .

From the man who was standing by the curtain? Yes.

You mean Hughes? Yes.

That was two shots? Yes.

. . . . .

After that second shot, what was the next thing that happened? After the two shots were fired, two young men came from the living-room into the store.

. . . . .

What did the deceased boy do when he came in? He was attempting to take the gun away from the accused, but could not reach because he was quite high.

In what way was he trying to get the gun away? I could not describe exactly, but Hughes was holding the gun, and my son grabbed his wrist.

Does she mean that Hughes was holding the gun in his hand? Yes, and my son was doing his best, and trying to bring it down, but he was quite weakened because he sustained injury already.

. . . . .

And then what happened, what was the next that happened? Well, they are struggling, and my boy fell down on the floor.

What was the next thing happened? And Hughes broke away from my deceased son and went out.

Was there any further shot fired? While they were struggling, I heard a shot, but afterwards I did not hear any more.

In the meantime, had the other two gone out, or were they still there? While the—when my boy fell on the floor, the two other young men who came ran away already.

Was it when the deceased son came in the store and was struggling with Hughes that the other two went out, or was it after they struggled and your deceased son fell on the floor they went out? Well, when the struggle started, the two men still there, but after my boy fell on the floor the two men left the place already.

Did your boy ever get up from the floor? No.

Were the other two men out of the store when the third shot was fired? When the third shot was fired, the two men left the store already.

Were they right through the door on to the street? Maybe so. I don't know what direction he went away.

In any event, they were right out of the store? Yes.

. . . . .

Who pointed the gun at you? The third man pointed the gun at me.

Who did the shooting? Hughes.

Was he the third man? Hughes was the first man.

Were there two guns? Yes, there must be.

Did you see two guns? Of course, I see one gun pointed at me, and the other one fired the shot, so naturally there are two.

You remember giving evidence in police court, Mrs. Uno? Yes.

Do you remember being asked this question and giving this answer at page 131: "When did the other two men run out of the store? Before my son lying on the floor two ran away." Yes.

That is correct? Yes.

Thank you. At the bottom of the page: "Were they in the store when the third shot was fired? When the third shot was discharged the two men have already gone." Yes, that is correct.

Now the two men that left the store, they didn't come back, did they? No, did not.

How many shots were fired during the struggle? I distinctly remember once. I distinctly remember once.

The witness Yukio Uno, a brother of the deceased, says in part as follows:

What happened after that? What was the next thing you saw or heard? The next thing I heard was my brother say "ouch" and grab his right—back of his hand.

And he was sitting on the chesterfield between your sister and you? Yes, sir.

. . . . .

All right, just go on. What was the next thing you heard or saw? Then he said "ouch" and fell back, sort of, and then he got up and then I heard another shot.

. . . . .

He got up? After he said "ouch" he got up.

Was it then you heard another shot? Yes.

Then what did your brother do? At that time he was making for the store.

. . . . .

Then you arrived in the store after your brother. What was the first thing you saw when you arrived in the store? Well, by the time I got out in the store my brother was struggling with this hold-up man.

. . . . .

What was he doing? Well, my brother and mother were just getting—my brother had Hughes's wrist raising it up in the air.

Which wrist of Hughes? The right—the one the gun has.

What did Hughes have, if anything, in his right hand? The gun, sir.

. . . . .

Did you see anybody else in the store when you first came in? No, sir.

What was the result of the struggle between your brother and Hughes? It was just a matter of seconds and Hughes got away.

You mean he got away? He broke away from my brother and made for the door, and just before he went out the door he turned around and fired a shot.

I see. How far would he be away from your brother when he fired that shot? Well, I would say about—I don't know—5 or 6 feet, I guess.

. . . . .

Was any shot fired while they were struggling? No, I don't think so.

The witness Edward Ciminelli said in part as follows:

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Now after you dropped the girls off you and Hughes were alone in the car, were you? That is right.

Did you have any conversation? Yes, we talked a little bit.

What was the subject of the conversation? Well, he told me he was in a jam.

What kind of a jam? He got into a little trouble with a Japanese.

Now I don't think the jury heard that. He said he got in a little trouble.

He said he got in a little trouble with——? With a Japanese.

Did he tell you how it came about? Apparently they were holding up the store, I guess.

Did he say he held up the store? He didn't exactly say that.

You said something about "holding up the store, I guess." What did you mean? He said the Jap came for him and struggled with him and then——

Yes, and what? And the gun went off.

. . . . .

Do you remember being asked these questions, and giving these answers at the lower Court: You were talking about the conversation with Hughes. "What was the conversation? He told me he was in a jam. What kind of a jam? He told me he took some store, and the guy came for him, and struggled with him, and the gun accidentally went off." Do you remember giving that evidence? That is right.

The witness Yaeko Uno, a sister of the deceased, said in part as follows:

What was the next thing you saw or heard? The next thing I heard was the voice from her——

From her? From my mother, saying someone came into the store. We thought it was very unusual, because the words she said, they meant something to us.

Why do you say it meant something to you? She does not say that certain word unless it is something unusual, so we understood right then.

I am afraid you cannot say what you understood, but by reason of what she said you thought it was unusual? Yes.

What was the next thing that happened? We saw the man at the living-room door, between the store and the living-room, and I heard a shot then.

Don't say "we." Did you hear a shot? Yes.

Did you see a man at the living-room curtain before you heard the shot? No, the shot was fired first, and then I saw his face.

. . . . .

You saw his face. Go on from there. What was the next thing you saw or heard after the shot and you saw this man's face? He drew back a bit from the doorway because Yoshy, we call him Yoshy for short, he sort of got up from the chair, and the man at the door drew back.

Did he draw back after Yoshy got up? He was getting up, and the man at the door drew back, and we heard another shot then.

Did you notice after the first or second shot anything about your deceased brother Yoshy? At the first shot, after the first shot, he said "ouch," and fell back to the chesterfield, and I looked at his arm, and he was already grasping his left hand with the right, so I could not see the wounded part. Then he got up and dashed out into the store, and Yukio followed him out, and I did.

That was after the second shot? Yes.

Did you notice him do anything after the second shot? No, by the time I was out to the store, he was already on the floor.

. . . . .

When you were sitting on the chesterfield with your brother, and the first shot was fired, would you say that the man who fired that shot could see your brother? No, I am sure he could not.

When the second shot was fired, could the man see your brother? Yes, he had already seen him in the living-room.

Because he had poked his head through? Yes.

. . . . .

The first shot that was fired was a wild shot, was it not? That is what I think.

Before referring further to the evidence as aforesaid I propose now to refer to some of the cases relied upon by counsel for the said appellant. Though I am not unmindful of the observation of Lord Finlay in *Craig* v. *Glasgow Corporation,* [1919] S.C. (H.L.) 1, at p. 10 to the effect that no inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together, nevertheless, with all respect, I think it must be applied within reasonable limits (see *Whitehead* v. *City of North Vancouver* (1937), 53 B.C. 512, at p. 527 *per* MACDONALD, J.A., as he then was), and in the present case I think that it will assist greatly to consider the nature of the evidence in such cases and then to compare it with the nature of the evidence here.

In *Rex* v. *Deal* (1923), 32 B.C. 279 there was the evidence of the accused who said, *inter alia* (see pp. 284-5), that he had never pointed or fired the gun at anyone. The nature of the evidence relied upon by counsel in such case is apparent from page 282 where there is a statement of the question which was answered in the negative by the majority of the Court (resulting in a new trial being granted):

After the trial the prisoner's counsel applied to the judge to state a case for appeal, which was acceded to and the judge has done so and in it has told us that after he had delivered his charge to the jury, the prisoner's counsel took objection to its sufficiency and requested him to tell the jury that, "If the jury believes his (the accused's) evidence that he did not point this gun at McBeath or did not point it at Quirk, and he had no intent—no intention of shooting anybody and in the scuffle the gun was discharged and McBeath was unfortunately killed, then he (the accused) is not guilty of the crime with which he is charged."

The learned judge refused to do so, and the question we have to answer and the only question we can answer on the facts is: "Was [he] right in refusing to instruct the jury as so requested by counsel for the prisoner?"

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In *Rex* v. *Dell'Ospedale* (1929), 51 Can. C.C. 117 the accused also gave evidence and the nature of the evidence relied upon by counsel for the accused is shown on page 119. As in the *Deal* case there was evidence given by the accused as to his intention and state of mind. Reference might also be made to the case of *Rex* v. *Roberts,* [1942] 1 All E.R. 187, to which my attention has been called. In such case according to Humphreys, J. delivering the judgment of the Court (see p. 188) the murder was alleged to have been committed by shooting the girl with a rifle. The defence set up at the trial was accident in the fullest sense of that term in that it was alleged that the discharge of the gun was accidental and not designed. In such case also the accused gave evidence (see p. 189) as to his design and intention. I would also refer to the case of *Rex* v. *Elnick* (1920), 33 Can. C.C. 174. There again it will be found that the accused gave evidence on his trial for murder stating that he did not intend to fire the pistol at all and denying any intention to kill.

Comparing the cases as aforesaid with the present one on the assumption that the deceased was killed during the struggle (though there is, of course, evidence that he was killed after that) I note that they are obviously distinguishable in that the accused here gave no evidence at all and never swore that he did not intend to fire the shot and did not intend to kill. In my view also they are obviously distinguishable with respect to the circumstances existing at the time the fatal shot was fired. As to what the circumstances were here, there is really no dispute with respect to certain matters. On the assumption that Hughes was the man who had the gun (on which assumption this phase of the matter is now being dealt with) it was and had to be common ground during the argument that Hughes had just fired two shots. It was suggested by his counsel that the gun was fired the first time wildly, but it is not suggested that the gun went off accidentally either time. There is evidence that the gun was discharged the third time while the deceased and Hughes were struggling but it should be noted that Yukio Uno says "it was a matter of seconds." There is evidence also by Yukio that his brother (*i.e.,* the deceased) "had Hughes's wrist raising it up in the air." The bullet when fired, however, did not go up in the

air but into the head of the deceased. No reasonable man could have any doubt as to what Hughes was able to do and did do if the deceased was killed during the struggle. He ended the struggle by firing the third shot and killing the deceased. No jury of reasonable men could fairly find on the evidence that the gun accidentally went off. The evidence as hereinbefore set out shows the intention and state of mind of Hughes while he was taking part in the "hold-up." He had fired two shots, both of which had hit the deceased so that he was "quite weakened" (as his mother says), and this he had done immediately before the gun was discharged a third time while still in his hand. As I have already indicated I am not able to bring myself to the conclusion that any jury of reasonable men could find that under the circumstances the intention and state of mind of Hughes changed "in a matter of seconds."

In regard to drunkenness I do not propose to set out in detail any of the evidence on which it is submitted that the question of drunkenness arises as I have to say that I am in doubt as to whether there is any evidence of drunkenness at the time the deceased was killed, but in any event I am satisfied that there is no evidence of that degree of incapacity resulting from drunkenness which alone could properly be considered by the jury in passing upon the existence of intent in fact. See *McAskill* v. *Regem* (1931), 55 Can. C.C. 81, *per* Duff, J. at pp. 84-5. Having carefully considered all the evidence, I have no hesitation in saying that the question of drunkenness does not properly arise here and it was not the duty of the trial judge in this case to put such question to the jury.

I am satisfied and hold that the evidence before the jury at the end of the case did not contain material on which a reasonable man could find a verdict of manslaughter instead of murder. I am also satisfied and hold that the learned trial judge put to and left with the jury all such questions as appear to me properly to arise on the evidence. It is or may be suggested that in his charge to the jury the judge took away from the jury the question as to the intent to commit murder. The charge, however, must be read as a whole and in the light of the evidence, and it is clear to me that in saying what he did in the part just referred to, the

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learned judge must be understood as simply stating that under certain circumstances an accused person would be guilty of murder under the section of the Code he had mentioned even though he did not intend to commit murder. If this were a case where a jury of reasonable men could fairly find on the evidence that the act of the accused was not intentional but accidental the statement might create some difficulty, but, as I have already found otherwise, no difficulty seems to me to arise. In his previous instructions the learned trial judge had clearly left to the jury, as the sole judges of the facts, all proper questions including, *inter alia,* those relating to the acts and intent of the accused and his subsequent instructions in my view did not nullify in any way his previous instructions.

I pause here to add that upon my conclusions in this case I do not find it necessary to express, and with all respect I have to say that I do not express, any opinion as to whether or not the Court of Appeal for Manitoba in the case of *Rex* v. *Elnick, supra,* was right in saying as it did (see p. 185) that

> . . . the definition in the Code, Sec. 262, "Culpable homicide not amounting to murder is manslaughter" is not restricted to "murder as defined by this Act"; thus it makes culpable homicide manslaughter only when it is not murder either by common law or under the Code.

In my view the culpable homicide in the present case was undoubtedly murder under the Code. I have only to add that, looking at all the circumstances and facts surrounding the killing of the deceased as detailed in the evidence, and following the principles laid down in the authorities as aforesaid, I hold that the directions of the learned trial judge in this case were sufficient and there was no duty on him to put before the jury the defences of accident or drunkenness or to direct the jury that a verdict of manslaughter might be returned.

Other submissions were made on behalf of the said appellant and I may deal more specifically with them when I hand down my reasons for judgment in the other cases. In the meantime I have to say with all deference to any contrary opinion that in my view no ground has been shown which would justify this Court in setting aside the verdict of the jury and ordering a new trial. I would dismiss the appeal of the appellant Hughes.

As to the appeals of John Petryk, William G. Billamy and

Floyd Berrigan I have only to say now that I would also dismiss each of said appeals for reasons to be handed down shortly.

11th July, 1942.

FISHER, J.A.: In continuation of the reasons for judgment that I delivered on the 30th of June, 1942, I now proceed to give my reasons for dismissing each of the appeals of the appellants John Petryk, William G. Billamy and Floyd Berrigan.

So far as the appeal of any of the said appellants rests upon the submission that there was error in the directions given to the jury by the learned trial judge in reference to the defences of accident and drunkenness, I have first to say that I repeat here what I have already said in dealing with a similar submission made by counsel on behalf of the appellant Hughes. I have also to add that it should be noted that during the trial counsel on behalf of the said appellant Petryk stated that there was no question of accident in this case.

At the beginning of the trial application was made by counsel on behalf of the said three appellants for separate trials, and on the appeal it was contended that the learned trial judge in refusing separate trials did not exercise his discretion upon judicial principles and by the refusal of the application an injustice was done to the appellants. In my view the learned trial judge properly exercised his discretion in refusing separate trials. The denial or granting of a separate trial to one jointly indicted rests on the exercise of sound discretion—see *Rex* v. *Janousky* (1922), 63 S.C.R. 223, at p. 225. Here it is quite apparent that the learned trial judge was satisfied at the beginning of the trial that no injustice would be done by trying the appellants together and at the close of the trial he stated that he felt confirmed in the view he had taken at the beginning, namely, that there was no need for separate trials and that justice would be done by trying all the accused together. For myself I have also to say that I am satisfied that there was no need for separate trials and that justice was done by trying all the appellants together. In my view nothing has been shown to support the contention that the Court in its refusal of a separate trial adopted a course which in the circumstances was not "conducive to the ends of justice": see *Rex* v. *Sowash* (1925), 37 B.C. 1,

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at p. 22. The learned trial judge cautioned the jury that statements made by one or more of the accused in the absence of the others were not admissible against those others who were absent. It is objected, however, that the learned trial judge did not warn, and should have warned, the jury at the same time that even on occasions when all four accused were together statements made by one of them in the absence of any assent by another accused, either by word or conduct, to the correctness of the statements made in his presence had no evidentiary value whatever as against him and should be entirely disregarded. See *Rex* v. *Christie,* [1914] A.C. 545 and *Stein* v. *Regem,* [1928] S.C.R. 553, at p. 556. The charge, however, must be read in the light of the evidence and it is manifest that there was evidence before the jury here showing that the accused were all in on a common intention as hereinafter referred to. If the jury accepted such evidence then certain acts and statements of each accused were evidence against all the others whether or not in his or their presence. See *Rex* v. *Wilson* (1911), 21 Can. C.C. 105 and *Rex* v. *Simington* (1926), 45 Can. C.C. 249. Having this in mind I have no hesitation in saying with regard to any other acts or statements that there has been no wrong or miscarriage of justice by reason of such warning not having been given in this case. See the *Stein* case, especially at p. 557 citing *Kelly* v. *Regem* (1916), 54 S.C.R. 220.

I come now to refer shortly to the submission that the learned trial judge failed to direct the jury fully and adequately on the law of a common purpose or a common intention to prosecute any unlawful purpose and to assist each other therein, particularly as to participation, abandonment of purpose and "probable consequence." In my view there is no sound basis for such submission and I propose to say very little in connection therewith. I am satisfied that the direction on the law was quite sufficient. I am also satisfied that all questions of fact arising on the evidence as to participation, abandonment of purpose and probable consequences were put to and left with the jury. Now that a new trial has been ordered by a majority I know that I should refrain from a detailed analysis of the evidence—see *Rex* v. *George* (1934), 49 B.C. 345, at pp. 356 and 366, but on the issue of abandon-

ment I cannot refrain from pointing out that, though the witness Oiyo Uno in her evidence as hereinbefore set out in my reasons for judgment as aforesaid says that "when the third shot was discharged, the two men have already gone" she also says that "when the struggle started the two men still there" making it clear that they had not taken to their heels before the first two shots had been fired by their companion in the hold-up. Other evidence also is to the effect that later on the same night the four accused, Hughes having a gun, were all back in the same hotel room in which they had all been some hours before according to the evidence of the witness Rosella Gorovenko. As to the complaint that the learned trial judge in his summing-up did not mention, or did not mention sufficiently certain matters I would refer again to *Rex* v. *Roberts,* [1942] 1 All E.R. 187, especially at pp. 190-1. In such case Humphreys, J. said at p. 191 in part as follows:

> A judge, in summing-up, is not obliged to refer to every witness in the case, . . . Every judge must be left to sum up a case in his own way so long as he does not misdirect the jury in law or in fact.

I come now to deal with several other submissions made on behalf of all the appellants. One of these submissions is that the learned trial judge erred in admitting evidence as to the commission of an offence at another place and time, namely, "the Chapman hold-up." As to this I have to say that I agree with what the trial judge said when he ruled that the evidence was admissible. Perhaps nothing further need be said but reference might be made to two cases relied on by counsel on behalf of the Crown: *Rex* v. *Sowash, supra,* at p. 22 and *Rex* v. *George* (1934), 49 B.C. 345, at pp. 364-5, 373-5, citing *Rex* v. *Bond,* [1906] 2 K.B. 389 at pp. 399-400.

One of the grounds of appeal argued was, as stated in one of the notices of appeal, that

> the learned trial judge erred on the issue of corroboration by not directing the attention of the jury to the evidence with particularity which might be held to be corroborative of the evidence of Gorovenko and in stating "you may find corroboration of the girl's evidence in that of Mrs. Chapman, the police officers, inspector Vance and the taxi-driver."

Having carefully considered what the learned trial judge said on this phase of the matter I have to say that it seems to me that the learned trial judge was attempting, in a careful and pains-

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taking charge, to strictly follow and did strictly follow the directions that should be given in such a case as this according to the rules well established at common law. See *Rex* v. *Baskerville* (1916), 12 Cr. App. R. 81; *Rex* v. *McClain* (1915), 23 Can. C.C. 488, at p. 493 and *Rex* v. *Beauchesne* (1933), 60 Can. C.C. 25, at p. 31.

There is another submission, made I think on behalf of all the appellants, that the trial judge erred in failing to direct the attention of the jury particularly to facts in evidence which would serve to indicate the complicity of a Crown witness Rosella Gorovenko in the crime and to submit to them the issue as to whether what she was proved to have done constituted her an accomplice—*Vigeant* v. *Regem,* [1930] S.C.R. 396, especially pp. 399-400, is especially relied upon in support of this submission. It is admitted, however, that the judge did properly define "accomplice" and did give the usual warning with respect to the evidence of an accomplice. It must also be admitted that he left to them the question as to whether the said Rosella Gorovenko was an accomplice and did set out in a certain part of his address most, if not all, of the facts in evidence which would indicate the complicity of the said witness in the crime. It is or may be argued that there was not strict compliance with the directions outlined and approved of in the *Vigeant* case, but it seems to me that there was substantial compliance with such directions. It is also argued that in any event the trial judge gave certain particular directions with regard to the evidence of Rosella Gorovenko and the jury might reasonably have concluded that these particular directions overruled the general direction as to the danger of convicting on the uncorroborated evidence of an accomplice and that if they believed the evidence of Rosella Gorovenko they should convict. As I have repeatedly said, however, the charge of the judge must be read as a whole and when so read it is clear that the jury could not reasonably have reached the suggested conclusion.

I have not overlooked other points raised by counsel but, with all respect, I do not consider them of any substantial weight. No doubt it would have been more satisfactory from the point of view of the accused if the learned trial judge had referred to

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certain parts of the evidence with more particularity, but in my view there can be no doubt that after a long and difficult trial the charge was fair to each of the accused, put before the jury every substantial defence that was available to him and did not misdirect the jury in law or in fact.

In the result, as I have already intimated, I would dismiss the appeals.

Appeals allowed; new trial ordered, McDonald, C.J.B.C. and Fisher, J.A. dissenting.

IN RE EDWARD BOWMAN WELSH.

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Feb. 20, 25.

Practice—Costs—Taxation—Application for adjournment — Granted by registrar under Order LXV., r. 57—Whether discretion properly exercised—Rule 754.

Pursuant to an order of MANSON, J. on the 22nd of December, 1941, costs of certain proceedings taken by Ruthella Welsh were ordered to be paid by her after taxation. The costs were presented for taxation on February 12th, 1942. Counsel for Ruthella Welsh asked for and was granted an adjournment until March 12th, 1942, on the grounds that an appeal had been taken from the order of MANSON, J. to the Court of Appeal sittings, commencing on the 3rd of March, 1942, that Mrs. Welsh was able to pay the costs pursuant to the order, and that if successful in her appeal it would save the expense of taxation. On an application under rule 754 that the taxation be proceeded with:—

Held, that the refusal to proceed with the taxation on the grounds aforesaid is not an exercise of discretion under rule 754. It deprives the party entitled to costs under an order of the Court of his right to have these costs taxed, and prevents him from proceeding with the enforcement of the judgment while the appeal is pending. The application is granted.

APPLICATION under rule 754 for an order directing the deputy district registrar to proceed with the taxation of a bill of costs. Heard by COADY, J. in Chambers at Vancouver on the 20th of February, 1942.

Tysoe, for the application.
O'Brian, K.C., contra.

Cur. adv. vult.

25th February, 1942.

COADY, J.: This is an application under rule 754 for an order directing the deputy district registrar of this Court to proceed with the taxation of a bill of costs. Pursuant to an order of MANSON, J. made herein on the 22nd of December, 1941, the

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costs of certain proceedings taken unsuccessfully in this matter by one Ruthella Welsh, wife of the above named Edward Bowman Welsh, were ordered to be paid by her after taxation thereof. The said costs were presented for taxation on February 12th, 1942, pursuant to appointment issued. The solicitor for the said Ruthella Welsh appeared on the said taxation and asked for, and was granted, an adjournment until the 12th of March, 1942. The application for the adjournment was based on the grounds as set out in the affidavit of the solicitor for the said Edward Bowman Welsh filed herein and are not in dispute. These grounds are: That an appeal had been taken from the said order of MANSON, J.; that the appeal would come on for hearing at the sittings of the Court of Appeal at Vancouver, commencing March 3rd, 1942; that the said Ruthella Welsh is a person financially responsible and will be able to pay any costs that she was ordered to pay pursuant to the said order; that if the appeal be successful she will not be liable for the payment of the said costs and, moreover, if the appeal be successful it would be a waste of time taxing these costs at this stage and thereby incurring further costs. In addition, counsel for the said Ruthella Welsh before me pointed out that this is a case where the costs are payable by the wife to husband.

Counsel further submitted that, in any event, the deputy district registrar exercised a discretion under Order LXV., r. 57 in granting the adjournment. I do not think that Order LXV., r. 57 is intended to cover a case such as this. The decisions of our own Courts, cited by counsel for Mrs. Ruthella Welsh, while affirming a well-recognized principle that on the taxation of costs the discretion of the registrar will not be lightly interfered with, do not assist in the present case.

The refusal to proceed with the taxation on the grounds aforesaid is not, it seems to me, an exercise of a discretion. It, in effect, deprives the party entitled to costs under an order of the Court of his right to have these costs taxed and effectively prevents him from proceeding with the enforcement of the judgment while the appeal from that judgment is pending. There is ample provision for dealing with a situation of that kind. Application can be made for a stay of execution. A stay cannot be secured in the manner attempted here. This application is, therefore, granted and there will be an order that the taxation be proceeded with.

Application granted.

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Cases reported in this volume appealed to the Supreme Court of Canada:

LUDDITT *et al.* v. GINGER COOTE AIRWAYS LIMITED (p. 176).—Affirmed by Supreme Court of Canada, 6th October, 1942. See [1942] S.C.R. 406; [1942] 4 D.L.R. 353.

MORROW *et al.* v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER (p. 251).—Affirmed by Supreme Court of Canada, 6th October, 1942. See [1942] S.C.R. 391; [1942] 4 D.L.R. 399.

TERRY v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER (p. 251). —Affirmed by Supreme Court of Canada, 6th October, 1942. See [1942] S.C.R. 391; [1942] 4 D.L.R. 399.

Case reported in 56 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

TAXATION ACT AND INCOME TAX ACT, *In re,* AND *In re* ASSESSMENTS OF FIRESTONE TIRE & RUBBER COMPANY OF CANADA LIMITED (p. 328).—Reversed by Supreme Court of Canada, 3rd November, 1942. See [1942] 4 D.L.R. 433.

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AUTOMOBILE—*Continued.*

that means a real consent and one sufficient to satisfy section 74A of the Motor-vehicle Act. TERRY v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER. MORROW AND MORROW v. VANCOUVER MOTORS U DRIVE LIMITED AND WALKER. - - - **251**

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CHILDREN—*Protection of—Order for maintenance by corporation — Judge of the juvenile court — Right of appeal—R.S.B.C. 1936, Cap. 271, Secs. 4 (1) (b) and 77—R.S.B.C. 1936, Cap. 128, Secs. 51, 56, 57 and 82.*] An order was made by a judge of the juvenile court committing certain children to the custody of the superintendent of neglected children, and required the city of Armstrong to provide weekly sums for their maintenance. On appeal to the county court, preliminary objection was taken to the jurisdiction of the Court to hear the appeal. *Held*, that judicial functions under sections 56, 57 and 82 of the Infants Act are to be exercised by a "judge" and "judge" as defined by section 51 of said Act includes a judge of the juvenile court. Section 4 (1) (*b*) of the Summary Convictions Act provides that the Act shall be applicable to

CHILDREN—*Continued.*

every case in which a complaint is made to a justice with respect to an act as to which the justice has authority to make an order, and section 77 of said Act provides for an appeal to the county court from a conviction or order made by a "justice." It should be noted that the word "justice" is used in both sections. "Justice" is defined by section 2 of the said Act and the definition includes justice of the peace, a stipendiary magistrate and police magistrate, but makes no mentionn of a judge of the juvenile court. It follows that there is no jurisdiction, and the appeal cannot be heard. THE KING v. CITY OF ARMSTRONG. - - - **241**

2.——*Right of of deceased children of intestate's sister to inherit.* - - **139**
See CONTRACT. 7.

COLLISION—Automobile. - **488**
See NEGLIGENCE. 2.

2.——*Negligence.* - **171, 481**
See MOTOR-VEHICLES.

COMMITTAL ORDER—Published in defendant's paper—Order that husband file financial statement—Non-compliance—Discovered next day that statement had been filed—Neglect of registrar's office—Correction and apology by defendant. - - - - - **321**
See LIBEL.

COMMON INTENT. - - - **521**
See CRIMINAL LAW. 11.

COMMON LAW OF ENGLAND—Operative effect in British Columbia. **521**
See CRIMINAL LAW. 11.

COMPANY—*Director—Ostensible authority—Contract—Change of control of defendant's mill—Business carried on in defendant's name—Purchase of shingles—Of benefit to defendant—Ratification.*] On the 11th of May, 1934, the defendant company entered into a written agreement with one Thomson, a creditor of the company, whereby Thomson was to have the use of its shingle mill and its employees for the purpose of turning a boom of logs owned by Thomson into shingles. Upon the completion of the boom the agreement terminated. Thomson was to pay the employees while the boom was being cut, and the mill was to be under the supervision and management of one Langs. Thomson was also to pay arrears of wages to the workmen up to a certain sum and was entitled to retain all moneys realized from the sale of the shingles cut from his boom. The

COMPANY—*Continued.*

bank account of the company as at that time operated at a branch of the Bank of Montreal was to continue as previously under Thomson's operations for the purpose of paying the workmen and operating expenses. Performance of the agreement by the defendant was to be accepted by Thomson as satisfaction of the debt due him by the defendant. During Thomson's control the shingles in question in this action were ordered from the plaintiff by Langs to enable him to complete an order received from a Seattle firm in the defendant's name, there being insufficient shingles on hand at the mill just then to fill the order. The plaintiff delivered the shingles on the defendant's premises and they were shipped with other shingles by Langs in the defendant's name to the Seattle firm and the defendant received credit for them in its running account with the Seattle firm. The plaintiff drew on the defendant for the price of the shingles and Langs as "director" accepted the draft. The plaintiff recovered judgment for the price of the shingles. *Held*, on appeal, affirming the decision of SIDNEY SMITH, J., that Langs was *de facto* manager, his act was proper and necessary in the defendant's interest. He was carrying on in the defendant's name with the entire approval of its executive, and for the defendant's own benefit as well as Thomson's. He used the shingles to fill an order received in the defendant's name and the proceeds actually went to its credit. Even if all that went before was unauthorized, the defendant, by taking advantage of the transaction ratified it. KEYSTONE SHINGLES AND LUMBER LIMITED v. MOODY SHINGLES LIMITED. - - - **401**

COMPANY LAW—*Shares issued and registered—Rectification of register—Privity of contract — Consideration — R.S.B.C. 1936, Cap. 42, Secs. 78 (3) and 255 (1).*] The British American Timber Company, incorporated in the State of South Dakota in 1907 and registered as an extraprovincial company in British Columbia, owned certain timber lands in this Province. Said company (called the Dakota company) entered into a contract with one Jones (called Jones, Sr.), who was vice-president of the company, on the 1st of June, 1917, for the purchase of 1,038 shares of the company's stock, in payment for which he gave two promissory notes for the par value of the shares. It was a term of the contract that the notes were to be held by the Dakota company until paid or until such time as dividends declared and paid by the company would pay the principal and interest, and

COMPANY LAW—*Continued.*

that the stock certificates be endorsed by Jones, Sr. and held by the company as collateral security for the notes. Those in control of the Dakota company decided to form a British Columbia company of the same name (adding the word "Limited" to it) to take over its timber holdings. The respondent company was accordingly incorporated in British Columbia on December 10th, 1917. On the 17th of December, 1917, a contract between the two companies was filed with the registrar of companies whereby the Dakota company transferred its timber lands to the respondent, and was to receive 9,276 fully paid-up shares in the respondent company, these to be issued to such persons as the Dakota company might nominate. Of those nominated Jones, Sr. was to receive 1,038 fully paid-up shares and he was allotted these shares by the B.C. company on December 24th, 1917, for which the company made a return of the allotment a month later. The two companies had the same directorate. Jones, Sr. disposed of 285 shares in his lifetime, and share certificate No. 75 was issued for the remaining 753 shares, which was held by the respondent as collateral security with the abovementioned notes which were held by the respondent. Jones, Sr. died prior to April 6th, 1920. These proceedings by petition were brought on the 28th of March, 1941, by the B.C. company under section 78 (3) of the Companies Act to amend the register by cancelling the 753 shares standing in the name of Jones, Sr., and R. W. Jones, Jr. was, by order of the Court, appointed to represent the heirs and next of kin. On the hearing of the petition the petitioner's prayer was granted, and the issue of 753 shares of the capital stock of the petitioner, as represented by share certificate No. 75 was cancelled, and the share register of the petitioner herein was rectified accordingly. *Held*, on appeal, reversing the decision of MORRISON, C.J.S.C. (MCDONALD, J.A. dissenting), that enough essential facts have not been disclosed on the record to enable a Court to decide whether the respondent is entitled or not entitled to an order for rectification, and the proper disposition of the appeal is to direct a new trial. BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JUNIOR. - - - **1**

CONSIDERATION — Contract — Sale of shares in company—Specific performance—Want of mutuality. **11**
See CONTRACT. 6.

2.——*Failure to state in charge—Sale of lottery tickets—Conviction—Habeas corpus*

CONSIDERATION—*Continued.*

—Motion for discharge—Charge—Criminal Code, Sec. 236 (b). - - - **138**
See CRIMINAL LAW. 13.

CONSTITUTIONAL LAW—*Public harbour —Foreshore—Right to — Crown grant of waterfront lot "with the appurtenances"— Whether foreshore included.*] The Dominion and Provincial orders in council passed in 1924, whereby it was agreed between the Dominion and the Province that Burrard Inlet should be considered a public harbour within the meaning of Schedule 3 of the British North America Act, 1867, and should be considered to have been and to be the property of the Dominion, were effective to vest title to Burrard Inlet and the foreshore thereof in the Crown in the right of the Dominion, notwithstanding previous disputes as to whether Burrard Inlet was to be considered a public harbour. A Crown grant of the lot facing on the waterfront of a public harbour contained in the *habendum* clause the words "with the appurtenances." *Held*, that these words were not sufficient to include the foreshore in the grant, especially in a grant from the Crown, which must always be construed most favourably to the Crown. ATTORNEY-GENERAL OF CANADA v. HIGBIE *et al.* - - - - **274**

CONTINUING CONTRACT. - **200**
See MECHANIC'S LIEN. 2.

CONTRACT—Construction of apartments —Sub-contracts — Two-thirds of contract completed and paid for— Contract not completed and final payment refused—Owner completes work and pays two material men not paid by contractor. - **328**
See MECHANIC'S LIEN. 1.

2.——*Director — Ostensible authority— Change of control of defendant's mill—Business carried on in defendant's name—Purchase of shingles—Of benefit to defendant— Ratification.* - - - - **401**
See COMPANY.

3.——*Illegality of.* - - **161**
See EMPLOYER AND SERVANT.

4.——*Installing tile floor—Construction of floor beneath under separate contracts— Buckling of tiles owing to escape of moisture from below — Reflooring necessary.*] The defendant had under construction a large concrete mercantile building in Vancouver, with basement. He employed an architect to prepare the plans and specifications but had neither a supervising architect nor a

CONTRACT—*Continued.*

master of works. The contract for the concrete shell of the building was given to one Vistaunet, and independent contracts were given for plumbing, heating, etc. The original specifications called for a laminated main floor and laminated second floor, in each case, covered with shiplap and masonite (laminated consists of planks two inches by six inches on edge). When the laminated portion was completed the defendant decided to surface the main and second floors with an asphalt floor tile instead of masonite. He then entered into a contract with the plaintiff company to put in the tiling. One Christie, manager of the defendant company and one Watt, manager of the plaintiff company, then had discussions as to the proper installation between the laminated and the tiling. It was necessary to sand the laminated in order to have a smooth surface. Watt quoted a price to the defendant for laying the three-ply, which price was to include a water-proof insulation of felt or tar paper between the laminated and three-ply, but he thought this should be done by Vistaunet. The contract was then given to Vistaunet, who did the sanding of the laminated and put in the three-ply but did not put water-proof insulation beneath the three-ply. Watt then laid the tiles and he was paid $1,000 on account. The balance of $3,243.88 remained unpaid, because within two months of completion, owing to the moisture from the laminated seeping through into the three-ply, the tile surface buckled and cracked so badly that the whole floor had to be scraped down to the laminated and resurfaced. In an action for the balance due on the contract, it was held that the situation did not arise through fault in the plaintiff's conduct or workmanship, that the defendant chose to rely upon persons other than the plaintiff as to the installation of the foundation floors, and the plaintiff was entitled to recover. *Held*, on appeal, reversing the decision of MANSON, J., that where a person is employed in a work of skill, the employer buys both his labour and judgment: he ought not to undertake the work if it cannot succeed, and he should know whether it will or not. A contractor who undertakes work which requires to be placed upon foundations or other works furnished by the proprietor, cannot excuse himself from the obligation to deliver his work to the proprietor in good condition by saying that the bad condition of his work was caused by the bad condition of works of other contractors upon which his work had been placed. The facts of this case fall within the principles enunciated, and the appeal

CONTRACT—*Continued.*

should be allowed. SANSAN FLOOR COMPANY v. FORST'S LIMITED. - - **222**

5.——*Privity of—Shares issued and registered — Rectification of register—Consideration.* - - - - - - **1**
See COMPANY LAW.

6.——*Sale of shares in company—Specific performance — Consideration—Want of mutuality.*] The plaintiff and defendant entered into an agreement whereby the defendant agreed to transfer to the plaintiff five shares in a company on condition that the plaintiff would purchase 6,000 shares in said company from a certain other party. The plaintiff then purchased the 6,000 shares from the party named but the defendant then refused to transfer the shares. In an action for specific performance the defence was raised that specific performance could not be granted because of want of consideration and want of mutuality. *Held*, that the plaintiff's purchase of the 6,000 shares from the third party was a sufficient consideration for the defendant's promise to transfer the shares, although the defendant received no benefit from such purchase, as the plaintiff, relying on the defendant's promise, had done an act by which the third party had benefited. *Held*, further, that the defence of want of mutuality could not be raised as the plaintiff had performed his part of the contract by purchasing the 6,000 shares. WESTMAN v. MACDONALD. - - **11**

7.——*Services rendered deceased person —Promise to provide for claimant by will—Intestate—Quantum meruit—Right of children of deceased children of intestate's sister to inherit.*] McI. died intestate in 1940. The plaintiff M. rendered services to him, loaned him money, supplied him with food, and in other ways looked after him from 1892 until his death, on the understanding that the deceased would compensate him by his will for such services. *Held*, that M. was entitled to recover compensation for his services from the deceased's estate on a *quantum meruit* basis for the six years preceding the deceased's death. A sister of the deceased who had predeceased him had children, two of whom were deceased leaving issue. *Held*, that such issue were entitled to inherit the interests which their parents would have taken. *In re* MCIVER ESTATE. - - - - - - - **139**

CONVICTION—Appeal from by magistrate —Motion to quash. - **52**
See MANDAMUS. 1.

CONVICTION—*Continued.*

2.——*Unlawfully practising dentistry—Notice of appeal—Proof of filing.* - **83**
See CRIMINAL LAW. 14.

CORPORATION—Order for maintenance by—Judge of the juvenile court—Right of appeal. - - **241**
See CHILDREN. 1.

CORRECTION AND APOLOGY. - **321**
See LIBEL.

CORROBORATION. - - **90**
See CRIMINAL LAW. 12.

COSTS. - - - - - **346**
See WOODMEN'S LIEN.

2.——*Petition to cancel share certificate and rectify register—Granted—New trial ordered on appeal—Petition dismissed on rehearing at instance of petitioner with right to commence new action—Costs of first hearing to abide result of new action—Appeal—Costs to follow event—R.S.B.C. 1936, Cap. 42, Sec. 78.*] On the application of the petitioner it was ordered by MORRISON, C.J.S.C. on the 21st of May, 1941, that the issue of 753 shares of the capital stock of the petitioner in the name of Ray W. Jones, Sr. as represented by share certificate No. 75, be cancelled and that the share register of the petitioner herein be rectified accordingly. On appeal, a majority of the Court held that there should be a new trial and that the costs of the hearing appealed from abide the result of the hearing to be had pursuant to this judgment. On the rehearing, counsel for the petitioner applied to have the petition dismissed with leave to institute new proceedings against the heirs of Ray W. Jones, deceased. An order was made granting the petitioner's application and ordering that in the event of the petitioner commencing new proceedings within thirty days, then the costs of the hearing of the said petition in the first instance in the Court below shall abide the result of the hearing of such proceedings that will be commenced as aforesaid. *Held*, on appeal, reversing the decision of MANSON, J., that when the petitioner requested the learned judge below to dismiss his petition after the hearing in this Court, the respondent then was entitled *ex debito* to his costs up to the motion for dismissal, since costs would follow the event unless for good reason otherwise ordered. This right to costs is according to the judgment of this Court on the former hearing, when it was ordered that the costs of the original hearing before MORRISON, C.J.S.C. abide the result of the new hearing. BRITISH AMERICAN TIMBER COMPANY LIMITED v. RAY W. JONES, JR. - - - - - - - **409**

3.——*Solicitor and client's bill of—Lump sum charge—Allowed by taxing officer—Reference back to tax item by item.* - **304**
See SOLICITORS.

4.——*Taxation.* - - - **559**
See PRACTICE. 3.

COUNTY COURT—Appeal from conviction by magistrate—Motion to quash—Magistrate's notes—Sustained on ground of insufficient evidence to convict—*Mandamus* refused. **52**
See MANDAMUS. 1.

COURT OF APPEAL—*Both appeals heard by three members of the Court—Judgments reserved—Chief Justice dies before delivery of judgments—Jurisdiction of two remaining judges in each appeal.*] The appeals in these cases were heard by three judges, presided over by the late Chief Justice MACDONALD, and judgment was reserved in each case. The Chief Justice died before judgment was delivered. Argument was heard on whether the remaining two judges in each appeal if in agreement could deliver the judgments of the Court. *Held*, O'HALLORAN, J.A. dissenting, that the remaining members of the Court in each appeal did not have jurisdiction to deliver judgment, and the appeals would have to be reheard. SKELDING v. DALY AND SMITH v. STUBBERT. **109**

CRIMINAL LAW—*Appeal from dismissal on summary trial—Validity of notice of appeal — Mandamus refused — Granted on appeal—Crown Office Rule (Civil) 76—Can. Stats. 1929, Cap. 49, Sec. 4 (d).*] On the information of an officer of the Royal Canadian Mounted Police the accused was charged with unlawful possession of a drug, and on being tried before two justices of the peace the charge was dismissed. The informant appealed to the County Court Judge's Criminal Court, and on the hearing counsel for accused raised the preliminary objection that as the notice of appeal was served on the accused by the informant there was no jurisdiction to entertain the appeal. The objection was sustained and the appeal was dismissed. A motion to make absolute an order *nisi* for *mandamus* was dismissed on the same ground. *Held*, on appeal, reversing the decision of MANSON, J., that service of the notice of appeal on accused by the informant in summary proceedings is not a ground for refusing to entertain the

CRIMINAL LAW—*Continued.*

appeal, Crown Office Rule (Civil) 76 referred to. *In re Kennedy* (1907), 3 E.L.R. 555; 17 Can. C.C. 342 and *Rex* v. *Kennedy*, [1933] 2 W.W.R. 213, not followed. *Rex ex rel. Bell* v. *Cruit*, [1928] 2 W.W.R. 377, applied. THE KING *ex rel.* YOUNG v. THE JUDGE OF THE COUNTY COURT OF WESTMINSTER, AND HEINRICH. - - - - **70**

2.——*Appeal from sentence—Retaining stolen goods worth $35—Previous criminal record—Sentenced to four years—Reduced—Criminal Code, Sec. 1015.*] On appeal from sentence, where evidence is received of character and other relevant circumstances which were not before the trial judge, the Court, having had the advantage of hearing this further material, may, if it considers the facts warrant it in so doing, reduce the sentence. REX v. SMITH. - - **158**

3.——*Attempting to break and enter—Circumstantial evidence only—Sufficiency of to found conviction — Appeal — Criminal Code, Secs. 459 and 571.*] On a charge of attempting to break and enter under sections 459 and 571 of the Criminal Code, accused was convicted on circumstantial evidence only. *Held*, on appeal, affirming the decision of LENNOX, Co. J., that the test to apply is "viewing the evidence as a whole, can it be said that the facts proven from which the Crown asks that the inference of guilt be made are of such a nature and so related to each other as to lead the guarded discretion of a reasonable and just man to the conclusion of guilt and to no other conclusion." Considering the evidence as a whole and in the light of the defence relied upon by the appellant, the cumulative effect of the circumstances established leads irresistibly to the conclusion of guilt and is inconsistent with any other rational hypothesis. REX v. MCDONALD. - **478**

4.——*Charge of retaining stolen goods—Explanation of accused—Whether a reasonable one—Exclusive or joint control of goods.*] A. having stolen an electric sewing-machine worth about $175 from a salesman's parked car, carried it to B.'s house (a second-hand dealer) and placed it on the verandah. He told B. that his wife had left him, that his home was broken up, and he was disposing of his furniture. B. refused to buy the machine but suggested that one Pitten, who lived a short distance away might be interested. B. then went to Pitten's house and repeated what A. had told him. Pitten and his wife then went to B.'s house and B. assisted A. to carry the machine into the house so that it might be seen in the light. After bargaining, A. sold the machine to Pitten for $12 and B. assisted A. to carry the machine to Pitten's house. B. was convicted of having retained in his possession a sewing-machine, knowing it to have been stolen. *Held*, on appeal, reversing the decision of police magistrate Wood, that the offence imports a measure of control over the subject-matter. The appellant did not at any time have exclusive or joint control of the machine. The appeal is allowed and the conviction quashed. REX v. PARKER. **117**

5.——*Charge of stealing letter and money contents — Inadequacy in placing defence before jury—Comments by counsel on failure of accused to give evidence on preliminary hearing.*] On a criminal trial, the real defence of the accused should be placed before the jury. It matters not whether it is weak or strong, and the evidence must be presented in such a way that it can be appreciated by the jury. Where the defence of the accused was not adequately and fairly placed before the jury and there was on the part of the trial judge an unconcealed conviction of the guilt of the accused, impressed upon the jury by comments and observations throughout the hearing, likely leading them to believe that there was no question about the guilt of the accused, a new trial will be ordered. *Held*, further, that comment by counsel respecting the failure of the accused to give evidence at the preliminary hearing was fatal to the conviction. REX v. MCCARTHY. - - - - - **155**

6.——*Company—Director concurring in false statement — Trial judge dies during hearing—Evidence taken on first trial included in record on second trial—Jurisdiction—Criminal Code, Secs. 414 and 831.*] Section 831 of the Criminal Code reads: "Proceedings under this Part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this Part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him and may cause such portion of the proceedings to be repeated before him as he shall deem necessary." The accused was tried for an offence under section 414 of the Criminal Code before MCINTOSH, Co. J. and shortly after the evidence of the principal witness for the Crown was taken, the learned judge died. Later accused was brought before HARPER, Co. J. and under the alleged authority of section 831 of the Criminal Code the evidence of said

witness taken on the first trial was placed before the learned judge and read into the record. The accused was convicted. *Held*, on appeal, reversing the decision of HARPER, Co. J., and ordering a new trial, that said section 831 contemplates proceedings commenced not before a judge since deceased, but before a living judge unable for any reason to proceed with the trial. It is a section to which a narrow and limited construction should be given, and the language used therein has reference to the temporary incapacity of an existing judge and not the complete lack of capacity of a non-existing judge. They connote a judicial capacity which cannot immediately function, not a complete cessation of it. *Held*, further, that even if it is authorized by section 831 the discretion to resort to it should not have been exercised. The learned judge based his judgment upon the evidence of this witness as credible evidence, although the witness was not before him. He lacked an important aid in reaching a conclusion, namely, the deportment and demeanour of the witness. REX v. MCLEOD. - **17**

7.——*Evidence — Accused and another jointly charged and tried together—Cross-examination of other on alleged confession ruled improperly permitted—Whether trial of accused was prejudicially affected.*] Accused was convicted on a charge of robbery with violence. He and one Byers were jointly charged and tried together. Byers appealed from his conviction and it was held that the magistrate erred in permitting his cross-examination on an alleged statement he made to the police, which the magistrate had ruled was not free and voluntary. *Held*, on appeal, that the evidence of Byers having been weakened and his credibility destroyed by his improper cross-examination, the case of the appellant was prejudicially affected by such cross-examination and there should be a new trial. REX v. OLESCHUK. - - - - **344**

8.——*Evidence — Charge of receiving stolen goods—Admissibility of evidence of receiving other property—Evidence that the property was stolen—Instructions to jury—Criminal Code, Secs. 399 and 993.*] The accused was charged with receiving an oil-skin slicker, knowing it to have been stolen. Evidence was admitted under protest regarding three other coats found in accused's second-hand store at the same time, and accused was convicted. *Held*, on appeal, reversing the decision of MANSON, J., that evidence that accused had received other property from the same person is only

admissible if it is proved that such other property was also stolen, and there being no such evidence its admission was fatal to the conviction. On objection that there was no proof of the coat in question having been stolen, an attempt was made to prove this by calling a police officer who gave evidence that the man who sold accused the slicker had pleaded guilty to stealing it when the accused was present in Court, and it was held that such evidence was not admissible merely because accused was present at the trial and had no opportunity to contradict the statement. In instructing the jury on a charge of receiving, the judge should leave the question "Did the accused receive the goods in such circumstances that he must then have known them to have been stolen?" If the accused offers an explanation of his possession of the goods the jury should be instructed to acquit the accused if they are satisfied that his explanation is consistent with his innocence. REX v. KEIWITZ. **85**

9.——*Evidence—Statement to police by accused—Ruled as not free and voluntary—Accused testifies on his own behalf—Cross-examined on his statement to the police.*] On appeal from accused's conviction on a charge of robbery with violence:—*Held*, that the learned magistrate erred in permitting cross-examination of the accused on his alleged statement to the police, which the magistrate had ruled was not free and voluntary, and a new trial was ordered. REX v. BYERS. - - - - - **336**

10.——*Government Liquor Act — Consumption of liquor in a public place—In a motor-vehicle parked near a highway—R.S.B.C. 1936, Cap. 160, Sec. 39.*] The site of the Tyee barbecue adjoins the Island Highway in Nanaimo County. The building is a short distance back from the highway and the space between the building and the highway is clear ground without obstruction from the highway, and the public are permitted to travel in off the highway and park in front of the building. The accused parked his car in front of the building and was found consuming liquor in a public place contrary to section 39 of the Government Liquor Act. *Held*, on appeal to the county court, that the adjoining property in front of the barbecue building is a public place within the definition of a public place under the Government Liquor Act, that the car of the accused was parked on that place, and he was properly convicted. REX *ex rel.* MATHESON v. MARIO GALEAZZI. - **486**

11.——*Murder—Common intent to commit a felony—Death resulting in further-*

CRIMINAL LAW—*Continued.*

ance of felonious act—Evidence of accident—Jury not charged on manslaughter—Common law of England—Operative effect in British Columbia—Criminal Code, Secs. 259 and 260.] A girl named Rosella Gorovenko occupied room 11 in the Piccadilly Hotel in Vancouver where she lived with the accused Billamy. The evidence disclosed that in the afternoon and early evening of the 16th of January, 1942, the four accused were in Rosella's room where they entered into a planned common design to rob with violence a small store operated by one Chapman and his wife, and another small store operated by a Japanese family named Uno. A quart bottle of rum procured by Rosella was consumed by the party during this time. At about 7 o'clock in the evening Hughes and Berrigan with the girl went across the road to a restaurant while Billamy and Petryk went to find a car. They stole a car and brought it back near the hotel. All five then went to the beer parlour in the hotel where they remained until a minute or two after 8 o'clock, when the four accused got into the stolen car and drove to a lane adjoining the Chapman store on its north side. Berrigan and Billamy with Petryk, who had a revolver, entered the store. Petryk shot off the revolver, narrowly missing Chapman, and about $40 was taken from the till. Hughes remained outside as he was known by Chapman and his wife. They then drove to the Japanese store which was about a block and a half away. Hughes with the revolver entered the store, followed by Berrigan and Billamy. At the back of the store was a living-room, the entrance to which was covered by two hanging curtains. Deceased's mother was in charge of the store at the time and Hughes went to the entrance to the living-room and fired two shots through the curtains, the first striking deceased on the left wrist and the second on the same arm. Deceased then came through the curtains and grappled with Hughes. Deceased's mother states the third shot that hit deceased on the head and killed him was fired when the two men were together. Deceased's brother, who followed him into the store from the living-room states that Hughes broke away from deceased, and when going towards the front door turned and fired the shot when five or six feet away. The evidence of one Vance, an expert, was that as there were no powder marks on deceased's head the bullet was shot from a distance of some feet. Shortly after 9 o'clock the car in which the accused were driving stalled in the sand on Kitsilano Beach. The four men got out, Hughes visiting a girl friend with whom he went to a dance, and the three others getting a taxi went back to Rosella's room in the Piccadilly Hotel, where they were joined by Hughes after 11 o'clock. The four accused were convicted on a charge of murder. *Held*, on appeal, McDONALD, C.J.B.C. and FISHER, J.A. dissenting, that there be a new trial. *Per* McQUARRIE and SLOAN, JJ.A.: The learned judge in charging the jury said: "You must find each of them guilty or not guilty. There is not, with respect to any of them, any middle course. It is guilty or not guilty." The charge is erroneous in law because of non-direction amounting to misdirection in that the learned trial judge erred in not instructing the jury that if they believed that the gun was accidentally discharged during a struggle between Hughes and the deceased they could find a verdict of manslaughter. There should be a new trial. *Per* O'HALLORAN, J.A.: There should be new trials upon two grounds: (1) As to Hughes, although there was some evidence which pointed to an accidental shooting or at most an unlawful killing without premeditation, the jury were not instructed in regard to manslaughter; (2) as to the other appellants, the judge did not leave it to the jury to decide whether murder was or ought to have been known to be a probable consequence of the prosecution of their common purpose of robbery. Their criminality is governed by section 69, subsection 2 of the Criminal Code. *Per* McDONALD, C.J.B.C.: The main defence is that the learned judge ought to have left it open to the jury to find a verdict of manslaughter based on the evidence of deceased's mother in preference to that of deceased's brother and inspector Vance, then it was open to the jury to find that the fatal shooting was accidental. No such verdict was open to the jury following *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479, and *Rex* v. *Elnick*, [1920] 2 W.W.R. 606. The English common-law definition of murder is the law of British Columbia. These men, pursuant to a concerted plan, committed a felonious act in the course of or in the furtherance of which the deceased was fatally shot, and they are guilty of murder. *Per* FISHER, J.A.: Hughes gave no evidence at all and never swore that he did not intend to fire the shot and did not intend to kill. No jury of reasonable men could fairly find on the evidence that the gun accidentally went off when the shot was fired. Hughes had immediately before that fired two shots which wounded the deceased; no jury of reasonable men could find that his intention and state of

CRIMINAL LAW—*Continued.*

CRIMINAL LAW—*Continued.*

mind changed "in a matter of seconds." It is not necessary to express an opinion on the soundness of the view expressed in *Rex* v. *Elnick* (1920), 33 Can. C.C. 174 that section 262 of the Code makes culpable homicide manslaughter only when it is not murder either by common law or under the Code, since the culpable homicide in the present case was undoubtedly murder under the Code. REX v. HUGHES, PETRYK, BILLAMY AND BERRIGAN. - - **521**

12.——*Rape—Charge to jury—Corroboration—Non-direction and misdirection—New trial.*] On a charge of rape it is the duty of the trial judge to warn the jury of the danger of conviction upon the uncorroborated testimony of the prosecutrix, and this rule applies equally whether or not there is evidence corroborative of her testimony. A charge is wrong in law in directing the jury that corroboration may be found in her complaint and other facts tending only to support the credibility of the prosecutrix. Evidence of a complaint by a prosecutrix is not corroboration of her evidence against the prisoner. It entirely lacks the essential quality of coming from an independent quarter. There is error in telling the jury to "look for corroboration" without instructing them in what sense that word is used in cases of this ntaure. The jury should be told that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirmed in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it. REX v. REEVES. - - **90**

13.——*Sale of lottery tickets—Conviction—Habeas corpus—Motion for discharge—Charge—Failure to state consideration—Criminal Code, Sec. 236 (b).*] Accused was convicted on a charge that he "unlawfully did dispose of tickets in a scheme for the purpose of determining who were the winners of property proposed to be disposed of by a mode of chance." On motion for discharge on *habeas corpus*:—*Held*, that the charge fails to state that such tickets were disposed of for consideration. This is a defect in a matter of substance in that an essential averment has been omitted and is fatal to the conviction. REX v. O'MALLEY. - - - - - - - - **138**

14.——*Unlawfully practising dentistry—Conviction—Notice of appeal—Proof of filing.*] The accused was acquitted by a police magistrate on a charge of unlawfully practising dentistry. On appeal to the county court judge who had before him as part of the record in the case, the original notice of appeal bearing the registrar's stamp which showed that the notice had been filed in time, it was objected that no formal proof had been given that the notice of appeal had been filed in time. It was held that the notice being in Court speaks for itself and was sufficient proof of the filing. The appeal was allowed and accused convicted. *Held*, on appeal, affirming the decision of ELLIS, Co. J., that the Court has at all times power to look at its own records and to take notice of their contents without further formal proof of the filing. REX *ex rel.* PALLEN v. LEWIS. - - **83**

CRIMINAL RECORD. - - **158**
See CRIMINAL LAW. 2.

CROWN—Servants of — Workmen's Compensation Board. - - **217**
See MANDAMUS.

DAMAGES—*Negligence—Death of child hit by truck—Shortening of expectation of life—Quantum.*] The plaintiff's child, three years old, was struck and killed by a truck owned by the defendant company in mid-afternoon. There were no intervening or distracting conditions at the time. The driver's field of vision was in no way obscured, he had full control of the truck and could have easily avoided the child. *Held*, that the driver owed a duty to the child to take care and he committed a breach of duty which was the sole cause of the fatality. *Held*, further, on the question of damages, that the thing to be valued is not the prospect of length of days but the prospect of predominating happy life. The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of the measure of prospective happiness. The damages were fixed at $500. ITOKU MURAKAMI v. HENDERSON *et al.* **244**

2.——*Pedestrian run down by motor-car—Three companies associated.* - **270**
See NEGLIGENCE. 6.

3.——*Quantum.* - - - **121**
See PATENT.

DEATH OF PLAINTIFF—Judgment—Order of revivor—Garnishee proceedings 25 years after judgment—Effect of order of revivor on statute. - **372**
See LIMITATIONS, STATUTE OF.

DETENTION—Legality of—Foreign Forces Order, 1941, P.C. No. 2546. **281**
See HABEAS CORPUS. 2.

DENTISTRY—Unlawful practising — Conviction—Notice of appeal—Proof of filing. - - - - **83**
See CRIMINAL LAW. 14.

DEPORTATION—*Habeas corpus*—Canadian domicil. - - - - **316**
See IMMIGRATION.

DESERTER—Arrest and detention of from forces of allied state—Legality of detention when he is a British subject—Foreign Forces Order, 1941, P.C. No. 2546. - - **295**
See HABEAS CORPUS. 1.

2.——*From the armed forces of an allied state—Arrest of—Legality of his detention —Foreign Forces Order, 1941, P.C. No. 2546.* - - - - - - - - - **281**
See HABEAS CORPUS. 2.

DETENTION—Legality of when a British subject—Foreign Forces Order, 1941, P.C. No. 2546. - **295**
See HABEAS CORPUS. 1.

DIRECTOR—Authority. - - **401**
See COMPANY.

2.——*Concurring in false statement—Company.* - - - - - **17**
See CRIMINAL LAW. 6.

DIVORCE—Maintenance. - - **321**
See LIBEL.

2.——*Maintenance for child of marriage —Time within which application can be made — Security for payments — R.S.B.C. 1936, Cap. 76, Sec. 20; Cap. 249, Sec. 4 (3) —Divorce Rules 1925, rr. 65 and 69 (a) and (c).*] On the 17th of December, 1926, the plaintiff obtained a final decree of divorce, and on the 20th of December, 1926, she launched a petition for her own maintenance under r. 65 of the Divorce Rules, 1925. The registrar directed the husband to pay $35 per month, but the order was not confirmed by a judge and no monthly payments were ever made thereunder. In April, 1941, the petitioner obtained leave to amend her 1926 petition by claiming maintenance for their child (then sixteen years old). The registrar, under r. 69 (*a*), reported that the husband should pay $40 per month for the child's maintenance, and recommended that the interest of the husband in his father's estate (in the hands of a receiver for distribution) be charged in the sum of $2,400 to make provision for the payments. The learned judge reduced the monthly payments

DIVORCE—*Continued.*

to $25 but made no order as to the security. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C. (O'HALLORAN, J.A. dissenting), that section 20 of the Divorce and Matrimonial Causes Act provides that the order for maintenance of children of the marriage may not be made at any time later than the making of the final decree for divorce, while r. 69 (*a*), in providing for an order for maintenance, contains no limitation as to time, and it is contended that the rule is in conflict with the statute and the statute must prevail. By an amendment of the Court Rules of Practice Act passed in 1925 it was enacted that such Rules should regulate the procedure and practice in the Supreme Court in matters therein provided for, hence the Rules were given legal effect. Rule 69 (*a*) deals only with procedure and in effect extends the time. The Rules had been promulgated and were brought before the Legislature and made into law. Therefore, although this application is made some fourteen years after the decree, nevertheless there was jurisdiction in the Supreme Court to deal with the matter. *Held*, further, as to the question of security, there is no power to make any such order, at any rate, at this stage of the proceedings. *Hunt* v. *Hunt* (1883), 8 P.D. 161, and *Twentyman* v. *Twentyman*, [1903] P. 82, followed. *Held*, further, allowing the cross-appeal (O'HALLORAN, J.A. dissenting), that the evidence must be taken to have been sufficient to satisfy the registrar as to the order to be made, and there is nothing before the Court to justify its holding that the registrar was wrong. The monthly payments of $40 were restored. BETSWORTH v. BETSWORTH. - - - - - **206**

DOMICIL—Canadian—Deportation order—*Habeas corpus.* - - **316**
See IMMIGRATION.

DRIVER—Negligence of—Statutory liability of owner—"Consent express or implied" to driver's possession—Driver obtains possession of car through false representation. **251**
See AUTOMOBILE. 2.

2.——*Negligent—Liability to passenger.* - - - - - - - **171, 481**
See MOTOR-VEHICLES.

DWELLING-HOUSE — Construction of — Wages—Filing of affidavit under section 19 of Act—*Lis pendens* not filed in Land Registry office—Effect of. - - - - **476**
See MECHANIC'S LIEN. 3.

EMPLOYER AND SERVANT—*Workman—Definition—Wages—Agreement by workman to take in part payment for wages, shares of the company—Illegality of contract—Truck Act, R.S.B.C. 1936, Cap. 291, Secs. 2 and 13.*] The defendant company was incorporated by the plaintiff's father in May, 1933, for the purpose of developing peat lands in Pitt Meadows and to market the peat commercially. The subscribers to the memorandum of association were the plaintiff, his father R. F. Arnett, and two men named Steen and Oien. In the fall of 1933 Steen and Oien left the company, transferring their shares to R. F. Arnett, the result being that the plaintiff and his father became the only shareholders. At the time of incorporation the plaintiff acquired ten shares in the company of the par value of $100 each, and he became secretary of the company, remaining so until 1936. He was also a director of the company. The plaintiff claimed that at the time of incorporation he entered into a contract with the company providing that he was to receive $100 a month for his services, of which $50 was to be paid in cash and the remaining $50 in stock of the company. In addition to his being secretary of the company his work included erection of buildings, digging ditches, digging peat, putting it through the various drying processes, taking it into storage and repairing the plant machinery. As part of his wages eighteen shares of the par value of $100 each were allotted to and accepted by him. He claimed that he was a workman and was entitled to recover $1,800 for services rendered, and pleaded the Truck Act. The plaintiff recovered judgment for $1,505.75. *Held*, on appeal, affirming the decision of SIDNEY SMITH, J. (O'HALLORAN, J.A. dissenting), that on the facts the plaintiff is a "workman" and entitled to take advantage of the provisions of the Truck Act. It is immaterial that he assented to the transfer of the shares in question to him and exercised rights of ownership therein. The defendant company is not entitled to set off against the plaintiff's claim for wages the amount payable for the shares. This result follows from the plain language of section 13 of the Truck Act. W. H. ARNETT v. ALOUETTE PEAT PRODUCTS LIMITED. - - - - - - **161**

EVIDENCE — Charge of receiving stolen goods—Admissibility of evidence of receiving other property—Evidence that the property was stolen—Instructions to jury. - - **85**
See CRIMINAL LAW. 8.

EVIDENCE—*Continued.*

2.——*Circumstantial only—Sufficiency of to found conviction—Appeal.* - - **478**
See CRIMINAL LAW. 3.

3.——*Cross-examination on alleged confession ruled improperly permitted.* - **344**
See CRIMINAL LAW. 7.

4.——*Statement to police by accused—Ruled as not free and voluntary—Accused testifies on his own behalf—Cross-examined on his statement to the police.* - **336**
See CRIMINAL LAW. 9.

5.——*Taken during trial before judge dies—Evidence taken on first trial included in record on second trial—Jurisdiction.* **17**
See CRIMINAL LAW. 6.

ESTATE—Disposition of residue of. - **500**
See WILL. 1.

EXECUTORY DEVISE—Vesting—Disposition of residue of estate. - **500**
See WILL. 1.

FALSE ARREST—*Imprisonment—Arrest by police officer without warrant—Suspicion of committing an offence — Justification for arrest—Liability—Criminal Code, Secs. 30 and 205A.*] Section 205A, subsection 1 (*c*) of the Criminal Code provides that: "Every one is guilty of an offence . . . who, while nude is found without lawful excuse . . . upon any private property not his own, so as to be exposed to the public view." The defendant, a police officer, received a complaint that the plaintiff had committed an offence under said section, and after investigation ordered her and two other girls to accompany him to the police station. He questioned them and held them at the station pending his locating certain other witnesses. Then not being satisfied of the girl's guilt, he released her. In an action for damages for false arrest and imprisonment:—*Held*, that the alleged offence under said section was not one of those enumerated in sections 646 and 647 of the Criminal Code as being one for which a police officer might arrest without a warrant. But the defendant was protected by section 648 of the Code, which authorizes a peace officer to arrest without a warrant anyone whom he finds committing any criminal offence. The nature of the suspected offence being one which called for prompt action, and the defendant having acted on reasonable grounds and without malice, he was justified in arresting and detaining the plaintiff. Under such circumstances it is immaterial that the plaintiff had not committed the offence since the

FALSE ARREST—*Continued.*

defendant had believed on reasonable grounds that she had. *Held*, further, that the defendant was protected by section 30 of the Criminal Code. LEIGHTON v. LINES. **232**

FOREIGN FORCES ORDER, 1941, P.C. No. 2546. - - **295, 281**
See HABEAS CORPUS. 1, 2.

FORESHORE—Right to—Public harbour—Crown grant of waterfront lot "with the appurtenances"—Whether foreshore included. - - **274**
See CONSTITUTIONAL LAW.

FURNACE—Sawdust burner and feed unit—Infringement — Damages—*Quantum.* - - - **121**
See PATENT.

GOVERNMENT LIQUOR ACT—Consuming liquor in a public place. - **486**
See CRIMINAL LAW. 10.

HABEAS CORPUS—*Arrest and detention as deserter from forces of allied state—Legality of detention when he is a British subject—Foreign Forces Order, 1941, P.C. No. 2546.*] The facts are similar to those in *In re de Bruijn* (*ante*, p. 281), except that the applicant had, after his alleged desertion, received a certificate of naturalization as a British subject. *Held*, that as the applicant was a member of the Netherlands forces, the fact that he was a British subject did not exempt him from the operation of the Foreign Forces Order, 1941, P.C. No. 2546. The writ of *habeas corpus* must be discharged. *In re* ROMEIJNSEN. - **295**

2.——*Arrest of a person as a deserter from the armed forces of an allied state—Legality of his detention—Foreign Forces Order, 1941, P.C. No. 2546.*] A citizen of the Netherlands received notice from the Netherlands Government in January, 1941, requiring him to report to the Netherlands forces in Canada for military service. He reported and served in said forces for a short time, when he received an indefinite leave of absence. In July, 1941, he received notice that his leave had expired and requiring him to report for duty. He failed to return and the officer commanding charged him with desertion and pursuant to the Foreign Forces Order, 1941, P.C. No. 2546, and the general order of the Minister of National Defence, he was arrested and detained by military police of the Canadian army pending his delivery to the Netherlands forces for trial on the charge of desertion. He applied for his discharge on *habeas*

HABEAS CORPUS—*Continued.*

corpus proceedings. *Held*, that although the Netherlands Government had no authority to compel the applicant to report for military service, he had by so reporting and serving become a member of the Netherlands forces. Whether he was such a member was a question of Netherlands law to be determined by expert evidence, and the Court would accept the evidence of the Netherlands officer as being such evidence, and as being adequate proof that the applicant was a member of the Netherlands forces. Therefore the Foreign Forces Order, 1941, and the General Order of the Minister of National Defence applied to him, and his arrest and detention were legal. The writ must be discharged. *In re* DE BRUIJN. - **281**

3.——*Deportation order — Canadian domicil.* - - - - **316**
See IMMIGRATION.

4.——*Sale of lottery tickets—Conviction—Motion for discharge—Charge—Failure to state consideration — Criminal Code, Sec. 236 (b).* - - - - - **138**
See CRIMINAL LAW. 13.

HIGHWAY — Dedicated as such but not opened—Property owner—Access to his property—Application for consent of council to open highway at his own expense—Refused—Appeal to Supreme Court. - **81**
See MUNICIPAL LAW.

IMMIGRATION — *Deportation order—Habeas corpus—Canadian domicil—R.S.C. 1927, Cap. 93, Secs. 18, 23, 40 and 42.*] The petitioner's husband came to Canada from Scotland in January, 1926, and was followed by his wife and son in July, 1926. They resided at Powell River, B.C. until November, 1933, when they returned to Scotland, where the husband remained. The wife with her infant son returned to Canada in August, 1935, without the knowledge or consent of her husband, but was refused entry at Quebec and deported by order of a Board of Inquiry at that port. In June, 1938, she again came to Canada with her son without the knowledge or consent of her husband, using a British passport and securing entry to Canada as a visitor. She stated in her affidavit that she secured entry on a visiting passport to test out whether or not she and her son were Canadian citizens or had Canadian domicil. On the 6th of October, 1938, a board of inquiry at Vancouver ordered that she and her son be deported under sections 40 and 42 (3) of the Immigration Act, she being a person

IMMIGRATION—*Continued.*

other than a Canadian citizen or a person having Canadian domicil. An appeal from this order to the Minister was dismissed. On petition for a writ of *habeas corpus* and for an order quashing said order:—*Held*, on the evidence, that the husband abandoned his Canadian domicil, and that being so the domicil of the petitioner and her son had changed with that of her husband, so that when they applied for entry into Canada in 1938 neither one of them had Canadian domicil. *In re* IMMIGRATION ACT. *In re* MARY C. CARMICHAEL AND ROY CARMICHAEL. - - - - - - - - **316**

IMPRISONMENT—Arrest by police officer without warrant — Suspicion of committing an offence—Justification for arrest—Liability. - **232**
See FALSE ARREST.

INDIAN RESERVE — Lands—Lease within Reserve to Chinaman—Taxation of lessee's interest — Exemptions — Construction of statutes. - **104**
See TAXATION. 2.

INFRINGEMENT — Furnace — Sawdust burner and feed unit—Damages—*Quantum.* - - - **121**
See PATENT.

JUDGE—Death of during trial—Evidence taken on first trial included in record on second trial—Jurisdiction—Criminal Code, Secs. 414 and 831. - - - - - **17**
See CRIMINAL LAW. 6.

2.——*Exercise of discretion by—Application for trial by jury—Refused—Appeal—Ground for appellate Court to interfere—Rules 429 and 430.* - - - **457**
See PRACTICE. 2.

JUDGMENT—Death of plaintiff—Order of revivor—Garnishee proceedings 25 years after judgment — Effect of order of revivor on statute. - **372**
See LIMITATIONS, STATUTE OF.

2.——*Default—Signed under rule 282—Removal of lien logs by defendant—Action for possession and damages—Judgment void—Effect on lien.* - - - **346**
See WOODMEN'S LIEN.

JUDGMENTS—Reserved—Chief Justice dies before delivery of judgments—Jurisdiction of two remaining judges in each appeal. - **109**
See COURT OF APPEAL.

JURY—Application for trial by—Refused appeal — Exercise of discretion by judge below—Ground for appellate Court to interfere—Rules 429 and 430. - - - - - **457**
See PRACTICE. 2.

2.——*Charge to—Non-direction and misdirection—New trial.* - - - **90**
See CRIMINAL LAW. 12.

3.——*Instructions to.* - - - **85**
See CRIMINAL LAW. 8.

LAW—Important question of — Appeal to Supreme Court of Canada—Motion to the Court of Appeal for special leave—Matter of public interest. - - - - - - **268**
See PRACTICE. 1.

LIBEL—*Divorce—Maintenance—Order that husband file financial statement—Non-compliance — Committal order — Published in defendant's paper—Discovered next day that statement had been filed—Neglect of registrar's office — Correction and apology by defendant.*] A divorce absolute had been granted the plaintiff's wife, and subsequently an order was made directing the plaintiff to pay $100 per month for maintenance. Being in arrears in his payments an order was made on December 16th, 1935, in the Supreme Court, directing the plaintiff to pay $45 per month and to furnish the petitioner's solicitor every three months with a statement of his receipts and disbursements during the previous three months. The plaintiff not having furnished a statement as directed, a summons was issued for an order to commit on the return of which he was directed by MANSON, J. to deliver a statement of his affairs by the 22nd of March, 1939, to the registrar of the Court, and the application was adjourned for a week. On a search being made in the registrar's office on the 27th of March it was found that no such statement was filed. Neither the plaintiff nor his solicitor appeared on the hearing of the adjourned application, and an order was made that he be committed to gaol for forty days. The court reporter of the defendant then telephoned his principals the substance of the order, which was published in the late edition of the paper, to which was added in the office the caption "Husband jailed on wife's plea." On the following morning the defendant's court reporter was told in the registrar's office that a mistake had been made and that the plaintiff had in fact filed a statement. The court reporter then telephoned his principals of the mistake and the story was not published in any other

LIBEL—*Continued.*

issue. On being informed of the mistake the learned judge rescinded the order committing the plaintiff. The defendant published a correction and apology as to the publication. The plaintiff's action for damages for libel was dismissed. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C., that the learned Chief Justice, sitting as a jury, must be presumed to have held that the report was substantially accurate, that what is stated inaccurately is not the gist of the libel, and that it did not mislead the public mind. VROMAN v. THE VANCOUVER DAILY PROVINCE LIMITED. - - - **321**

LIMITATIONS — *Judgment — Death of plaintiff—Order of revivor—Garnishee proceedings 25 years after judgment—Effect of order of revivor on statute—R.S.B.C. 1936, Cap. 159, Secs. 43 and 49—Order XII., r. 17.*] In March, 1916, one Ghaniya obtained judgment in the county court against several East Indians, including the defendant Pram Singh, for $312.95. Ghaniya died in July, 1922, and in the following September letters of administration of his estate were granted to the plaintiff Thakar Singh. In April, 1925, Thakar Singh applied in the action to a judge in Chambers and obtained an order that all proceedings in the action be carried on in his name. In September, 1941, Thakar Singh made application to the registrar and obtained an order attaching sufficient moneys of the defendant Pram Singh in the Canadian Bank of Commerce to pay the debt and interest, and pursuant to the order said bank paid into Court the sum of $626.52. On the application of the defendant an order was made setting aside the garnishee order on the ground that the judgment on which it was based was barred by the Statute of Limitations. *Held*, on appeal, affirming the order of WHITESIDE, Co. J., that the appeal be dismissed. *Per* MCDONALD, C.J.B.C. and SLOAN, J.A.: That the obtaining of an order of revivor is ineffective to stop the Statute of Limitations from running, and the garnishee proceedings were statute-barred. *Per* O'HALLORAN, J.A.: That the judgment is not statute-barred because it is not a judgment relating to real property within the meaning of section 43 of the statute, and it is not a specialty within the meaning of section 49, but garnishee proceedings after judgment are a mode of execution within the meaning of Order XII., r. 17. As more than six years had elapsed since the judgment, and also a change in death had occurred, leave to issue garnishee proceedings was required by that rule and order. Such leave was not obtained

LIMITATIONS—*Continued.*

and the garnishee order was properly set aside. THAKAR SINGH v. PRAM SINGH. - - - - - - - - **372**

LIQUOR—Consumption of in a public place —In a motor-vehicle parked near a highway. - - - - **486**
See CRIMINAL LAW. 10.

LOTTERY TICKETS—Sale of—Conviction —*Habeas corpus*—Motion for discharge—Charge—Failure to state consideration—Criminal Code, Sec. 236 (*b*). - - - **138**
See CRIMINAL LAW. 13.

LIS PENDENS—Not filed in Land Registry office—Effect of. - - **476**
See MECHANIC'S LIEN. 3.

MAGISTRATE'S NOTES—Appeal from conviction by magistrate—Motion to quash—Sustained on ground of insufficient evidence to convict—*Mandamus* refused. - **52**
See MANDAMUS. 1.

MAINTENANCE — By corporation — Order for—Judge of the juvenile court—Right of appeal. - - **241**
See CHILDREN. 1.

2.——*Divorce.* - - - **321**
See LIBEL.

3.——*For child of marriage—Security for payments.* - - - - **206**
See DIVORCE.

MANDAMUS—*County Court—Appeal from conviction by magistrate—Motion to quash—Magistrate's notes—Sustained on ground of insufficient evidence to convict—Mandamus refused—Decision on merits—Right of appeal—Criminal Code, Secs. 285, Subsec. 6 and 752, Subsec. 3.*] On conviction of accused by a police magistrate for dangerous driving, he appealed to the judge of the county court. On the hearing of the appeal counsel for accused moved to quash the conviction on the ground that the evidence as disclosed by the magistrate's notes did not justify the conviction. The judge looked at the depositions, refused Crown counsel the right to call witnesses, and quashed the conviction on the ground above mentioned. An application by the Attorney-General pursuant to section 130 of the County Courts Act for an order by way of *mandamus* requiring the judge to hear and adjudicate upon the appeal, was dismissed. On appeal to the Court of Appeal the preliminary objection was raised that no appeal lies on the ground

MANDAMUS—*Continued.*

that these proceedings arise out of a criminal cause or matter. *Held* (McDONALD, J.A. dissenting), that the Court had jurisdiction to entertain the appeal. *Held*, on the merits, affirming the decision of ROBERTSON, J., that hearing and granting the application to quash is a hearing and determination on the merits, and *mandamus* does not lie. THE KING v. THE JUNIOR JUDGE OF THE COUNTY COURT OF NANAIMO AND McLEAN. - - - - - **52**

2.——*Refused — Granted on appeal — Crown Office Rule (Civil) 76.* - - **70**
See CRIMINAL LAW. 1.

3.——*Servants of the Crown—Workmen's Compensation Board — Old-age pensions—Application to enforce payment of pension—R.S.C. 1927, Cap. 156, Secs. 8, 9 and 19—B.C. Stats. 1926-27, Cap. 50.*] On the application of the claimant for *mandamus* to compel the Workmen's Compensation Board as administrator of old-age pensions to pay him a pension, it was held that the application should be dismissed on the ground that funds available for old-age pensions were Crown funds and no *mandamus* would lie against the Crown. The proper remedy is by petition of right. *Held*, on appeal, affirming the decision of MURPHY, J., that the appeal should be dismissed. *Per* MARTIN, J.A.: Subsections (*b*) and (*c*) of section 18 of the Regulations are within the scope of the power delegated to the Governor in Council by section 19, subsection (*e*) of the Old Age Pensions Act (Dominion), and the word "income" is to be viewed as intended to include those facilities for maintenance that the applicant for a pension already has, all his property and assets must be taken into consideration. GARTLEY v. WORKMEN'S COMPENSATION BOARD. - - **217**

4.——*Workmen's Compensation Board—Old-age pension — Discontinuance of payment by Board—Application by pensioner for mandamus to compel payment—Whether Board a special or general agent of Crown—R.S.C. 1927, Cap. 156, Sec. 9, Subsec. 3—R.S.B.C. 1936, Cap. 208.*] The applicant Lee was paid an old-age pension by the Workmen's Compensation Board for six years prior to the 1st of September, 1941. His pension was discontinued on the ground that he had divested himself of an equity in a certain property in Nanoose District, British Columbia. He seeks *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension from September 1st, 1941, as required by the Old Age Pensions Act (Dominion) and the Old-age Pension

MANDAMUS—*Continued.*

Act (Provincial) and the regulations thereunder. It was held that there is nothing in either Act or the regulations to support the action taken by the Board, and *mandamus* lies to compel it to make payments to persons entitled to pensions. *Held*, on appeal, affirming the decision of MANSON, J. (McDONALD, C.J.B.C. dissenting), that there was a statutory obligation or duty on the part of the Board to pay the respondent the pension and to continue such monthly payments as may be required pursuant to the provisions of the Old Age Pensions Acts and regulations. The Court below was right in directing a *mandamus* as asked to compel the Board to do the very thing authorized by the Legislature and for which the Legislature specifically provided the money. THE KING *ex rel.* LEE v. WORKMEN'S COMPENSATION BOARD. - - - - **412**

5.——*Workmen's Compensation Board—Old-age pension—Whether mandamus lies to compel Board to pay—Whether Board special or general agent of Crown—R.S.C. 1927, Cap. 156, Sec. 9 (3)—R.S.B.C. 1936, Cap. 208.*] The applicant Lee was paid an old-age pension by the Board for six or seven years prior to the 1st of September, 1941. His pension was discontinued on the ground that he had divested himself of an equity in lot 3 of lot 29, Nanoose District. He seeks a *mandamus* to compel the Workmen's Compensation Board to pay him an old-age pension from September 1st, 1941, as required by the Old Age Pensions Act (Dominion) and the Old-age Pension Act (Provincial), and the regulations thereunder. *Held*, that there is nothing in either Act or the regulations thereunder to support the action taken by the Board, and the applicant is a person entitled to a pension within said statutes and regulations. *Held*, further, that the Board is not a general agent of the Crown but a special agent constituted by statute to administer the old age pensions legislation, and *mandamus* lies to compel it to make payments to persons entitled to pensions. *Held*, further, that it was no objection to the issue of *mandamus* that the Board was distributing public funds, since the funds used by it for the payment of pensions had been specially allocated for the purpose by the Legislature. THE KING *ex rel.* LEE v. WORKMEN'S COMPENSATION BOARD. - - - **298**

MECHANIC'S LIEN—*Contract — Construction of apartments — Sub-contracts — Two-thirds of contract completed and paid for—Contract not completed and final payment*

MECHANIC'S LIEN—*Continued.*

refused—Owner completes work and pays two material men not paid by contractor—R.S.B.C. 1936, Cap. 170, Sec. 8.] Andresen contracted with Stubbert on the 17th of August, 1940, to construct two four-roomed suites of apartments above the latter's store, and to do certain additional work below. The contract price was $3,000, payable $200 on execution of agreement, $1,000 when ready for roofing, $800 when plastering was done, and $1,000 "when work is completed." Andresen entered into several sub-contracts, one of which was with Gray for the plumbing. Andresen received the first three payments, the third of $800 being made on October 11th, 1940. After this, owing to slow progress by Andresen, Stubbert gave him written notice on November 26th that unless he proceeded with the work and completed it without delay he would employ another contractor. Andresen did his last work on December 28th, when Stubbert took over and completed the work himself on January 23rd, 1941, at an expense to him of $250. Stubbert also paid two material men $772.60 owing them by Andresen. The plaintiff Gray, who had a subcontract for plumbing, completed his work on December 5th, 1940, but was not paid by Andresen. Both plaintiffs filed liens, and the actions were consolidated. It was held on the trial that Andresen had failed to complete his contract, and on an adjustment of accounts the contractor owed Stubbert $19.54, and Gray's claim was not allowed under section 8 of the Mechanics' Lien Act. *Held*, on appeal, affirming the decision of LENNOX, Co. J. (MCDONALD, C.J.B.C. dissenting), that it was so found and there was ample evidence to show that Andresen failed to complete his contract, and his appeal must be denied accordingly. The plaintiff Gray completed his work on the 5th of December, 1940, but neither at that date nor since has there been any money owing or payable by the owner to the contractor Andresen. Gray's lien is therefore defeated by section 8 of the Mechanics' Lien Act. SMITH *et al.* v. STUBBERT. **328**

2.——*Verbal agreement to improve and reconstruct building—Owners to pay for labour and material plus ten per cent. to contractor — Continuing contract — Work changed from time to time—Filing of lien—R.S.B.C. 1936, Cap. 170, Secs. 2 and 19.*] In May, 1940, the plaintiff was employed by the owner of a building to renovate it. He was to put in an office below, put in new plumbing, new roof, paint the outside, waterproof the building outside, a new office on the third floor, new elevators and new heating. There was no agreement to do the work for a stated price or within a stated time. He supplied the labour and material for the work as the owner wished to have it done and received ten per cent. of the cost plus his own wages as foreman. Work continued from May, 1940, into 1941, and large payments were made on account. During this time orders by the owner were changed periodically and other work ordered. On May 13th, 1941, payments having fallen into arrear, the plaintiffs filed a mechanic's lien but took no proceedings. Further work was done on one or two occasions up to May 30th, 1941, some of the work contracted for remaining uncompleted. On June 11th, 1941, a second mechanic's lien was filed and action commenced on June 13th to enforce the lien. The action was dismissed on the sole ground that the lien had not been filed in time. *Held*, on appeal, reversing the decision of LENNOX, Co. J., that this is a continuing contract and the contractor's lien did not expire until thirty-one days had elapsed after the last work was done, namely, on the 30th of May, 1941. The claim for lien filed on the 11th of June, 1941, was filed in time. J. DAVIES *et al. v.* E. B. EDDY COMPANY LIMITED. - - - - **200**

3.——*Wages — Construction of dwelling-house—Filing of affidavit under section 19 of Act—Lis pendens not filed in Land Registry office—Effect of — R.S.B.C. 1936, Cap. 170, Secs. 19 and 23.*] Subsection (2) of section 23 of the Mechanics' Lien Act provides that the claimant shall file a *lis pendens* in the Land Registry office immediately after the institution of proceedings to enforce the lien, and if no *lis pendens* is filed within 31 days from the date of filing the affidavit, the lien shall be cancelled from the records of the Land Registry office. In an action by the claimant for a declaration that he is entitled to a mechanic's lien for his wages and for enforcement of the said lien, the evidence disclosed that the claimant did not file a *lis pendens* in the Land Registry office. *Held*, that the filing of a *lis pendens* is an absolute enactment and must be fulfilled, and no *lis pendens* having been filed there is no jurisdiction to hear the case. MCCOUBREY v. THE CARVER CONSTRUCTION COMPANY, LIMITED, WOODBURY AND WOODBURY. - - - - **476**

MILL—Change of control of. - **401**
See COMPANY.

MINING LEASES—Option to operate—Right to test and prospect ground—Notice

MINING LEASES—*Continued.*

of intention to operate—Purchase of machinery and plant on ground—Royalty. - - - **141**
See PLACER-MINING.

MORTGAGE—Default—Motion for extension of time for redemption—Heard by a local judge of the Supreme Court in Chambers. - **94**
See PRACTICE. 4.

MOTOR-VEHICLES—*Collision—Negligence—Passengers paying part of expenses of trip—Injury to—Liability—Section 74B of Motor-vehicle Act—Effect of—R.S.B.C. 1936, Cap. 195, Sec. 74B.*] Section 74B of the Motor-vehicle Act provides that "No action shall lie against either the owner or the driver of a motor-vehicle by a person who is carried as a passenger in that motor-vehicle, . . . , for any injury, loss, or damage sustained by such person . . . by reason of the operation of that motor-vehicle by the driver thereof while such person is a passenger on or is entering or alighting from that motor-vehicle; but the provisions of this section shall not relieve:—(*a.*) Any person transporting a passenger for hire or gain; . . ." The plaintiffs were carried as passengers in the defendants' car and were injured in an accident arising from the negligence of the female defendant, who was driving the car. Before starting on the trip the parties had agreed that the plaintiffs would pay part of the cost of the gasoline and part of the other expenses incurred. In an action for damages, the plaintiffs claimed that the above section did not apply because they were being "transported for hire or gain" in the defendant's car. *Held*, that the above section applied to the plaintiffs. The mere fact that they had made arrangements with the defendants to pay part of the expenses of the trip did not make them "passengers transported for hire or gain" and their action was barred by said section. *Shaw et al.* v. *McNay et al.*, [1939] O.R. 368, followed. [Affirmed by Court of Appeal]. GUERARD AND GUERARD v. RODGERS AND RODGERS. - - **171, 481**

MUNICIPAL LAW—*Highway—Dedicated as such but not opened—Property owner—Access to his property—Application for consent of council to open highway at his own expense—Refused—Appeal to Supreme Court—R.S.B.C. 1936, Cap. 199, Sec. 323 (3).*] S., owning a property within the district of West Vancouver, and desiring to obtain access thereto by opening a roadway at his own expense for a distance of 300 feet on 15th Street, applied to the council of the corporation for its consent. This was refused, and he appealed to the Supreme Court under section 323 (3) of the Municipal Act, upon the ground that such consent had been unreasonably withheld. *Held*, that in view of its language and in particular of its opening words, the section was intended to apply only to such persons who under some other statute already had (or might thereafter acquire) rights of one kind or another on or over streets within a municipality. A property owner merely as such has not, and never has had, any right to construct works of any description upon streets of a municipality. This section does not apply to the case of the appellant and he has no right of appeal under it. *In re* MUNICIPAL ACT AND GEORGE FREDERICK STRONG. - **81**

MURDER—Common intent to commit a felony—Death resulting in furtherance of felonious act—Evidence of accident—Jury not charged on manslaughter—Common law of England—Operative in British Columbia. - - **521**
See CRIMINAL LAW. 11.

MUTUALITY—Want of—Sale of shares in company—Specific performance—Consideration. - - **11**
See CONTRACT. 6.

NEGLIGENCE—Airways company—Carrier of passengers and baggage—Forced landing—Injury to passengers and loss of baggage—Special conditions limiting liability. - **176**
See CARRIER.

2.——*Automobile collision—Defendant runs out of gas—Left side of truck left five or six feet on pavement—Lack of effort to get assistance—Run into by plaintiff's car—No lights on stalled truck—Liability.*] On the 24th of December, 1941, the defendant was driving his truck northerly on the Pacific Highway, and at about 10 p.m., when half a mile from Cloverdale, he ran out of gas. He left the truck on the east side of the road, his left wheels being from five to six feet on the pavement. He left the front and rear lights on and walked to Cloverdale where he visited three service stations which were closed, and went to the home of one operator who was out at the time. He made no report to the police and made no further effort to get assistance. He then went to a dance with a friend, but finding the dance was not on, he and his friend went home. On the way they passed the truck at about 11.15 p.m., and they both swore the lights

NEGLIGENCE—*Continued.*

were still on. It was a crisp night with good visibility. On the same night the plaintiff loaned his car to his brother, who with two relatives in the car was driving towards Cloverdale on the Pacific Highway and at about 11.30 o'clock he ran into the rear of the defendant's truck. He was going at about 25 miles an hour. A car was coming in the opposite direction, and when about 10 or 15 feet away from the truck the driver states the lights from the approaching car dimmed his vision, and as the truck had no lights on he did not see it, his own lights being dimmed owing to the approaching car. A police officer heard the crash, arrived shortly after, and said the truck lights were not on. In an action for damages:—*Held*, that there was negligence on the part of the defendant, as after a few casual efforts to find a regular service station the defendant abandoned his efforts to find someone to remove his truck from the highway, and proceeded to attend a dance. The evidence of the officer is accepted as to the truck lights being out at the time of the accident, and there was no evidence that the plaintiff's brother was driving negligently. RENNER v. HADDEN. - - - **488**

3.——*Collision.* - - **171, 481**
See MOTOR-VEHICLES.

4.——*Death of child hit by truck—Shortening of expectation of life—Quantum.* **244**
See DAMAGES. 1.

5.——*Derailment of train — Plaintiff's crane on a car included in train—Crane improperly secured to car—Damages resulting —R.S.B.C. 1936, Cap. 241, Sec. 215 (2).*] The plaintiff company, having its 20-ton gasoline locomotive crane at Bridge River, and wishing to ship the crane to Vancouver, entered into a contract with the defendant company for transportation of the crane from Bridge River to Squamish. The crane is built into its own car, and when transported by rail may be taken into a train and hauled along like any other car. The contract for carriage was verbal and made between one Newton, sole representative of the railway company at Bridge River, and one Grant, the crane operator. Grant said he would secure the crane and he secured the body of the crane to the frame of the car by passing wire through eyelet holes, making fast to its own part, and then tightening by twisting with a bar after the fashion of a Spanish windlass. This was done on both sides. A hardwood wedge was driven in at the rear end between the main body and the deck of the car. Grant and

NEGLIGENCE—*Continued.*

the superintendent of the plaintiff company inspected the crane fastenings and were satisfied the crane was secure. Newton and the conductor of the train were of the same opinion. There are many curves on the railway, and when the train reached about seven and one-half miles south of Bridge River the car with the crane derailed. It was found that the swinging of the crane car around these curves gradually slackened the wires and the increased play eventually broke the wires and dislodged the wedge, thus allowing the crane body to swing around at an angle to the car with the ballasted end outboard causing the derailment. *Held*, that the cause of the derailment was the insecure fastening of the crane. The railway company had the duty of seeing that the crane was in proper condition for the journey. It is a transportation problem. The duty of securing the crane so as to make the train "railworthy" was upon the railway company. BRIDGE RIVER POWER COMPANY LIMITED v. PACIFIC GREAT EASTERN RAILWAY COMPANY. - - - **247**

6.——*Pedestrian run down by motor-car —Damages—Three companies associated for display and sale of used cars — Separate branch and premises for purpose—Partnership—Instructions to driver from branch premises—Liability.*] The plaintiff, while crossing Georgia Street at its intersection with Bute Street in the city of Vancouver, was run into by the defendant Hall who was held to be solely responsible for the accident. For the purpose of disposing of their used cars, the three defendant companies became associated in an organization called Distributors Used Car Branch. The branch appointed and paid a manager, salesmen and other employees, its object being the display and retail sale of used cars. During the winter months the cars were kept overnight for their own protection upon the premises of one or more of the defendant companies, and in the morning they were driven by the employees of the branch from such premises to the separate premises occupied by the branch. Hall was instructed by the manager's assistant of the branch to drive this particular car (owned by the consolidated company) to the premises of the branch, and it was during the progress of this drive that the accident happened. *Held*, that the business of the branch was conducted on behalf of all three companies for their mutual benefit, and that it contained all the necessary ingredients of a partnership. The motor-car was being driven by Hall as a servant of the branch and in

NEGLIGENCE—*Continued.*

the course of his employment as such. It follows that the defendants are all liable in damages. BARNES v. CONSOLIDATED MOTOR COMPANY LIMITED *et al.* - - **270**

ORDER OF REVIVOR—Effect of on statute. - - - - - - **372**
See LIMITATIONS, STATUTE OF.

OWNER OF CAR—Liability. - **251**
See AUTOMOBILE. 2.

PARTNERSHIP. - - - **270**
See NEGLIGENCE. 6.

PASSENGER—Injury to. - **176**
See CARRIER.

2.——*Liability to—Negligent driver.* - - - - - - **171, 481**
See MOTOR-VEHICLES.

PASSENGERS—Paying part of expenses of trip—Injury to — Liability — Section 74B of Motor-vehicle Act—Effect of. - - **171, 481**
See MOTOR-VEHICLES.

PATENT—*Furnace — Sawdust burner and feed unit—Infringement—Damages—Quantum.*] The plaintiff recovered judgment in an action for infringement of two patents, one covering an alleged new and useful invention of a hot-air furnace, and the other covering an alleged new and useful invention or device commonly known as a feed unit or sawdust burner. On appeal this judgment was varied, it being adjudged that only the second-mentioned invention had been infringed by the defendants. Pursuant to the Supreme Court judgment, an inquiry before the district registrar was proceeded with to ascertain what damages the plaintiff had sustained by reason of the infringement of the second-mentioned patent. The district registrar found that the defendant had manufactured 350 sawdust burners in infringement of the patent and assessed the damages at $2,975, which was affirmed by the trial judge. *Held*, on appeal, varying the decision of MORRISON, C.J.S.C., that a principal contention before the registrar was that Daly, after the issue of the patent, made no burners as therein described, but if any were made they were made by one LeBlanc upon Daly's premises under an arrangement with LeBlanc, whereby LeBlanc leased a space in Daly's foundry for the purpose of manufacturing the burners in question. From what took place before him it would appear that the registrar, in reaching his conclusion, held that what was done by LeBlanc was really the act of Daly. No

PATENT—*Continued.*

such issue was raised on the pleadings in the action. There was error in including the burners manufactured by LeBlanc and infringement should be found only in respect of four burners, and the damages should therefore be reduced to $34. SKELDING v. DALY *et al.* - - - - **121**

PEDESTRIAN—Run down by motor-car—Damages. - - **270**
See NEGLIGENCE. 6.

PENSION—Old-age—Application to enforce payment of. - - **217**
See MANDAMUS. 3.

2.——*Old-age — Discontinuance of payment by Board—Application by pensioner for mandamus to compel payment—Whether Board a special or general agent of Crown.* - - - - - - - **412**
See MANDAMUS. 4.

3.——*Old-age—Workmen's Compensation Board—Whether mandamus lies to compel Board to pay — Whether Board special or general agent of Crown.* - - **298**
See MANDAMUS. 5.

PETITION—To cancel share certificate and rectify register — Granted — New trial ordered on appeal—Petition dismissed on rehearing at instance of petitioner with right to commence new action. - **409**
See COSTS. 2.

PLACER-MINING—*Mining leases — Option to operate leases—Right to test and prospect ground—Notice of intention to operate —Purchase of machinery and plant on ground — Royalty.*] The defendants John and George Campbell owned four mining leases on the Similkameen River and the defendant Cam-Roy Company owned a mining plant and machinery stationed on the ground of one of the leases. On the 3rd of March, 1941, the plaintiff entered into an agreement with the defendants to operate the leases on a royalty basis if satisfied by testing and prospecting that the ground contained sufficient values in gold and platinum. He was given 60 days for testing and prospecting the ground, and if he decided to exercise his option he was to give the defendants written notice of his intention to do so. It was further agreed that he would purchase the machinery on the ground from the Cam-Roy Company for $34,500, of which $3,000 was paid in cash, the balance to be paid in instalments as operating the properties progressed, and he was to immediately enter upon the lands

PLACER MINING—*Continued.*

and rebuild and relocate the mining equipment and commence operations, and the company agreed that if the plaintiff did not exercise his option it would reimburse him for the moneys spent in improving the mining plant up to $3,000. The plaintiff started testing and prospecting by putting down holes and repairing the mining equipment for operating on the 20th of March, 1941. The rebuilding of the plant was completed on the 13th of May, 1941, when the plaintiff commenced mining operations with the plant and shovel. This was continued until the 4th of June, 1941, when, owing to a dispute with the defendants, he stopped operations. In two clean-ups during his operations with the shovel he recovered $1,759.72. He never gave notice of his intention to exercise his option. Under a prior agreement the Campbells had staked and recorded eight leases on the Tulameen River, adjoining the Similkameen leases, for the plaintiff, for which the plaintiff had paid them $900, but the Campbells had not assigned the leases to the plaintiff. The plaintiff recovered judgment in an action against the Cam-Roy Company for $3,000 for moneys expended in improvements to the mining plant, and as against the Campbells for a declaration that he is entitled to an assignment from them for the eight remaining leases on the Tulameen River. *Held*, on appeal, affirming the decision of KELLEY, Co. J. (MCDONALD, C.J.B.C. dissenting), that in the particular circumstances, Watkins's operation of the plant and equipment came within the "testing and prospecting" permitted by the agreement. *It did not estop him from relying upon the* fact that he had not given the appellants the written notice of election to operate which the agreement stipulated as an essential to his exercise of the option therein provided for. The agreement does not define what constitutes "testing and prospecting" the property with a view to its placer-mining operation. One must ascertain the real intention of the parties from a perusal of the whole contract. The agreement and the supporting evidence leads to the conclusion that "testing and prospecting" was something more than sinking holes to bed rock and washing the contents to measure the values, and must be read in the light of the provision therein that the plaintiff was bound to purchase the mining equipment for $34,500 and pay a minimum of $500 per month in royalty if he should exercise his option. It is a proper inference that it was intended he should operate the plant under operating conditions during the testing and prospecting period to enable him to decide whether

PLACER MINING—*Continued.*

the equipment he was purchasing was of the kind which would enable commercial operation of the ground to be worked, and whether commercial results could be averaged over a reasonable period. WATKINS v. CAM-ROY MINING COMPANY LIMITED (N.P.L.) AND JOHN A. CAMPBELL AND GEORGE CAMPBELL. - - - - - - - - **141**

POLICE—Statement to—Ruled as not free and voluntary. - - **336**
See CRIMINAL LAW. 9.

PRACTICE—*Appeal to Supreme Court of Canada—Motion to the Court of Appeal for special leave—Matter of public interest—Important question of law—R.S.C. 1927, Cap. 35, Sec. 41.*] The defendant Walker, whose negligent driving resulted in an accident, obtained the car from his co-defendant by falsely representing that he was one Hindle, and he produced Hindle's driver's licence, the possession of which he had obtained. The point for discussion on the appeal was the proper construction to be placed on section 74A of the Motor-vehicle Act, namely, as to whether or not Walker acquired possession of the car with the consent, express or implied, of its owner. On motion for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal pronounced in favour of the plaintiff Terry:—*Held*, that leave to appeal should be granted for the reason that the case involves a "matter of public interest" and an "important question of law." TERRY *v.* VANCOUVER MOTORS U DRIVE LIMITED. MORROW AND MORROW v. VANCOUVER MOTORS U DRIVE LIMITED. **268**

2.——*Application for trial by jury—Refused—Appeal — Exercise of discretion by judge below—Ground for appellate Court to interfere—Rules 429 and 430.*] In an action for damages for breach of contract in failing to provide finances for drilling operations and production of petroleum as a commercial enterprise on lands in the Province of Alberta, the plaintiff's application for a jury under rule 430 was refused on the ground that the case falls within the exceptions mentioned in rule 429. *Held*, on appeal affirming he decision of COADY, J. (O'HALLORAN and FISHER, JJ.A. dissenting), that the judge below having exercised his discretion in dismissing the application, the Court of Appeal will not interfere unless clearly of opinion that it has been wrongly exercised or that he has acted on a wrong principle, and there is no ground for interference in this case. CREASEY v. SWENY *et al.* - - - - - - **457**

PRACTICE—*Continued.*

3.——*Costs—Taxation — Application for adjournment — Granted by registrar under Order LXV., r. 57—Whether discretion properly exercised—Rule 754.*] Pursuant to an order of MANSON, J. on the 22nd of December, 1941, costs of certain proceedings taken by Ruthella Welsh were ordered to be paid by her after taxation. The costs were presented for taxation on February 12th, 1942. Counsel for Ruthella Welsh asked for and was granted an adjournment until March 12th, 1942, on the grounds that an appeal had been taken from the order of MANSON, J. to the Court of Appeal sittings, commencing on the 3rd of March, 1942, that Mrs. Welsh was able to pay the costs pursuant to the order, and that if successful in her appeal it would save the expense of taxation. On an application under rule 754 that the taxation be proceeded with:—*Held*, that the refusal to proceed with the taxation on the grounds aforesaid is not an exercise of discretion under rule 754. It deprives the party entitled to costs under an order of the Court of his right to have these costs taxed, and prevents him from proceeding with the enforcement of the judgment while the appeal is pending. The application is granted. *In re* EDWARD BOWMAN WELSH. - **559**

4.——*Mortgage — Default — Motion for extension of time for redemption—Heard by local judge of the Supreme Court in Chambers—Order XXXII., r. 6; Order LXXB—R.S.B.C. 1936, Cap. 56, Sec. 18.*] The defendant loaned the plaintiff $7,500 secured by a first mortgage on the plaintiff's lands near Vernon, B.C. He had stipulated as a condition that the plaintiff should deposit an executed conveyance in escrow, to be delivered to him if the mortgage money was not repaid within one year. The plaintiff defaulted in payment and commenced an action in the Supreme Court for a declaration that the conveyance was void as against his equity of redemption, and also for a declaration that he was entitled to redeem the lands. In his statement of defence the defendant admitted the essential facts in the statement of claim and stated his willingness to permit the plaintiff to redeem. On motion for judgment before SWANSON, Co. J. sitting in Court as a local judge of the Supreme Court, under Order XXXII., r. 6, upon the admissions of fact, it was ordered that the conveyance aforesaid be declared void and that if the plaintiff did not pay into Court within nine months from the date of the registrar's certificate the amount found due, the respondent should stand absolutely debarred and foreclosed from all interest in

PRACTICE—*Continued.*

the lands. Shortly before the expiration of the redemption period the plaintiff took out a notice that "the Court will be moved before His Honour Judge W. C. KELLEY as local judge thereof, . . . , by counsel on behalf of the plaintiff for an order extending the period fixed for redemption . . . by His Honour Judge JOHN D. SWANSON on the 9th day of January, 1941." The motion was heard by the local judge in Chambers on October 24th, 1941. Although the motion was a Court motion, he elected to treat it as a Chamber matter or refer it to himself in Chambers. The learned judge extended the period of redemption for one year, and the formal order then made and subsequently entered was entitled "In Chambers." *Held*, on appeal, reversing the decision of KELLEY, Co. J., that as jurisdiction is lacking the impugned order should be quashed and the appeal allowed. KENNEDY v. MACKENZIE. - - - - - - **94**

PUBLICATION. - - - **321**
See LIBEL.

PUBLIC HARBOUR—Foreshore—Right to —Crown grant of waterfront lot "with the appurtenances"—Whether foreshore included. - - **274**
See CONSTITUTIONAL LAW.

PUBLIC INTEREST—Matter of—Appeal to Supreme Court of Canada—Motion to the Court of Appeal for special leave—Important question of law. - - - - - - **268**
See PRACTICE. 1.

RAPE—Consent—Charge to jury—Corroboration — Non-direction and misdirection—New trial. - **90**
See CRIMINAL LAW. 12.

RATIFICATION. - - - **401**
See COMPANY.

REDEMPTION—Motion for extension of time for—Heard by local judge of the Supreme Court in Chambers. - - - - - - **94**
See PRACTICE. 4.

REGISTER—Rectification of—Shares issued and registered — Privity of contract—Consideration. - **1**
See COMPANY LAW.

ROYALTY. - - - - - **141**
See PLACER-MINING.

RULES AND ORDERS—Crown Office Rule (Civil) 76. - - - - **70**
See CRIMINAL LAW. 1.

RULES AND ORDERS—*Continued.*

2.——*Divorce Rules 1925, rr. 65 and 69 (a) and (c).* - - - - - **206**
See DIVORCE. 2.

3.——*Supreme Court Order XXI., r. 17.* - - - - - - - - - **372**
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4.——*Supreme Court Order XXXII., r. 6.* - - - - - - - - **94**
See PRACTICE. 4.

5.——*Supreme Court Order LXV., r. 57.* - - - - - - - - **559**
See PRACTICE. 3.

6.——*Supreme Court Order LXXA, r. 1 (a).* - - - - - - **390**
See ALIMONY.

7.——*Supreme Court Order LXXB.* - **94**
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8.——*Supreme Court Rule 282.* - **346**
See WOODMEN'S LIEN.

9.——*Supreme Court Rules 429, 430.* - - - - - - - - **457**
See PRACTICE. 2.

10.——*Supreme Court Rule 754.* - **559**
See PRACTICE. 3.

SALE OF LAND—Interim receipt signed by parties — Deposit of $500 as part payment of purchase price — Assumption of mortgage in part payment—Description of mortgage in interim receipt incomplete—Tender of assignment of vendor's right to purchase — Insufficiency of title—Purchaser repudiates — Action to recover deposit. - - **492**
See VENDOR AND PURCHASER.

SAWDUST BURNER AND FEED UNIT—Infringement—Damages—*Quantum.* - - - - - - **121**
See PATENT.

SENTENCE—Appeal from—Previous criminal record—Sentenced to four years—Reduced. - - - **158**
See CRIMINAL LAW. 2.

SHARES—Issued and registered—Rectification of register — Privity of contract—Consideration. - **1**
See COMPANY LAW.

2.——*Sale of in company—Specific performance — Consideration—Want of mutuality.* - - - - - - **11**
See CONTRACT. 6.

SOLICITORS—*Solicitor and client's bill of costs—Bill presented in lump sum charge—Allowed by taxing officer—Reference back to tax item by item—R.S.B.C. 1936, Cap. 149, Sec. 82; Cap. 249, Sec. 4 (6)—Appendix M.*] The solicitors delivered a solicitor and client bill of costs to the clients and consented to an order for the taxation thereof. The bill of costs was drawn under the provisions of section 82 of the Legal Professions Act and sets out a lump sum fee and a detailed statement of disbursements. On the taxation the taxing officer ordered and obtained further details of the services rendered, and at the request of the solicitors he heard evidence from outside counsel as to the nature and extent of the services. The bill was taxed in the lump sum claimed with disbursements and the costs of taxation. On the application of the clients for an order to review the taxation it was held that the bill must be taxed in accordance with the established practice, namely, item by item, and the taxing officer must be governed by Appendix M and no higher fees than those set out in that Appendix be allowed in any case. *Held*, on appeal, affirming the order of SIDNEY SMITH, J., that section 82 of the Legal Professions Act makes no change in the practice with the exception that it enables the solicitor to make the lump sum charge in the first instance but as soon as the bill comes before the taxing officer he would at once require particulars of charges. The section made no change in the method of taxation. The bill must be taxed item by item. *Held*, further, that there was error in the taxing officer receiving evidence of the type given on the reasonableness of the bill taken as a whole. *In re* TAXATION OF COSTS AND *In re* LOCKE, LANE, NICHOLSON & SHEPPARD, SOLICITORS. - - **304**

SPECIFIC PERFORMANCE—Sale of shares in company—Consideration—Want of mutuality. - - **11**
See CONTRACT. 6.

STATUTE OF LIMITATIONS. - **372**
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STATUTES—30 & 31 Vict., Cap. 3, Sec. 125. - - - - - - **104**
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B.C. Stats. 1921 (Second Session), Cap. 55. - - - - - - **104**
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B.C. Stats. 1926-27, Cap. 50. - **217**
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B.C. Stats. 1937, Cap. 82, Sec. 5. - **104**
See TAXATION. 2.

B.C. Stats. 1938, Cap. 42, Sec. 3. - - - - - **171, 481**
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R.S.B.C. 1936, Cap. 170, Secs. 2 and 19. - - - - - - **200**
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STOLEN GOODS—Charge of receiving—Admissibility of evidence of receiving other property—Evidence that the property was stolen—Instructions to jury. - - **85**
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2.——*Retaining—Explanation of accused—Whether a reasonable one—Exclusive of joint control of goods.* - - **117**
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SUPREME COURT OF CANADA—Appeal to—Motion to the Court of Appeal for special leave—Matter of public interest — Important question of law. - - - **268**
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TAXATION—Costs — Application for adjournment — Granted by registrar under Order LXV., r. 57—Whether discretion properly exercised—Rule 754. - - - **559**
See PRACTICE. 3.

2.——*Indian Reserve — Lands — Lease within Reserve to Chinaman—Taxation of lessee's interest—Exemptions—Construction of statutes—B.N.A. Act, Sec. 125 — R.S.C. 1927, Cap. 98—B.C. Stats. 1921 (Second Session), Cap. 55; 1937, Cap. 82, Sec. 5.*] Musqueam Indian Reserve No. 2 is situate within the boundaries of the city of Vancouver. Andrew Charlie, an Indian who held five acres of land within the Reserve, entered into a written agreement with the defendant whereby he would surrender the five acres to the Department of Indian Affairs for the purpose of the granting by the Department to the defendant a permit to occupy and cultivate the five acres from the 1st of April, 1936, until the 31st of March, 1937, at a rental of $250 a year, to be paid to the Department on behalf of Andrew Charlie. The defendant entered into possession and raised agricultural products for sale. Under the Vancouver Incorporation Act, 1921, as amended by section 5 of the Vancouver Incorporation Act, 1921, Amendment Act, 1937, the city assessed the interest of the defendant, and in 1939 levied a tax against him in the sum of $34.75. The tax not having been paid, the city brought action in December, 1940, for the amount of the taxes with interest and costs. It was held on the trial that the Vancouver Incorporation Act, 1921, and the 1937 amendment authorizing the taxation of interests in Dominion lands held by persons occupying them under permits of the Department of Indian Affairs are not in contravention of the provisions of section 125 of the

TAXATION—*Continued.*

British North America Act, 1867, and are *intra vires* of the Provincial Legislature. For the purpose of the collection of taxes so levied the Provincial Legislature may authorize their recovery by personal action against persons so occupying such lands. *Held*, on appeal, affirming the decision of ELLIS, Co. J., that the land is occupied by a Chinaman under an agreement made with an Indian of the Reserve through the Indian Department, and hence the occupant by virtue of the Vancouver Incorporation Act, 1921, and the 1937 amendment of said Act, may be assessed and taxed. The land itself is not subject to the tax nor to any lien in respect thereof. As to the validity of the Provincial statute the matter is concluded by the decision on which the learned trial judge relied, *Smith* v. *Vermilion Hills Rural Council*, [1916] 2 A.C. 569. THE CITY OF VANCOUVER v. CHOW CHEE. - **104**

TAXING OFFICER—Solicitor and client's bill of costs—Allowed by—Bill presented in lump sum charge—Reference back to tax item by item. - - - - - **304**
See SOLICITORS.

TESTATOR'S FAMILY MAINTENANCE ACT—*Estate of deceased wife—Husband's petition under Act dismissed—Appeal heard and judgment reserved—Death of husband before delivery of judgment—Motion to add executors of husband as parties — R.S.B.C. 1936, Cap. 285, Sec. 3.*] A husband petitioned for adequate provision for maintenance from his deceased wife's estate under the Testator's Family Maintenance Act. They were married in 1911. He joined the Canadian forces in 1914, but in eighteen months was discharged as unfit. During this time the wife obtained a separation allowance. In 1917 he went into the lumber business but in the course of one year the business failed with the loss of $1,000. In 1918 he and his wife contributed to the purchase of a ranch in Burnaby upon which they raised goats. This proved a success, and in 1929 they sold out for $10,000 and jointly purchased lands in Surrey. Shortly after the wife went on a trip east and the husband commenced gambling on the Stock Exchange, resulting in great loss. A judgment for a large sum was obtained against him, which was eventually settled by the wife paying $2,500. Prior to this the wife had obtained her share of the assets in her own name. In May, 1931, the wife left him and obtained a divorce in Reno, Nevada. She married again, but two days after the

TESTATOR'S FAMILY MAINTENANCE ACT—*Continued.*

marriage she left her second husband and returned to the petitioner in Surrey, where she built a house and they lived together until her death in February, 1937. She had in the meantime obtained a divorce from her second husband in Mexico. The net value of her estate was $12,934, which included $3,711, balance owing her by petitioner in respect of certain lands she had sold to him under agreement for sale. This land, which was unimproved rural land from which there was no revenue, was substantially all he had at the time of her death. They had no children, and by her will executed just before her death she left one dollar to her husband and the remainder of her estate to two nieces. The learned trial judge found that upon the evidence he was satisfied that the wife had just cause for disinheriting her husband, and dismissed the petition. The petitioner appealed, and upon the appeal being heard judgment was reserved. Two days later, and before judgment was delivered, the petitioner died. Counsel for the petitioner then moved that the executors of the deceased appellant be added as parties. *Held*, reversing the decision of MANSON, J. (MCDONALD, J.A. dissenting), that the executors of the appellant be added as parties and that the appellant's estate receive from the wife's estate the house property and the real estate unencumbered. SLOAN, J.A. would allow the appeal and direct judgment be entered *nunc pro tunc* as of the date when arguments were concluded. The appellant should be given the house property and the real estate unencumbered. *Per* O'HALLORAN, J.A.: The maxim "*actio personalis moritur cum persona*" does not apply and the appellant's action survives. The appellant's equitable right under the Testator's Family Maintenance Act passes to his personal representatives. If an intestacy had occurred he would have received her entire estate, and that is what he is entitled to, in the absence of grounds which would have justified his wife giving him less than the policy of the law indicates as proper. That conclusion is indicated by the governing considerations, namely: disinheritance of the husband, his means and circumstances, the size and nature of the wife's estate, the lack of children who would properly have an interest, and the part he played in building up and preservation of his wife's estate. *Per* MCDONALD, J.A.: The problem is whether the powers given by the Act are such that they can or should be exercised in favour of anyone other than the petitioner himself. Under this Act maintenance

TESTATOR'S FAMILY MAINTENANCE ACT—*Continued.*

by the estate of a deceased person is in the nature of a bounty. The appellant had nothing vested in him when he died. He had had a right to ask for a bounty but no bounty had been awarded him. He alone had a right to ask and that right died with him. BARKER v. WESTMINSTER TRUST COMPANY *et al.* - - - - - - **21**

TILE FLOOR—Installing—Construction of floor beneath under separate contracts—Buckling of tiles owing to escape of moisture from below—Reflooring necessary. - **222**
See CONTRACT. 4.

TITLE—Insufficiency of—Sale of land. - - - - - - **492**
See VENDOR AND PURCHASER.

TRAIN—Derailment of. - **247**
See NEGLIGENCE. 5.

"TRANSPORTING A PASSENGER FOR HIRE OR GAIN"—Negligent driver—Liability to passenger—Expense sharing. - - **171, 481**
See MOTOR-VEHICLES.

TRUCK—Stalled—No lights on. - **488**
See NEGLIGENCE. 2.

VENDOR AND PURCHASER—*Sale of land—Interim receipt signed by parties—Deposit of $500 as part of purchase price—Assumption of mortgage in part payment—Description of mortgage in interim receipt incomplete—Tender of assignment of vendor's right to purchase—Insufficiency of title—Purchaser repudiates—Action to recover deposit.*] The plaintiff entered into an agreement with the defendant to purchase a property and paid the defendant $500, being a deposit on account of the purchase price. They signed an interim agreement which set out the price as "$7,500 payable on the following terms, namely: $4,000 cash on completion of agreement, of which the deposit shall form a part, the balance . . . : By assuming 1st mortgage of $3,500 @ 6%." There was no mortgage on the property and the vendor did not have a complete title at the time but had an agreement to purchase on which a balance of $3,500 with interest at 6 per cent. was due. Six days after the interim agreement was signed the plaintiff called to complete the sale but instead of being offered a deed subject to a mortgage, was offered an assignment of the vendor's rights under her agreement to purchase. The plaintiff wanted to consult

VENDOR AND PURCHASER—*Continued.*

his solicitor as to this document and next day his solicitor wrote the defendant's agents repudiating the deal because "the variance between the documents and the interim receipt is so great." The vendor's solicitors then whote to the plaintiff threatening to forfeit his deposit. There were certain negotiations with a view to a settlement, but finally the plaintiff's solicitor wrote repudiating the deal and demaning return of the deposit. An action for the return of the deposit paid to the defendant's agents was dismissed. *Held*, on appeal, reversing the decision of ELLIS, Co. J., that there never was a complete agreement, but only an agreement incomplete in an essential term, in that the only description of the mortgage was that it should be for $3,500 at 6 per cent. This would probably have sufficed if there had been an existent mortgage, but there was none. This leaves complete uncertainty as to the identity of the proposed mortgagee and the duration of the proposed mortgage. His right to recover the deposit where there was never a completed contract is covered by authority. JACKSON *v.* MACAULAY NICOLLS MAITLAND AND COMPANY LIMITED AND WILLETT. **492**

WAGES—Construction of dwelling-house—Filing of affidavit under section 19 of Act—*Lis pendens* not filed in Land Reistry office—Effect of. - - - - - - **476**

See MECHANIC'S LIEN. 3.

2.——*Workman—Definition—Agreement by workman to take in part payment for wages, shares of the company—Illegality of contract.* - - - - - **161**

See EMPLOYER AND SERVANT.

WIFE'S CRUELTY—Persistent groundless accusations of husband's infidelity—Husband's health impaired. - - - - - - **390**

See ALIMONY.

WILL—*Construction of—Executory devise—Vesting—Disposition of residue of estate—Order to refund payments made on previous order—Appeal.*] A testator by clause 9 of his will directed that the trustee therein named shall pay to each of his four grandchildren the sum of $600 a year as long as he shall live. Clause 12 provides: "Subject to the other provisions of these presents I give, devise, and bequeath all the residue of my estate, real and personal, to the said Susan McAinsh Paul My trustee shall pay the income from the same to her from the time she is of age, but shall not hand over the principal until all the annuitants herein

WILL—*Continued.*

mentioned have died, and she is thirty years of age." Clause 15 provides: "Should Susan McAinsh Paul die leaving issue, her issue shall receive all the benefits under these presents which she would have had if alive, and she may distribute these benefits as she pleases among her issue by will. Should the said Susan McAinsh Paul die without leaving issue, the General Hospital at Kelowna shall receive all the benefits, and all the estate read and personal, which she would have received hereunder if alive." On originating summons it was held that if Susan McAinsh Paul survives the annuitants, having attained the age of 30 years, she shall have the *corpus* and then only a life interest therein. *Held*, on appeal, *per* MCDONALD, C.J.B.C., MCQUARRIE and FISHER, JJ.A. reversing the decision of MANSON, J., that Susan McAinsh Paul took a vested estate in the residue which can be divested by her death before the death of the last annuitant, but which will become indefeasible if she outlives the annuitants. If she dies first leaving issue, they take equally if she makes no appointment by will, otherwise according to her appointment. If she dies leaving no issue then living, then the hospital takes. *Per* SLOAN and O'HALLORAN, JJ.A.: That Susan took an absolute interest with right of possession postponed until after the death of the last annuitant. On the petition of Susan McAinsh Paul an order had been made on the 18th of June, 1940, authorizing the trustee to advance to the said Susan McAinsh Paul the sum of $4,000, as to $1,500 forthwith and as to the remainder in quarterly instalments of $250 each. Of the said sum of $4,000, $2,250 was paid up to the date of these proceedings. It was ordered that said order of the 18th of June, 1940, was wrongly made; that the trustee do not advance any further sum from the *corpus* of the estate to said Susan McAinsh Paul under said order, and that the trustee do charge the said Susan McAinsh Paul with such sums as may have already been paid to her under said order, and collect the same from the income of the said residue from time to time payable to her under the will. *Held*, affirming the decision of MANSON, J. (SLOAN and O'HALLORAN, JJ.A. dissenting), that the order is that the trustee simply retain what comes to its hands until the estate has been recouped in the said sum of $2,250. There is ample authority for this and the majority of the Court is satisfied that he was justifield in making the order which he did. *In re* REMBLER PAUL, DECEASED. THE ROYAL TRUST COMPANY v. ROWBOTHAM *et al.* **500**

WILL—*Continued.*

2.——*Services rendered deceased person —Promise to provide for claimant by—Intestate—Quantum meruit — Right of children of deceased children of intestate's sister to inherit.* - - - **139**

See CONTRACT. 7.

WOODMEN'S LIEN — *Default judgment signed under rule 282—Removal of lien logs by defendant — Action for possession and damages—Judgment void—Effect on lien—Amendment of pleadings — Costs—R.S.B.C. 1936, Cap. 310, Secs. 3, 4, 6 and 7—Rule 282.*] Certain workmen duly filed statements of woodmen's liens against the logs of the Narrows Arm Logging Company for labour or services performed. On the 3rd of August, 1938, the plaintiff company took an assignment of the liens, and on the 16th of August following duly issued a writ against said company to enforce liens. The Narrows Arm Company did not enter an appearance or file a defence, and on the 19th of October, 1938, the plaintiff signed judgment purporting to act under section 7 (2) of the Woodmen's Lien for Wages Act. The defendant Oscar Niemi Limited having seized and removed the logs in question, the plaintiff brought this action claiming a declaration that it was entitled to possession of the logs, an injunction and damages. In its defence Oscar Niemi Limited raised two points of law, and on its application they were set down for hearing before trial under rule 282, namely, that the district registrar had no power or authority to give the said alleged judgment, and that the statement of claim discloses no cause of action. It was held that the registrar had acted beyond his powers in signing judgment in the woodmen's lien action, that the judgment was a nullity, and that the action be dismissed. *Held*, on appeal, reversing the decision of MANSON, J. (MCQUARRIE, J.A. dissenting), that sections 3 to 7 of the Woodmen's Lien for Wages Act make it clear that the lien comes into existence when the work is done. The workmen rendered the services necessary to found a lien and they took the necessary steps under the statute to preserve their liens, which give an interest in the logs. No sale or transfer of the lien logs could be successfully defended on the sole ground that the judgment in question was not properly signed. Although the statement of claim is deficient there is nothing to show that the defects could not be cured by amendment. The appeal should be allowed from the order dismissing the action, and the action should be remitted for trial with leave to both parties

WOODMEN'S LIEN—*Continued.*

to amend as they may be advised. The examination for discovery of Oscar Niemi disclosed that the defendant Niemi Logging Company Limited had nothing to do with the removal of the logs, and the order made on the motion for trial by jury recited that counsel for the plaintiff had undertaken to discontinue or apply for dismissal of the action as against the Niemi Logging Company Limited. The next day counsel for the plaintiff wrote the solicitor for said company stating he intended to apply at the trial of the action for dismissal against Niemi Logging Company Limited, but insisted that this should be without costs. Subsequently an order was made by MURPHY, J. that certain points of law raised by Oscar Niemi Limited be set down for hearing before the trial. On the hearing before MANSON, J. counsel for the plaintiff stated he had given notice of abandoning his action against the Niemi Logging Company Limited, and on the trial the question of costs would be spoken to. Counsel for the Niemi Company remained throughout the hearing when the action was dismissed. On this appeal counsel for the Niemi Company filed a factum and appeared throughout the hearing. *Held*, that the Niemi Logging Company Limited receive no costs of this appeal, that its costs up to the opening of the hearing before MANSON, J. be taxed as if it had been successful below, and that it recover same together with one-fifth of its costs as taxed on such hearing. WAREHOUSE SECURITY FINANCE COMPANY LIMITED v. NIEMI LOGGING COMPANY LIMITED AND OSCAR NIEMI LIMITED. - - **346**

WORKMAN—Definition — Wages — Agreement by workman to take in part payment for wages, shares of the company—Illegality of contract. - - - - - - **161**

See EMPLOYER AND SERVANT.

WORKMEN'S COMPENSATION BOARD. - - - - - - **217**

See MANDAMUS. 3.

2.——*Old-age pension—Discontinuance of payment by Board—Application by pensioner for—Mandamus to compel payment.* - **412**

See MANDAMUS. 4.

3.——*Old-age pension — Whether mandamus lies to compel Board to pay—Whether Board special or general agent of Crown.* - - - - - - - - **298**

See MANDAMUS. 5.

WORDS AND PHRASES—"Consent express or implied." - - **251**

See AUTOMOBILE. 2.